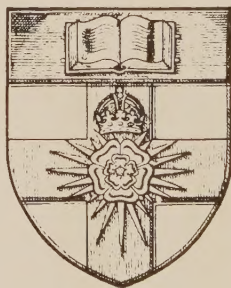


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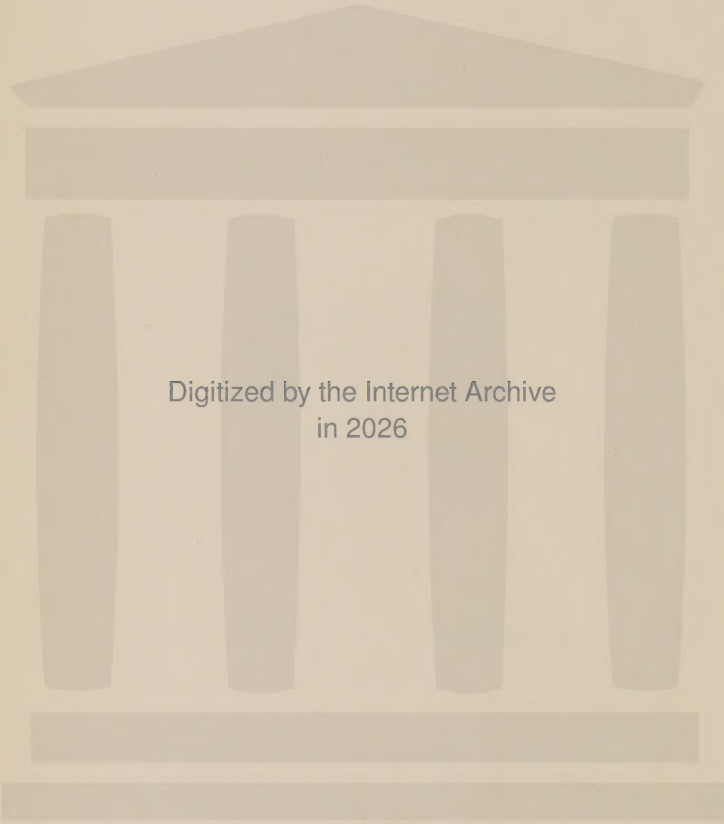
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OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

THE COURT OF APPEAL

ALL DIVISIONS OF THE HIGH COURT

AND

COURTS OF SPECIAL JURISDICTION

1953

VOLUME 2

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[1953] 1 All E.R.

p. 797. *HEARN v. HEARN & JARVIS*. With regard to this Note it is desired to be made clear that, so far as the first point is concerned, DAVIES, J., was not insisting on a seal or rubber stamp on a copy of an order, but on some authentication, e.g., a signature by the clerk of the court of summary jurisdiction. The documents about which the judge was complaining were mere typewritten pieces of paper with no signature, seal, or anything else to show their origin. As to the second point, in the last two lines of the Note, if the solicitors get properly authenticated copies from the court of summary jurisdiction, then, of course, counsel can act on copies of these documents supplied by the solicitors, but there have been frequent cases of grave inaccuracies in the recital of proceedings in courts of summary jurisdiction in petitions, which are, of course, signed by counsel and sworn by the petitioner.

p. 818. *Re ST. JOHN THE DIVINE, RICHMOND*. Catchwords: for "*Canon 92*" read "*Canon 82*".

p. 1169. *BRIDGMAN v. STOCKDALE*. Solicitors: for "*Beckinsales*" read "*Beckingsales*".

[1953] 2 All E.R.

p. 1. *Re HOLDER'S WILL TRUSTS*. Line G.1: add at the end of the paragraph: "It was conceded in argument that the increase in value of the certificates after the testator's death was income."

p. 55. *THEOCHARIDES v. JOANNOU*. Solicitors: after "*Joynson-Hicks & Co.*" read "agents for *Robert C. Wilson, Margate*".

p. 74. *CORBETT v. CORBETT*. Solicitors: read "*Lee, Bolton & Lee, agents for Roythorne & Co., Spalding (for the husband); Blakeney & Marsden Popple, agents for Cyril E. Wheeler, Brighton (for the wife)*" instead of as printed.

p. 535. *MILLS v. ALLEN*. Lines F.4, 5, 10, 11: for "*Mrs. Allen*" read "*Mrs. Andrews*".

p. 689. *R. v. DURKIN*. Delete last paragraph of judgment and substitute: "When the case came before the second court-martial the appellant did not put forward the plea in bar again, but, if we thought that that plea ought to have succeeded on the first hearing—i.e., that the confirming officer was wrong in not confirming it—we should not hesitate to allow the point to be raised before us. On the question whether there was condonation it is suggested that when Major Littledale ordered the appellant out of close arrest into open arrest and that he should resume his duties in the cook-house and that a summary of evidence should be taken, that meant condonation. This court, however, cannot see any evidence on which it can possibly be said that Major Littledale condoned the offence. Condonation means a wiping out or forgiveness of an offence in some way. The passage from CLODE to which our attention had been called states: "When any offence has been committed by an officer or soldier, and that offence not punished or forgiven, but advisedly overlooked, the person implicated being continued in his employment—these circumstances are held to be a good plea of condonation and a bar to further proceedings". In this case the appellant was informed that he was to remain in open arrest, that a summary of evidence would be taken, and that meanwhile he could continue or was to continue his duties. How can that be said to be a condonation of an offence of which Major Littledale, who had only just arrived at the camp, had any knowledge? It is difficult to understand how an offence can be condoned before it is known that it has been committed. In the present case, as there was no summary of evidence at the time Major Littledale told the appellant to resume his duties, it seems to the court that there was no evidence on which the first court-martial could find condonation. Therefore, the confirming officer was right in refusing to confirm the finding. In these circumstances, the plea of condonation could not have been successfully raised at the second trial, and, as there is no other ground on which it is suggested that the proceedings were in any way wrong, this appeal is dismissed."

p. 796. *TRAVERS v. HOLLEY AND HOLLEY*. Counsel: read "*Phillimore, Q.C., and Douglas Potter* for the husband. *Ifor Lloyd, Q.C., and Hollins* for the wife" instead of as printed.

p. 930. *CAVE v. CAPEL*. Counsel: read "*James Stirling and N. Lerman* for the plaintiff. *E. S. Fay and A. M. Wallace* for the defendant" instead of as printed.

p. 1021. *WHITE v. JOHN WARRICK & Co., LTD.* Counsel: for "*Donald Macintyre*" read "*F. Donald McIntyre*."

p. 1186. *THOMSON v. CREMIN*. Counsel for the second respondents: read "*G. R. Thomson, K.C. (of the Scottish Bar) and John Bassett (of the English Bar)* . . ." instead of as printed.

p. 1197. *PADLEY v. PADLEY*. Line G.4: for "*Nottingham city justices*" read "*justices of the Nottingham petty sessional division*".

p. 1327. *S.A. MARITIME ET COMMERCIALE OF GENEVA v. ANGLO-IRANIAN OIL Co., LTD.* Line C.3: for "assignee" read "consignee".

p. 1330. *BREWER STREET INVESTMENTS, LTD. v. BARCLAYS WOOLLEN Co., LTD.* Line H.3: for "liable to the defendants for its cost" read "liable to the plaintiffs for its cost".

p. 1339. *R. v. INDUSTRIAL DISPUTES TRIBUNAL. Ex parte TECHNALOY, LTD.* Counsel: for "*S. B. R. Cooke* for the tribunal" read "*S. B. R. Cooke* for the Ministry of Labour and National Service."

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Re HOLDER'S WILL TRUSTS. NATIONAL PROVINCIAL BANK, LTD. v. HOLDER AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 16, 1953.]

Administration of Estates—Capital or income—National savings certificates encashed after death of holder.

D On June 12, 1940, a testator purchased five hundred units of national savings certificates, seventh issue, of 15s. each. On Sept. 21, 1951, the testator died, and his executor called in the certificates, receiving £534 7s. 6d., being £159 7s. 6d. more than their cost. By his will the testator declared that "no part of any dividends rents interest or moneys of the nature of income which shall actually be paid after my death shall be apportioned or treated as capital of my estate . . ." In a prospectus issued by the National Savings Committee relating to the said certificates it was stated: "A national savings certificate costs 15s. and becomes worth 20s. 6d. in ten years at the following rate of growth:—At the end of the first year 3d. interest is added; thereafter $\frac{1}{2}$ d. is added at the end of each completed period of one month up to the end of the tenth year. A bonus of 3d. is added at the end of the fifth year, and a further bonus of 6d. at the end of the tenth year. This represents a rate of interest of £3 3s. 5d. per cent. per annum over the whole period of ten years". The prospectus contained a statement of "Points to note" which referred to the fact that "no income tax is payable on the interest on certificates, and the interest they earn need not be included in any income tax return" and also to the fact that certificates might be cashed at any time "the owner receiving whatever interest is due".

H **HELD:** the sum received by the executor included an amount which in its inception was interest, but, having regard to the general tenor of the prospectus, there was an agreement between the testator, as purchaser of the savings certificates, and the government that, unless the testator encashed them, a sum was to be added to the principal value of the certificates each month, with the result that at the end of each completed month the addition was capitalised and could no longer be regarded as "dividends rents interest or moneys of the nature of income".

ADJOURNED SUMMONS to determine (inter alia) as to the national savings certificates held by Ernest Cyril Coulthurst Holder, deceased, at the date of his death, and in respect of which £534 7s. 6d. was received after his death, including a total of £159 7s. 6d. representing interest, whether the whole or

some and what part of such interest was payable to the beneficiaries entitled to income.

D. A. Ziegler for the plaintiff, the executor.

Plowman for the first defendant, interested in income.

N. S. S. Warren for the second defendant, interested in income.

T. A. C. Burgess for the remaining defendants, interested in capital.

ROXBURGH, J.: On June 12, 1940, the testator purchased five hundred units of national savings certificates, seventh issue, of 15s. each, which cost him £375. The testator might, of course, have encashed those savings certificates at any time on short notice, but in fact he did not do so. The normal span for certificates, of ten years, expired and they became subject to the provisions which the government made with regard to such certificates. On Sept. 21, 1951, the testator died. After his death, his executor, the plaintiff bank, called in the said certificates, and on Feb. 8, 1952, £534 7s. 6d. was received in respect thereof, of which £159 7s. 6d., according to the affidavit in support of this summons, represented interest. That payment was, of course, a lump sum of £534 7s. 6d. The statement that £159 7s. 6d. represented interest merely means that, if one deducts £375, the cost price, from £534 7s. 6d., the sum actually repaid, £159 7s. 6d., remains.

The testator included in his will a common form clause, which was borrowed, apparently, from some other document because it appears in his will with an erroneous number and plainly did not have regard to the special features of national savings certificates. By that clause he provided:

"13. I expressly declare that no part of any dividends rents interest or moneys of the nature of income which shall actually be paid after my death shall be apportioned or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent or interest shall be income payable to such tenant for life and I further declare that any bonus or bonuses which may from time to time be declared in respect of any shares or stock subject to the trusts hereof shall be applied as and be deemed to be income arising from such shares or stock."

Counsel for those interested in capital conceded that any interest earned by these national savings certificates after the death of the testator must be income. I think he was bound to concede that, although this was a lump sum payment, and there is no direction in this clause to "unscramble" lump sum payments. However, I think that he would have been in grave difficulty if he had not made that concession and, as he has made it, I need not say any more about that.

That national savings certificates earn income is beyond doubt. It is beyond doubt that, if they are not encashed, the income accumulates, and that accumulating interest, or accumulated interest, is not subject to income tax by virtue of the Income Tax Act, 1952, s. 191. That does not solve my problem, for, in my judgment, the question is—and I regard it as a difficult question—whether that portion of the lump sum payment actually received by the bank after the testator's death comprised "any dividends rents interest or moneys of the nature of income". It did comprise moneys in the nature of income, unless they had been effectively capitalised by agreement between the testator and the government, i.e., the authority issuing the savings certificates, before his death, because they once had been in the nature of income. The question is whether they had been capitalised during his lifetime so as to lose the character of moneys of the nature of income,

That question is not made easier by some ambiguities in what I may call the prospectus of the seventh issue of national savings certificates, which obviously was intended to be couched in popular language and did not envisage this point. The material part of this prospectus is as follows:

"Put your savings into national savings certificates. See how they grow in value."

A There "they" must mean, in my view, the corpus, the amount of the certificates. Then:

"A national savings certificate costs 15s. and becomes worth 20s. 6d. in ten years at the following rate of growth."

B That must be the growth of the corpus. "At the end of the first year 3d. interest is added." That, I understand to mean, interest is deemed to be paid and is added to the corpus.

"Thereafter $\frac{1}{2}$ d. is added at the end of each completed period of one month up to the end of the tenth year."

There, again, I think that that must mean added to the corpus.

C "A bonus of 3d. is added at the end of the fifth year, and a further bonus of 6d. at the end of the tenth year."

I think that the bonus must be regarded as an income bonus in its inception, but there, again, it is, under the terms of issue, added to the corpus.

"This represents a rate of interest of £3 3s. 5d. per cent. per annum over the whole period of ten years."

D It is to be noticed that it says "This represents a rate of interest", which is not the same thing as saying "This is interest." Then comes a table headed: "The growth in value of savings certificates (seventh issue)." Again, that means surely, the growth in value of the corpus. The certificate costs 15s. and we see: "value after one year . . . 15s. 3d." Everything seems to me to point to the view that, unless the purchaser encashes his certificate, interest is deemed to be paid but added to the corpus by the agreement, between the purchaser and the government, embodied in the terms of issue.

On the back of the prospectus are "Points to Note". Point No. 2 is:

"No income tax is payable on the interest on certificates, and the interest they earn need not be included in any income tax return."

F That, of course, is a reference to what is now the Income Tax Act, 1952, s. 191, but that does not affect the question, because there is no doubt that it is interest in its inception, in my judgment. The question is whether it has been, by agreement, capitalised before the testator's death.

G There are some provisions in the Savings Certificates Regulations, 1933 (S.R. & O., 1933, No. 1149), which indicate a point that is not in dispute with regard to interest, but there is nothing that I can find in that order which bears on the present question. At the end of "Points to Note" on the prospectus, however, there is one point which seems to me to be at variance with the general tenor of the prospectus. It is there stated:

H "5. After short notice, certificates may be cashed at any time provided the holder is not under seven years of age, the owner receiving whatever interest is due."

That points in the opposite direction, in my view. It points to the fact that the interest is never capitalised, or, in other words, that the arrangement is an agreement to pay interest at a rate referable to the intervening period, but payable only on the termination of the holding. In my judgment, that view, though it does receive support from point No. 5, is quite at variance with the whole of the rest of the tenor of the prospectus, and, though I think the point

is difficult, in my judgment, there is an agreement between the purchaser of savings certificates of that issue and the government that, unless the holder encashes them, a sum shall be added to the principal month by month, with the result that at the end of each completed month the addition is capitalised, unless the holder before the end of the month calls for repayment.

Order accordingly.

Solicitors: *Collyer-Bristow & Co.* (for the plaintiff); *Stibbard, Gibson & Co.* (for the first defendant); *Waterhouse & Co.* (for the remaining defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* HIEROWSKI.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, J.J.), April 21, 1953.]

Rent Control—Rent tribunal—Re-consideration of registered rent—Change of circumstances—Jurisdiction of tribunal—Receipt by landlord of war damage compensation—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (3).

On June 21, 1949, on the reference of a tenant, a rent tribunal fixed the rent of a furnished flat at £6 6s. per week, which rent was registered by the local authority under s. 3 (2) of the *Furnished Houses (Rent Control) Act, 1946*. By an agreement dated May 24, 1952, a new tenant took possession of the flat at a rent of £6 10s. per week, the 4s. increase in the rent being made by the landlord in respect of an increase in the rates and other outgoings. In October, 1952, following breaches of covenant in the agreement of May 24, 1952, by the new tenant, the landlord claimed the right to re-enter the flat and determine the agreement. The tenant thereupon referred the contract to the tribunal to fix the rent payable for the flat. He alleged no change of circumstances under s. 2 (3) of the *Act*. The landlord, in his answer to the tenant's reference of the agreement to the tribunal, set out the fact that the rates and other outgoings had increased, and stated that when he had been informed by the clerk that he had overcharged the tenant 4s. per week (the registered rent being £6 6s. per week), he had refunded the amount due to the tenant. On Dec. 12, 1952, the tribunal ordered a reduction in the rent to £4 14s. 6d. per week. In doing so they treated the 4s. per week increase as a change of circumstances entitling them to deal with the whole matter at large, and they also took into consideration, as being a new factor, war damage compensation received by the landlord in respect of the premises. On an application for certiorari to bring up the order of the tribunal to be quashed,

HELD: the tribunal had jurisdiction to consider a reference under s. 2 (3) of the *Act* only if there had been a change of circumstances, whether alleged by the landlord or by the tenant; here no change of circumstances had been alleged, and the receipt by the landlord of the war damage compensation was entirely irrelevant and not a matter for the tribunal to take into consideration; and, therefore, the tribunal had never acquired jurisdiction and certiorari would go.

Per GODDARD, C.J.: All the tribunal could consider was the change of circumstances alleged—here the increase in the rates, which gave them no jurisdiction to re-open the question of the rent and further to reduce it.

Per LYNKEY, J., and PARKER, J.: The power of the tribunal was not limited to considering the change of circumstances alleged by the person applying for re-consideration of the rent. Once they had jurisdiction to deal with the reference, they were entitled to consider any change of

circumstances, but not the whole case de novo, thus getting the right to review a decision which they thought was wrong.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 2 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1086.

Case referred to:

- A (1) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Gormly* [1951] 2 All E.R. 1030; [1952] 1 K.B. 179; 116 J.P. 22; 2nd Digest Supp.

MOTION for an order of certiorari to bring up and quash an order of the Fulham, Hammersmith and Kensington Rent Tribunal, made on Dec. 12, 1952, reducing the rent of a furnished letting which had already been fixed by a previous decision of the tribunal, dated June 21, 1949.

- B The order of Dec. 12, 1952, was made on the reference of a new tenant and no change of circumstances was alleged by him. The grounds on which certiorari was sought were (i) that the tribunal had no jurisdiction under the Furnished Houses (Rent Control) Act, 1946, to make their decision, and (ii) that the tribunal, having, on June 21, 1949, reduced the rent from £7 per week to C £6 6s. per week, which rent was entered in the register kept by the local authority in pursuance of the Act of 1946, had no jurisdiction to reduce the rent further except on the grounds of change of circumstances which was at no time alleged and of which there was no evidence.

Ackner for the landlord.

- D J. P. Ashworth for the tribunal.

LORD GODDARD, C.J.: Counsel for the landlord moves for an order of certiorari directed to the Fulham, Hammersmith and Kensington Rent Tribunal to bring up and quash a decision by which they reduced the registered rent of certain premises from six guineas a week to £4 14s. 6d. a week.

- E In June, 1949, these premises had been let furnished by the landlord to tenant at a weekly rent of £7. The tenant referred the contract to the tribunal under the Furnished Houses (Rent Control) Act, 1946, and the tribunal reduced the rent to six guineas a week. That rent was entered in the register of the local authority under s. 3 (2) of the Act. Thereafter, the rates and other outgoings were increased, and the landlord sought to recoup himself by making a charge for the increased amounts which he had to pay. What he ought to have done was to have gone back to the tribunal and asked for a re-consideration on the ground of a change in circumstances, namely, the increased rates. Meanwhile, a new tenant, who had come into the premises referred the tenancy to the tribunal, but he alleged no change of circumstances under s. 2 (3) of the Act of 1946. It is clear, therefore, that, in the absence of a change of circumstances, and, I would add, a change of circumstances on which the tenant could rely, the case was entirely covered by *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Gormly* (1), in which this court granted certiorari and quashed the decision of the tribunal where they had interfered with a rent which they had fixed. The court pointed out that, once the rent had been fixed, it could only be altered under the provisions of s. 2 (3) on the ground of change of circumstances.

- H When the landlord had to put in an answer to the tenant's reference, he set out the facts that the rates had gone up and that he had increased the rent by 4s. a week, but, meanwhile, he had refunded that 4s. a week to the tenant. Thereupon, the tribunal seem to have seized on that as a change of circumstances and proceeded on the tenant's application to reduce the rent from six guineas a week to £4 14s. 6d. a week. When one puts it in that way, one sees at once that it is impossible to construe the Act of Parliament in the way in which the tribunal did.

Section 2 (3) of the Act provides:

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

That would give the tribunal power to increase the rent if the landlord applied on the ground of a change of circumstances. The only words we need consider are:

"it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ."

The tribunal have, apparently, taken the view, and counsel for the tribunal has strenuously argued on their behalf, that, once any change of circumstances is shown, the matter is at large for the tribunal to deal with as they like. Speaking for myself, if that were the construction which should be placed on this sub-section, it would be nothing more nor less than a trap, because a landlord who went to the tribunal and said:

"I ask you to re-consider this on the ground that there has been a rise in the rates",

might suddenly be met with the whole case being re-opened and the tribunal saying:

"We are not going to increase the rent on the ground that the rates have gone up. Although the rates have gone up, we are going to put the rent down."

That seems to me to be a most astonishing proposition. The true construction, in my opinion, which should be placed on this sub-section is that all that the tribunal can consider is the change of circumstances alleged. They are to re-consider the rent on the ground of change of circumstances. The only change of circumstances existing here is the rise in the rates, which was not set up by the tenant, but was set up by the landlord. In considering the tenant's application, therefore, it followed that the only change of circumstances that had arisen since the rent had previously been fixed was the rise in rates, and, accordingly, the tribunal were limited to founding their jurisdiction on that matter. In my opinion, they had no power and no jurisdiction to regard this as a case in which the whole matter was at large so that they could inquire into whether they had fixed a proper rent on the previous occasion.

But there is another ground on which, in my opinion, the court is bound to grant certiorari. If it can be shown that an inferior tribunal has come to its decision by taking into account matters which it ought never to have taken into account and are virtually extraneous to what they have to decide, that is a ground for granting certiorari. The chairman, in his affidavit, has frankly stated that the tribunal acted as they did on grounds which appear to this court to be entirely irrelevant, quite apart from the fact that nobody asked them to act on those grounds and quite apart from the fact that this was not the complaint of the tenant. The ground the chairman has set out is this:

"Upon a comparison of the answers given to question (8) in the lessor's particulars (Form F.R.4A) on the present occasion and on the previous consideration by the tribunal it appeared to the tribunal that the matter of war damage compensation was a new factor. I had presided as chairman at the hearing by the tribunal of the application by the [previous

tenant] and to the best of my recollection the matter of war damage had not been brought to the notice of the tribunal on that occasion. In the presence of the said Hierowski and the [present tenant] I there and then telephoned the surveyor's department of Hammersmith Metropolitan Borough Council and was informed by them that the damage claim approximated to £815 and the said Hierowski agreed that he had received this sum. This appeared to the rent tribunal materially to affect their decision as to what should be the appropriate rent of the premises under the said Act of 1946. While the tribunal have never considered it to be conclusive they nevertheless normally have had regard to the capital expenditure by a landlord on the provision of the accommodation under reference."

A

B The circumstances were these. The landlord bought the premises in a war-damaged condition. He received a sum of money and spent it on the premises for the purpose of repairing the damage. How the tribunal could come to the conclusion that it made any difference whatever where the money came from, whether the landlord took it out of his own pocket, or a friend lent it to him, or he recovered it from the War Damage Commission, I do not know, but that was a point which ought never to have been taken into consideration. It was entirely irrelevant to the matters which the tribunal had to consider, and as, on the face of the chairman's affidavit, it appears that that was one of the factors which operated on the tribunal in coming to the conclusion they did, it seems to me, on that ground also, that certiorari must go.

C

LYNSKEY, J.: I agree. Section 2 (3) reads:

D

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ."

E It seems to me that the natural meaning of those words is that the tribunal are given power to re-consider the rent on the ground of the change of circumstances, or, in other words, to re-consider the rent in the light of such change of circumstances, but it is suggested by the tribunal that the remaining words of the sub-section:

F " . . . and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable",

in some way either qualify or extend the jurisdiction given to them by the first portion of the sub-section to re-consider the rent on the ground of change of circumstances. I do not so read that portion of the sub-section. It provides

G the machinery whereby the tribunal shall re-consider the rent on the ground of change of circumstances. The tribunal can only re-consider the rent if there is a change of circumstances, and they must adjust the rent in the light of that change of circumstances. But, speaking for myself, I would not limit their power to consider the change of circumstances to that change of circumstances which is alleged by the person applying for re-consideration, whether

H lessor, lessee or local authority. The tribunal are entitled, once they have jurisdiction to deal with the reference, to consider any change of circumstances, but their decision must be the result of considering a change of circumstances and not a re-decision on circumstances which existed when they first fixed the rent. In the present case it seems to me that the tribunal have gone far beyond their powers. There was no change of circumstances alleged, and, so far as I can see on the application before them, no person asked them to exercise their powers under s. 2 (3). I agree with my Lord that there should be certiorari.

PARKER, J.: I agree with both judgments delivered, and I would only add a word with regard to the construction of s. 2 (3). Counsel for the tribunal has contended that under that sub-section the tribunal have jurisdiction to consider the reference if there has been any change of circumstances, whether it is one which redounds to the benefit of the landlord or to the benefit of the tenant. He then goes on to argue that the tribunal, once they have jurisdiction, are entitled to consider, not only the change of circumstances, but the whole case *de novo*, thereby incidentally getting the right to review a decision which they feel is wrong. With regard to the first contention, I entirely accept that. It seems to me, that, in order that the tribunal should have jurisdiction—it matters not what the change of circumstances may be, whether, on a tenant's application, it be an increase in rates which are payable by the tenant, or, on a landlord's application, some other change which would be to the benefit of the tenant—once there is a change, there is jurisdiction. But as regards counsel for the tribunal's second contention, it seems to me contrary to the natural reading of the sub-section. In effect, he is forced to read the sub-section as if the words "on the ground of change of circumstances" qualify the referring of the case—in other words, that they mean only in the event of a change of circumstances. On the natural reading of the words the re-consideration which the tribunal are to make is one having regard to the change of circumstances, and to that alone. It is suggested that the reference thereafter to the provisions of sub-s. (2) of the section shows that the tribunal are really re-considering the whole case *de novo*. I certainly do not read it in that way; sub-s. (2) is only invoked as part of the machinery for determining the adjustment which is to be made having regard to the change of circumstances which has been proved. For these reasons, I agree that this order should go.

Order for certiorari.

Solicitors: *S. Farren & Co.* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

CORSINI AND ANOTHER *v.* MONTAGUE BURTON, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 23, 24, 1953.]

Landlord and Tenant—Compensation for goodwill—Carrying on business for five years—Need for business to be carried on by predecessors as tenants—Business carried on for part of period under friendly arrangement with previous tenant—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1).

From a date before September, 1947, the tenants' predecessors in title carried on the business of a restaurant under a friendly arrangement with the existing tenant of the premises. On Sept. 29, 1948, they were granted a tenancy of the premises for four years and continued to carry on the business. On Mar. 28, 1949, they sold the business and goodwill to the tenants and assigned the lease to them. On an application for a new lease under the Landlord and Tenant Act, 1927, s. 5, the tenants claimed that they were entitled to compensation under s. 4 (1) as the business had been carried on by them or their predecessors in title at the premises for a period of not less than five years, within the meaning of the sub-section.

HELD: to comply with s. 4 (1) of the Act of 1927, the tenants had to show, not merely that they or their predecessors in title had carried on the business at the premises during the requisite period, but also that they had done so throughout the whole period in their capacity as tenants; as the tenants or their predecessors in title had not been the tenants of the premises for a period of not less than five years, they could not claim

compensation under s. 4 (1); and, therefore, they were not entitled to a new lease under s. 5.

AS TO COMPENSATION FOR GOODWILL AND RIGHT TO NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 629-633, Nos. 7393-7417.

Cases referred to:

- A (1) *Williams v. Portman (Viscount)*, [1951] 2 All E.R. 539; [1951] 2 K.B. 948; 2nd Digest Supp.
 (2) *Pasmore v. Whitbread & Co., Ltd.*, [1953] 1 All E.R. 361.

APPEAL by the tenants from an order of His Honour JUDGE HOWARD, made at Southend County Court, and dated Feb. 18, 1953.

B Since Mar. 28, 1949, the tenants had been carrying on the business of a restaurant on the ground floor and in the cellar of a house known as 13 High Street, Southend, having on that day purchased the business and goodwill and taken an assignment of a four years' tenancy of the premises from two persons of the name of Alleck. The lease commenced on Sept. 29, 1948, but the Allecks had been carrying on the business of a restaurant at the premises for at least one year before that date under an arrangement with a Miss Wren who was then the tenant under an earlier agreement for three years. The tenants applied for a new lease of the premises under the Landlord and Tenant Act, 1927, s. 5, and, to bring themselves within s. 4 (1) of the Act, they sought to prove that their predecessors had acquired Miss Wren's interest in the premises or were her sub-tenants from before September, 1947, but the learned county court judge found that there was merely a friendly understanding between Miss Wren and the Allecks which did not amount to a sub-letting or an assignment. The evidence of one of the witnesses showed that Miss Wren expected to obtain a long lease of the premises when her three years' agreement came to an end and wished to appropriate to herself, if she could, any benefit which might accrue from the carrying on at the premises of the business by the Allecks. The tenants further contended that, whether or not the Allecks had any interest in the premises before 1948, they (the tenants) came within s. 4 (1) as they or the Allecks had carried on the business at the premises for a period of over five years. The learned judge held that the tenants had not complied with the requirement of s. 4 (1), as they or their predecessors in title had not carried on the business as tenants of the premises for the requisite period, and, therefore, he dismissed the application.

F *Merriton* for the tenants.

C. G. A. Cowan for the landlord.

G **SIR RAYMOND EVERSLED, M.R.:** This is an appeal from an order of His Honour JUDGE HOWARD, sitting at Southend County Court, whereby he came to the conclusion that the tenants, who were making an application under the Landlord and Tenant Act, 1927, s. 5, for the purpose of obtaining a new lease, had not brought themselves within the language of s. 4 (1) of the Act, as it was necessary for them to do. Section 4 (1) reads:

H "The tenant of a holding . . . shall, if a claim for the purpose is made in the prescribed manner . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises . . ."

Section 5 contains the provision that, in the circumstances there stated, a tenant may obtain, in lieu of compensation, a new lease. Section 25 (1) of the Act contains, inter alia, the following definition:

"The expression 'predecessor in title' in relation to a tenant or landlord means any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy, or by operation of law."

[HIS LORDSHIP stated the facts, reviewed the evidence, and continued:] In my judgment, it is manifest that there was evidence on which the learned judge could hold, as he did, that there was never any legal contractual relationship which might lead to, or be the equivalent of, an assignment or an under-letting between Miss Wren and the Allecks. Counsel for the tenants, however, has taken a second point of some nicety, simplicity and ingenuity. It is, undoubtedly, the fact that the Allecks were the tenants' predecessors in title. Therefore, said counsel, as the Allecks had carried on the business at the premises from before September, 1947, the requirement of s. 4 (1) of the Act was satisfied, whether or not they had any interest in the premises before September, 1948. He pointed to the language of the sub-section which, he said, must, in accordance with well-known principles, be read in its ordinary sense. The requirement of s. 4 (1) is that the tenant should prove that

"... by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years . . ."

he has a claim under the sub-section. It is not in doubt that one can aggregate the period during which the predecessor in title has carried on the business with the period during which the tenant himself has carried on the same business. Counsel for the tenants says that it is the fact, as proved, that for five years either the tenants or their predecessors in title, viz., the Allecks, carried on the business at the premises. In other words, substituting the names for the descriptions in s. 4 (1), he seeks to read the material part of the sub-section as follows: "if he proves that by reason of the carrying on by the tenants or the Allecks at the premises of a trade or business . . ." That is a simple and not unattractive point, but I have come to the conclusion that it is incorrect. I agree with the learned judge that the plain sense of the language is to require that the persons who carried on the business before the tenants must have been the tenants' predecessors in title and must have carried on the business *as tenants*, that is, having an interest in the premises during the whole of the relevant period. It seems to me that any other view would lead to an extraordinary result and render it inconsequent that the persons who carried on the business before the tenants should have had at any time any interest in the premises. It is plain, and it has, indeed, been laid down by this court in *Williams v. Viscount Portman* (1) and *Pasmore v. Whitbread & Co., Ltd.* (2), that the phrase "predecessors in title", having regard particularly to the definition in s. 25 (1), means predecessors in title to the premises, i.e., persons having the title to the premises to which the tenant has succeeded. It, therefore, necessarily follows that, to comply with s. 4 (1), the persons who carried on the business before the tenant must have had an interest in the premises immediately before the tenant took over. It would be an illogical and capricious result if they were only required to have it at that point of time, or for a period, however short, immediately prior thereto, but were not required to have any interest in the premises throughout the whole of the relevant period during which they carried on business. It is true that s. 4 (1) is concerned with giving compensation for goodwill (or its equivalent), but the goodwill is what is called an adherent goodwill, i.e., goodwill which has become attached to the premises so as to give them, in the market, a particular and increased value. It seems to me that the logic of the sub-section requires the combination both of a title in the premises and of the conduct of the business in order that the purposes of the Act may be satisfied. The point is a short one. It does not lend itself usefully to any attempt at elaboration. I am satisfied

to express my concurrence with the learned county court judge and to adopt the way in which he expressed his conclusion. He said:

A "I think that on its true meaning [s. 4 (1)] means that the tenant must prove either that he as tenant has carried on business for five years, or that his predecessors in title in their capacity as tenants have carried on the business and the period during which he as tenant and the predecessors as tenants have carried on business is not less than five years."

That, in my judgment, is a correct statement of the meaning of the sub-section, and I am, therefore, unable to accept the contention of counsel for the tenants to the contrary. The result, in my judgment, is that the appeal fails and must be dismissed.

B **BIRKETT, L.J.:** I am entirely of the same opinion. As **SIR RAYMOND EVERSHED, M.R.**, said, the point is really not capable of elaboration, and I agree that the appeal ought to be dismissed.

C **ROMER, L.J.:** I also agree, and only add a word or two on the second point. It seems to me that the argument of counsel for the tenants on that point really amounts to this, that, provided only that the predecessor of a tenant who makes a claim under s. 4 (1) of the Act had a title to the premises, from which title could and did derive to the tenant, it does not matter, for the purpose of fulfilling the five-years' requirement which is referred to in the sub-section, when the predecessor first acquired his title to the property, but it is enough to show that he was in actual occupation (and as to that I am not quite sure whether such occupation must be lawful or whether an unlawful occupation of the premises would be sufficient), and that he carried on the relevant business for the requisite time. In my judgment, that view attributes insufficient weight to the two words "in title" which follow on the word "predecessors". I think that when the legislature speaks of predecessors in title in this context it means, as a matter of construction, that those words must be attached to the word "predecessor" as a qualification throughout the whole period which is mentioned immediately afterwards. For the purposes of the five-years' period the legislature might have looked to title alone or (conceivably) to occupation alone. But, according to the contention of counsel for the tenants, it apparently looked to title alone at the date of the devolution from the predecessor of the tenant and also subsequently, but was content to look to either title or occupation, indifferently, at the earlier period of the predecessor's possession. That seems to me to be inherently improbable, and, if the legislature thought that mere occupation in conjunction with user were sufficient to form a foundation for a tenant's claim under s. 4 (1), it is not easy to see why it insisted on the possession of title at the time of devolution to the tenant. One would have thought that occupation would, on that hypothesis, have been a sufficient qualification both at that point of time and earlier. G Accordingly, as I have already said, I think that the words "in title" cover the whole five-years' period and that the phrase means what the learned judge said it meant, when he said that he thought

H "... on its true meaning [s. 4 (1)] means that the tenant must prove either that he as tenant has carried on business for five years, or that his predecessors in title in their capacity as tenants have carried on the business ..."

I quite agree with that. It has to be remembered that this is a landlord and tenant Act and it is not easy to see as a matter of logic or reason why there should be introduced into it an element which arose out of the possession of someone who was not a tenant, as was the position of the Allecks before September, 1948, in the present case. I quite agree with what my Lord has said. In my view, to satisfy a claim under s. 4 (1) it must be shown that there was

a continuous chain of title throughout the period of five years to which the sub-section refers. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Conway & Conway* (for the tenants); *Warren, Murton & Co.*, agents for *H. A. Dodman*, Leeds (for the landlord).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

HOUSEHOLD v. GRIMSHAW (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Upjohn, J.), April 20, 21, 1953.]

Income Tax—Income—Payment of lump sum for cancellation of contract—

Contract for exclusive services—Operative for twelve to sixteen consecutive weeks of each of three successive years—Option to acquire film rights in novels—Not a contract of employment—Income Tax Act, 1918 (c. 40), sched. E, r. 1, sched. D, Case II.

The taxpayer agreed to render exclusive and whole-time services to a film company in writing stories, treatments, adaptations, continuities and scenarios. The company was to have the sole property in the product of those services and all copyright, performing and other rights, and could use the work in any way it chose, but was not bound to use it. The taxpayer also granted to the company an option to acquire the film and certain other rights in any novel written by him during the subsistence of the agreement. For the taxpayer's "entire services hereunder and the products thereof and the rights to which [the company] is entitled hereunder" the company agreed to pay him £200 a week. The employment was to last twelve or sixteen consecutive weeks in each of three consecutive years commencing after the taxpayer's discharge from the army. During the remainder of each year the taxpayer was free to write and publish any works, but not for films except with the company's permission. Within a year of the commencement of the employment the agreement was cancelled by a deed of release, under which the taxpayer received £3,000 "in full satisfaction of all claims and demands" under the agreement. He was assessed to income tax under Case II of sched. D to the Income Tax Act, 1918, in respect of this sum, less £300 paid to an agent.

HELD: (i) the contract was not a contract of employment, since the consideration of the payment of £200 a week was one consideration in respect both of the taxpayer's services and the grant of the option to acquire the film and other rights, and was not severable, and, therefore, the taxpayer was not assessable in respect of the payment of £200 a week under sched. E, and the £2,700 was not a sum paid in consideration of the abrogation of a contract of employment.

(ii) the £2,700 was not a payment in respect of a surrender of a capital asset, but income of the taxpayer's profession of author assessable under Case II of sched. D.

Barr, Crombie & Co. v. Inland Revenue (1945 S.C. 271), distinguished.

Dictum of LAWRENCE, J., in *Bush, Beach & Gent, Ltd. v. Road* ([1939] 3 All E.R. 304), applied.

AS TO PROFITS OF A PROFESSION, see HALSBURY, Hailsham Edn., Vol. 17, pp. 174-177, paras. 363-370; and FOR CASES, see DIGEST, Vol. 28, pp. 61, 62, Nos. 310-315.

AS TO LIABILITY TO TAX OF PAYMENTS FOR CANCELLATION OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 17, p. 126, para. 237; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.

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Cases referred to:

- (1) *Henley v. Murray*, [1950] 1 All E.R. 908; 31 Tax Cas. 351; 2nd Digest Supp.
- (2) *Bury & Walkers v. Phillips*, (1951), 32 Tax Cas. 198.
- (3) *Davies v. Braithwaite*, [1931] 2 K.B. 628; 100 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198; Digest Supp.
- A (4) *Higgs v. Olivier*, [1952] Ch. 311.
- (5) *Short Bros., Ltd. v. Inland Revenue Comrs. Sunderland Shipbuilding Co., Ltd. v. Inland Revenue Comrs.*, (1927), 12 Tax Cas. 955.
- (6) *Barr, Crombie & Co. v. Inland Revenue*, 1945 S.C. 271; 26 Tax Cas. 406; 2nd Digest Supp.
- (7) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.
- B (8) *Kelsall Parsons & Co. v. Inland Revenue*, 1938 S.C. 238; 21 Tax Cas. 608; Digest Supp.
- (9) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390; Digest Supp.
- (10) *Bush, Beach & Gent, Ltd. v. Road*, [1939] 3 All E.R. 302; [1939] 2 K.B. 524; 108 L.J.K.B. 801; 161 L.T. 117; Digest Supp.
- C (11) *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.*, (1927), 12 Tax Cas. 1102.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer appealed against an assessment for 1947-48 under Case II of sched. D to the Income Tax Act, 1918, in the sum of £1,500 in respect of his profession as an author, on the ground that a sum of £3,000, less agent's commission of £300, received by him should not be taken into account in computing the profits of his profession. He received the £3,000 under a deed of release terminating a contract of service for three years into which he had entered with a film company, Metro-Goldwyn-Mayer British Studios, Ltd. (Metro), "in full satisfaction of all claims and demands" which he might have under the agreement against the company. He contended (i) that the cancelled agreement was a service agreement whereby he became an employee of Metro and that the £3,000 was consideration wholly or mainly for the cancellation of such service agreement; (ii) that the cancelled agreement was not a contract incidental to the normal course of the profession of author which the taxpayer carried on, or, alternatively, that the structure of the taxpayer's profession was radically altered by the cancellation of the agreement; and (iii) that the £3,000 was of a capital nature and ought not to be taken into account in computing the profits of his profession. The Crown contended (i) that the cancelled agreement was in part only a service agreement, the other essential part being an option whereby Metro was entitled to purchase film rights in novels and other writings of the taxpayer, and that the £3,000 was not paid wholly or mainly for the cancellation of the service agreement, but also for the cancellation of the other terms of the agreement; (ii) that the cancelled agreement was a mere engagement in the course of the taxpayer's profession of author and that its cancellation did not go to the whole structure or any substantial part of the structure of the taxpayer's profession; and (iii) that the £3,000 was merely incidental to the carrying on and realisation of the profits of the taxpayer's profession as an author and was properly taken into account. The commissioners held that the option to purchase the film rights was an essential part of the cancelled agreement, and that, therefore, the £3,000 was not paid wholly for the cancellation of the service agreement; that the cancelled agreement was a mere engagement in the course of the taxpayer's profession of author, that the cancellation of the agreement did not go to the whole structure or any substantial part of the structure of the taxpayer's profession and that the £3,000 was merely incidental to the carrying on, and

the realisation of the profits of, that profession. They dismissed the appeal. The taxpayer appealed.

H. M. Allen for the taxpayer.

Cross, Q.C., and *Sir Reginald Hills* for the Crown.

UPJOHN, J.: This appeal raises the question whether a sum of £2,700 net received by the taxpayer in 1946 in consideration of his agreement to the termination of what I may call a contract of service, intending thereby to use neutral language, which he had entered into with a film company, Metro-Goldwyn-Mayer British Studios, Ltd., which I will call "Metro", in 1943 ought to be treated as a part of his income for 1947-48 under Case II of sched. D, or whether it ought to be treated as a capital receipt. The taxpayer has been engaged in the profession of author continuously since 1936, save when serving with His Majesty's Forces. He was a writer of short stories, and, before 1939, also wrote two novels which were published in the United States and in the United Kingdom. But up to the war he had not had any contact with any film company and had sold no film rights in any of his novels or short stories. He joined the army on the outbreak of war, and, while he was serving in the Middle East, an agent on his behalf entered into an agreement dated Dec. 31, 1943, with Metro. He entered into this agreement with some reluctance, but he realised that it afforded a valuable means of securing his financial position while he was re-establishing himself in his profession as an author.

By cl. 2 of the agreement:

"Metro hereby employs the [taxpayer] to render and the [taxpayer] hereby agrees to render to Metro his exclusive services in the United Kingdom of Great Britain and Northern Ireland Eire and in Europe only in accordance with Metro's directions and instructions and either alone or in conjunction or collaboration with any other person appointed by Metro in writing and composing stories treatments adaptations continuities scenarios."

By cl. 3 (3):

"Metro will pay to the [taxpayer] the sum of £10 per week as from July 20, 1943, until the commencement of the employment."

Then it was provided that the taxpayer should not be bound to account for or repay this sum of £10 a week unless he broke the agreement, when it should become repayable, but the payment was

"in advance and on account of the purchase price of the first of the [taxpayer's] novels in respect of which Metro exercises its option"

under a later clause in the agreement. By cl. 3 (6):

"The term of the employment shall be a minimum period of twelve consecutive weeks in each of the three consecutive years commencing from the commencement of the employment."

The employment was to begin as soon as the taxpayer could obtain his discharge from the army on the cessation of hostilities, or, at the latest, three months after such discharge. It was further provided that the period of twelve consecutive weeks in each year might be extended by Metro for a further four weeks following consecutively on the twelve weeks in any year if they desired so to do. Clause 4 provided:

"All products of the [taxpayer's] services to Metro and all copyright performing right and all other rights therein throughout the world during the full term of copyright and all renewals and extensions thereof shall be the sole property of Metro who shall be deemed in law to be the sole author thereof (the [taxpayer] acting entirely as Metro's employee) and

the [taxpayer] shall at the request and cost of Metro make execute and do all acts deeds and things necessary or proper for the purpose of vesting and warranting all such rights in and to Metro."

By cl. 6:

A "Metro shall have the right to add to take from change adapt translate into and use and treat in every way and in all or any languages the products of the [taxpayer's] services and either alone or in conjunction with material taken or adapted from the work of any other person and/or other source in all respects as Metro in its sole discretion shall think fit but shall not be bound to make any use of the products of the [taxpayer's] services."

B It was then provided that, if Metro did make use of them, the taxpayer was entitled to what was called the customary screen credit. Clause 8 provided that during the employment—i.e., during the twelve or sixteen weeks in each year—the taxpayer was to devote the whole of his time and attention to rendering services to Metro, but he was to be entitled to work at home provided he attended Metro for conferences and discussions as and when required by Metro during normal business hours. Then, during the period of three years, the taxpayer undertook that he would not

C "(i) write any literary works dramatic works stories treatments adaptations continuities scenarios scripts and/or dialogue for films or (ii) render any other services for films to or for himself or any person (except Metro) in any part of the world without the previous consent in writing of Metro."

D By cl. 9:

E "Subject to the due and punctual performance and observance of the terms and conditions on the part of the [taxpayer] in this agreement contained Metro shall pay to the [taxpayer] for his entire services hereunder and the products thereof and the rights to which Metro is entitled hereunder a sum at the rate of £200 per week payable weekly during the employment the first weekly payment to be made seven days after the commencement of the employment."

Clause 13 provides:

F "In consideration of the premises (i) The [taxpayer] hereby grants and agrees to grant to Metro the option to acquire the rights hereinafter mentioned of and in each novel written by the [taxpayer] which is published after the date of this agreement and prior to the expiration of the said three consecutive years . . ."

G The price for the rights was to be £6,000 in respect of the first novel, £7,000 for the second, £8,000 for the third, and so on. The rights, putting it briefly, were "motion picture television broadcasting and ancillary rights". Metro was given the option of continuing the whole agreement, that is to say, relating to his service of twelve to sixteen weeks in each year and the option for a further period of two years consecutive on the expiration of the first three years on the same terms. Finally, it was provided that the agreement was to be construed according to the law of England.

H The taxpayer secured his release from the army in 1945, and, as required by the agreement, he duly notified Metro of that fact. As it was bound to do, Metro gave him employment which started in 1945 and lasted for the minimum period of twelve weeks. He was asked to and did write an original script of a film version of a play he had long had in mind. In March, 1946, Metro informed the taxpayer that, owing to a change in its plans and a substantial reorganisation, it would have no work for him, and, although it was willing to continue to employ him in accordance with the contract if he insisted on it, it was anxious to be released from its bargain and asked him what sum he wanted to be paid

for such a release. The taxpayer was not at all keen to be released. Indeed, it is stated in the Case that:

“The [taxpayer] was disappointed and angry at Metro’s suggestion, but realised that Metro could make his life miserable if he refused to agree to a cancellation.”

The desire for cancellation was entirely one-sided, but the taxpayer, sensibly enough, agreed to it on terms.

Those terms are contained in an agreement made on Sept. 11, 1946, which recited that he had received £1,168 6s. 8d. on account of the payments of £10 a week. He was to keep that sum unless Metro exercised the option contained in the agreement to purchase the film rights of any novel, in which case, as in the earlier agreement, he had to bring that sum into account as part of the purchase price. By cl. 1, in consideration of £3,000 paid by Metro to the taxpayer, each party released the other from all obligations under the agreement of 1943. By cl. 2:

“In consideration of the sum of 5s. now paid by [Metro] to the [taxpayer] . . . the [taxpayer] hereby grants and agrees to grant unto [Metro] the exclusive option to acquire by way of partial assignment of the copyright all photoplay rights in and throughout the world during the full term of copyright and all renewals and extensions thereof of his next three novels of not less than seventy thousand words or dramatic works or either of them . . .”

The price was to be as in the earlier agreement, £6,000 for the first novel, £7,000 for the second, and so on. This option agreement was in fact substantially identical with the option terms in the earlier agreement, save that the option was confined to the first three novels which might be produced by the taxpayer and not to any novels that he might produce during the currency of the earlier agreement. The photoplay rights to be assigned were, as in the earlier agreement, motion picture, television, broadcasting and ancillary rights.

By reason of that agreement, £3,000 was paid to the taxpayer, of which a sum of £300 was paid to an agent, and the question arises whether the sum of £2,700 should be treated as income assessable under Case II of sched. D, or whether it is a capital payment. Paragraph 10 of the Stated Case states:

“Since the date of the said deed of release, the [taxpayer] has never entered into any similar agreement with Metro or any other film company. He has not banished from his mind the possibility of obtaining a film contract, but he would now only consider the direct sale of film rights in a book or short story, as there is now a large market for his short stories both in the United Kingdom and the United States. He has not in fact sold any rights in any of his books to Metro or to any other film company, but he did subsequently sell the rights in a short story to a film company, in circumstances not otherwise material to this case.”

Two main arguments have been presented to me. The first depends on the answer to this question: Ought the remuneration of £200 a week for the minimum period of twelve weeks in each of the three years to be assessed for income tax purposes under sched. E on the footing that the contract is a contract of employment, or ought it to be assessed under Case II of sched. D on the ground that it was a profit of the profession or vocation carried on by the taxpayer as author at the material time? It is conceded in this court that, if the taxpayer establishes that the remuneration is assessable under sched. E, having regard to the decision in *Henley v. Murray* (1), the case must be concluded in the taxpayer’s favour. But the Crown reserves the right to challenge that authority should this case go higher. That is the first main question. If, however, the decision is against the taxpayer, and the remuneration ought to have been assessed under Case II of sched. D, a question still

arises whether in the circumstances of this case the payment he received in 1946 ought to be subject to tax, or whether it ought to be regarded as a capital payment.

A On the first point, whether this contract is to be regarded as a contract of employment and assessable under sched. E, the taxpayer puts his case in this way. He says: "Look at this agreement, particularly at cl. 2, cl. 4, cl. 6 and cl. 8, and you find that it is something entirely outside the scope of the profession or vocation of an author, because it bound the taxpayer for a minimum period of twelve weeks in each year hand and foot to Metro". He was not merely to produce novels. He had to produce, either alone or in collaboration, as he might be directed, such stories, treatments, adaptations, continuities and scenarios as he might be directed. Having done that, Metro could make such use of his work as it pleased. Metro might make no use of it at all. Metro might alter it, adapt it and treat it in any way it pleased. It is said that that falls entirely outside the conception of the work or profession or vocation of an author.

B In my judgment, this point is not open to the taxpayer. It is not for this court in a case such as this to decide, in the absence of evidence, what is or is not within the scope of the vocation of an author. There may, indeed, be some cases so plain and obvious that no evidence is required. Such a case is *Bury & Walkers v. Phillips* (2) where it was held that it was no part of the business of a solicitor as such to lend money to his clients. That was a simple and obvious case, but here I am left completely in the dark as to what is the true ambit of an author's vocation or profession. No evidence was called on that matter before the Special Commissioners, and there is no finding on it. D In my judgment, it is not open to the taxpayer to take that point before me.

E The taxpayer's argument, however, proceeds that, even if that be so, nevertheless this was a contract of employment. Counsel for the taxpayer points out rightly that one may carry on at the same time both a profession and an employment which is assessable under sched. E, even though the profession is of precisely the same character as the employment. That that may be so in proper circumstances, I think, cannot be doubted, and it is well illustrated in *Davies v. Braithwaite* (3), in which ROWLATT, J., said ([1931] 2 K.B. 635):

"For instance, a musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately."

F The Crown, however, say that, properly regarded, this contract is not one of employment, and they put their case in two ways. First, it is said that under the agreement of 1943 the taxpayer is to give his personal services for a minimum period of twelve weeks in each year for three years. He is also to give an option for the same period to Metro to acquire the film rights in any novel or other work which he may produce in his own time. He is also under certain restrictions G about giving any works to any other film companies, and as to secrecy. The consideration for those obligations on the part of the taxpayer is one entire consideration—that he is to be paid £200 a week for twelve weeks in each year. It is said that this figure cannot be split or apportioned, and, when the matter is looked at closely, this is not a contract of employment, but a contract whereby the taxpayer is exercising his vocation as author partly by giving services H and partly by giving an option over his literary products. It is said that the fact that Metro's consideration cannot be split into two parts shows conclusively that it cannot be an employment under sched. E.

On the other hand, the taxpayer submits that, on the true construction of the agreement, it is severable into two distinct parts, £200 a week being consideration for performing the services for the twelve weeks in each year, and the payment of £10 a week from July, 1943, onwards and the other provisions being consideration applicable if Metro exercised the option. Not unnaturally,

he refers me to a letter of Mar. 1, 1946, which he said shows where the agreement was severable. On the whole, however, I cannot accept the taxpayer's submission on that matter. Looking at cl. 9 and cl. 13 it seems to me clear that the consideration of £200 a week given by Metro is one consideration in respect of the taxpayer's services and option grant. In my judgment, on its true construction, this cannot be construed as a contract of employment. It is a contract entered into by the author partly to give an option on his activities as an author and partly to give services for some twelve to sixteen weeks in any year. A

But the Crown submits that, even if the contract be regarded as severable, nevertheless, it ought to be regarded, not as a contract of employment, but as a mere engagement entered into by the taxpayer in the course of carrying on his professional activity as an author. The Crown referred me to *Higgs v. Olivier* (4), where SIR RAYMOND EVERSHED, M.R., said ([1952] Ch. 318): B

"In this case the Special Commissioners concluded that the £15,000 was not within the taxing provisions I have quoted. 'We found it impossible to say that the sum of £15,000 under the deed came to the taxpayer as part of the income from his vocation. On the contrary, it came to him for refraining from carrying on his vocation, and in our opinion was a capital receipt'. I agree that in questions of this kind which involve a consideration of the true import and scope of the trading provisions, it is not possible to say that the whole matter is one of fact. It is, I think, a question of mixed law and fact. But I think that, if I am right in saying that in such a case as this it may well be a matter of degree, then so long as it does not appear that the Special Commissioners have misapprehended the effect of the taxing provisions their decision should not be disturbed. That was HARMAN, J.'s first approach to this case, and I am of the same opinion." C

The Crown say that, looking at the conclusions, admittedly of mixed law and fact here, one finds that the Special Commissioners have come to the conclusion that this is, not a contract of employment, but an engagement entered into in the course of carrying on the activities of an author. It is said, relying on the passage I have just quoted from the judgment of the Master of the Rolls, that the finding ought not to be disturbed unless I am clearly of opinion that it was wrong. D

The relevant passage in the Stated Case is in these terms: E

"We also hold that the said agreement [of 1943], though it did involve an engagement, and in one sense of the word an employment, was a mere engagement in the course of the [taxpayer's] profession of author. (Compare ROWLATT, J., in *Davies v. Braithwaite* (3) (18 Tax Cas. 204). Indeed we think that in one important respect the [taxpayer's] case is weaker than was the case of Miss Lilian Braithwaite, in that while each of her 'posts' was full time, while it lasted, the [taxpayer] was free for a minimum of thirty-six weeks in each of the three years covered by his agreement with Metro, to pursue his profession as author as he pleased, saving only Metro's option in the film rights of his writings." F

I do not think that the example given by the Special Commissioners is a very happy one. If they were going to make that point, it would at least have been right, in my judgment, to have pointed out that, in some respects, the taxpayer's case was much stronger, for during the period of employment of twelve weeks he was bound hand and foot as a mere servant or tool of Metro and had to carry out every literary duty laid on him as Metro pleased. Nevertheless, on the whole, I think that the Special Commissioners came to a correct conclusion on this matter, and I am not prepared to disturb their decision. It follows that, on the first main question, the remuneration under the agreement of G H

1943 is assessable, not under sched. E, but as part of the earnings of the author in the course of his profession or vocation under Case II of sched. D.

A The second main question is this. Notwithstanding that the taxpayer was carrying on in essence his vocation or profession of an author, does that fact preclude him from treating this sum of £2,700, which he received in the course of carrying on that profession as consideration for the termination of the agree-
ment of 1943, as capital? The general rule, as I have pointed out, under sched. E is, so far as this court is concerned, clear. The sum received as consideration for the termination of an agreement, at all events where the termination is one-sided in its inception, is a capital receipt. No clear rule appears to be laid down where a contract is terminated in the course of carrying on a trade or profession assessable under Case II of sched. D. No doubt, where a trading company is carrying on a trade, for instance such as building ships, and one or two of the persons for whom the ships are being built desire to be relieved of their bargains, money received as damages for breach of contract for failure to take delivery of the ship must be treated as a trade receipt for the purposes of income tax. That is plain from *Short Bros., Ltd. v. Inland Revenue Comrs. Sunderland Shipbuilding Co., Ltd. v. Inland Revenue Comrs.* (5), a decision of the Court of Appeal.

C On the other hand, there are cases where a different result has been reached, in particular, *Barr, Crombie & Co. v. Inland Revenue* (6) before the First Division of the Court of Session. That each case must depend on its own facts is clearly shown by the judgment of the Lord President (LORD NORMAND), who said (1945 S.C. 276):

D "It has been truly said that every case must be considered on its own facts, and that no legal criterion for distinguishing between capital payments and income payments is readily applicable. Therefore, though we have had a considerable citation of cases, I do not propose to refer to more than a few of them. LORD CAVE, L.C., in *British Insulated & Helsby Cables v. Atherton* (7) said ([1926] A.C. 213): 'But when an expenditure is made,
E not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attrib-
F utable not to revenue but to capital'. And, of course, one may equally say that an expenditure made once and for all as payment for abandoning or
surrendering an asset is received by the recipient as a capital and not as a revenue payment, in the absence of any indication to the contrary. In the present case virtually the whole assets of the appellant company con-
G sisted in this agreement. When the agreement was surrendered or abandoned, practically nothing remained of the company's business. It was forced to reduce its staff, to transfer into other premises, and it really
started a new trading life. Its trading existence as practised up to that
H time had ceased with the liquidation of the shipping company. The proportions of its profits, to which I have referred, demonstrate that. It is therefore an entirely different case from *Kelsall Parsons & Co. v. Inland Revenue* (8). I regard the payment here as a payment made in the sense of LORD CAVE's observations 'once and for all', and received by the appellant company as the price of the surrender of its only important capital asset. In *Kelsall Parsons* (8), on the other hand, the payment was in return for the loss of a single agency out of about a dozen agencies carried on by the company, and the fact that the payment in that case did not represent the whole capital assets of the company is easily shown by the fact that in the year after the surrender of the single agency profits were no less than they had been the year before the surrender. There is another distinction between the *Kelsall Parsons* case (8) and the present,

which is not conclusive, but is, I think, sometimes helpful. Here we are not dealing with a single payment in return for the surrender of the prospect of making profits in the final year of the agreement, but with a payment for the surrender of an agreement while there was still a substantial period—indeed, more than half of the period of the agreement—to run, and a period which extended to many years of accountancy for the purposes of this company's business."

Pausing there for a moment, it is, of course, plain here that the agreement had only run one-third of its minimum course.

"Then, again, to apply what was said by LORD MACMILLAN in *Van den Berghs, Ltd. v. Clark* (9) ([1935] A.C. 442), it is manifest that, after the liquidation of the shipping company and the payment to the appellant company of this sum of money, the structure of the company was radically affected and its whole character as a business was decisively altered. Though each one of the distinctions may be in itself indecisive, and though each is open to criticism, yet juncta juvant. And where you have a payment for the loss of the contract upon which the whole trade of the company has been built, where the expected profits of the contract are used to measure the loss of them for a period of future years, and where in consequence of the loss the company's structure and character are greatly affected, the payment seems to me to be beyond doubt a capital payment. For these reasons, therefore, I think that the question of law ought to be answered in the negative. So much for the income tax aspect of the case."

LORD MONCRIEFF said this (*ibid.*, 277):

"I am of the same opinion and have little to add. In cases such as this, which are so dependent each upon its own complicated circumstances, it is not possible to get much guidance by way of comparison from the decisions in other related cases. I think, however, that a general guide for application in all such cases is to be found in the passage from LORD CAVE's speech in *British Insulated & Helsby Cables v. Atherton* (7) ([1926] A.C. 213), as approved in the subsequent case of *Van den Berghs, Ltd. v. Clark* (9) ([1935] A.C. 439) by LORD MACMILLAN, in which he indicated that, when the transaction takes the form of a transfer from one party to another of something that has formed part of the enduring trading assets of one of them, any such transfer for a price points rather to a transaction on capital than on revenue account. That that was the nature of the present case is amply demonstrated by the few findings of fact which are contained in the case itself. This particular agency contract was the real stock-in-trade of the appellant company. The percentages show how little else of value would have been available to them for transfer as part of their goodwill, and it seems to me accordingly that it is manifest on the findings of the case that, had they desired to bring their business to a sale, the asset which would have earned a price would have been this agency contract and practically nothing else."

I think those passages are sufficient to show, first, the difficulty of coming to a conclusion on this matter, and, secondly, that that was a very different case from this one.

Bush, Beach & Gent, Ltd. v. Road (10) was cited by counsel for the Crown in support of his submission that the mere fact that, as found in the Stated Case, the contract with Metro was in a sense unique and special of its own kind, is not in any way conclusive. The facts ([1939] 3 All E.R. 304) show that, before the contract in respect of which a payment for termination was made, the business of the appellant company was that of merchants of industrial chemicals:

"Up to 1933 their business had been confined to industrial chemicals. In 1933 they entered into a contract for the purchase of agricultural chemicals, which, by the contract, were to be sold only in certain parts of the country, the sellers undertaking to debar all their other buyers from selling the same chemicals in those parts of the country. For the purposes of this contract the appellants set up a new sales organisation."

A Later on it is said that the agreement was terminated by a payment from Chemimetals, Ltd. of £4,750, and the question was whether that sum fell to be brought into tax by the appellant company. LAWRENCE, J., said (*ibid.*):

"The appellants contended before the commissioners and now contend, (i) that the selling of industrial and agricultural chemicals were two separate and distinct branches of the appellant company's business, (ii) that the cancellation of the contract destroyed the whole of their business in agricultural chemicals, and that the sum of £4,500 was paid by way of agreed compensation for the loss of that business, and, (iii) that the sum of £4,500 was paid by way of compensation for sterilisation of a capital asset. It was further argued that the appellants had, by the contract, established for themselves not only a source of supply but also a market, that the sale of agricultural chemicals was a new and profitable field, and that, in view of the agreement not to supply competitors, the contract was a capital asset, and the payment for its cancellation was, therefore, capital. In my opinion, the present case is more closely analogous to cases such as *Short Bros., Ltd. v. Inland Revenue Comrs.* (5) and *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (11) than to cases such as *Van den Berghs, Ltd. v. Clark* (9). The sum paid, in my view, represented profits which the appellants would or might have made under the contract, and not the purchase price of the contract itself . . ."

That certainly is an observation which is applicable to this case.

"Nor do I accept the argument that the structure of the appellant company was affected by the contract or its cancellation as in *Van den Berghs, Ltd. v. Clark* (9). The appellant company could always have sold agricultural chemicals, and it can still do so. The contract was made in the ordinary course of the company's business, although in a new field, and the exclusion of competition is an ordinary incident of such contracts, and not, as it seems to me, analogous to a pooling agreement . . . Here no money was paid to secure the contract in question, and the money paid for its cancellation was not a repayment of any such money, but must have been a payment in respect of the profits to have been earned under the contract. I am therefore of opinion that the commissioners' decision was right, and the appeal is dismissed with costs."

This matter is not free from difficulty. It was naturally submitted to me by counsel for the taxpayer that this contract was of outstanding, and, indeed, unique, importance to the taxpayer. The sole reason for his reluctant entry into the agreement was to give him financial security while he was re-establishing himself as an author. This, it was said, was in the nature of a capital asset which he agreed to surrender for the sum of £2,700. On the whole, I do not think that that is the correct way of looking at this matter. It seems to me that here was an author coming back from the war, seeking to re-establish himself in his vocation. For nine months of every year he was at liberty to carry on his vocation as an author without any restriction whatever, except that, in respect of any novels that he might produce, he had to offer the film rights during the currency of the agreement to Metro. True, for three months of the year he secured a valuable, and, indeed, very lucrative, employment with Metro, but I cannot regard this contract as being in any sense a capital asset such as was the case in *Barr, Crombie & Co.* (6). The capital asset which the

taxpayer has in this case is his own brain, talents and flair as an author and not this agreement, although it provided him with a very convenient remuneration to tide him over during the early period of re-conversion to civilian life. Accordingly, in my judgment, this appeal fails.

It was also submitted to me by counsel for the Crown that the payment of the £3,000 for the release of rights under the agreement of 1943 was made partly for the rights granted under cl. 2 of the agreement of 1946, that is to say, part of the consideration was for the re-granting of the options. In my judgment, that point is not open to the Crown in this case. I think the Special Commissioners misdirected themselves when they said, in para. 14 (3):

"Although, as is admitted on behalf of the Crown, the [taxpayer] did enter into a contract of service with Metro, we hold that on a proper construction of the agreement the option given to Metro to purchase during the term of the agreement the film rights of the [taxpayer's] novels was an essential part of the bargain between them . . ."

I do not quarrel with that, but I do with what follows:

"... and it follows that the sum paid under the deed of release was not by any means wholly paid for the abrogation of the service agreement."

That is a complete non sequitur.

Clause 2 of the agreement of 1946 provides for what is virtually a re-granting of the options for the sum of 5s. There was no cross-examination of the taxpayer, who gave evidence before the Special Commissioners, to disturb the accuracy of that statement to be found in the agreement. Therefore, in the absence of any evidence that the consideration in cl. 2 of the agreement was wrongly stated, in my judgment, it was not open to the Special Commissioners to make a finding of fact to that effect. In truth, the consideration may well have been correctly stated. The taxpayer had received the sum of £1,168 under the agreement of 1943, and he might well have thought it only fair, and have been willing, to give an option to the company to buy the film rights for the substantial sums contained in the new agreement for a nominal consideration. I mention this in case this case should go further and it should be thought material, but in the circumstances, it does not affect my decision. Accordingly, the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Lovell, White & King* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re A SOLICITOR. Re TAXATION OF COSTS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), April 30, 1953.]

Solicitor—Costs—Need to deliver detailed bill—Non-contentious business—Charge of gross sum including disbursements—Discretion of court to order delivery of detailed bill—Solicitors Act, 1932 (c. 37), s. 64, s. 66—Solicitors' Remuneration (Gross Sum) Order, 1934 (S.R. & O., 1934, No. 548), art. 1.

The executors named in a will instructed solicitors to act in the winding-up of the estate. In July, 1949, the solicitors delivered to the executors a document, headed: "In the estate of [E.L.E.], deceased. Statement of receipts and payments", in which the sum for "legal charges and disbursements on extracting probate, administration of estate, assents and negotiating surrender of . . . leases" was shown as £735, of which sum there was shown a balance owing by the executors to the solicitors of £260 9s. 7d. On Oct. 1, 1949, that balance was paid. On Aug. 12, 1952, the executors requested an itemised bill, and the solicitors delivered a document dated Aug. 13, 1952, setting out five headings of work done, together with an item for disbursements amounting to £19 10s. 6d. On an originating summons by the executors for taxation of the bill dated Aug. 13, 1952, and, alternatively, for delivery of a detailed bill of charges,

HELD: the Solicitors' Remuneration (Gross Sum) Order, 1934, art. 1, was concerned with remuneration and nothing in the order justified a solicitor charging a lump sum to cover both remuneration and disbursements, and, as the figure of £735 covered, not only legal charges, i.e., profit costs and remuneration, but also disbursements, that item did not fall within the terms of the order, and, in the exercise of its jurisdiction under the Solicitors Act, 1932, s. 64 (1), the court would make an order for the delivery of an itemised bill.

Re A Solicitor ([1947] 1 All E.R. 369), distinguished.

EDITORIAL NOTE. The Solicitors' Remuneration (Gross Sum) Order, 1934 (S.R. & O., 1934, No. 548), has been revoked and replaced by the Solicitors' Remuneration Order, 1953 (S.I., 1953, No. 117).

FOR THE SOLICITORS ACT, 1932, s. 64, s. 66, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 58, 60.

Case referred to:

(1) *Re A Solicitor. Re Taxation of Costs*, [1947] 1 All E.R. 369; [1947] Ch. 274; [1947] L.J.R. 665; 176 L.T. 373; 2nd Digest Supp.

APPEAL by executors against an order of VAISEY, J., in chambers dated Feb. 16, 1953.

The testator, Edgar Louis East, who died on June 15, 1946, by his will appointed his wife, Flora Grace East, and his son, Edgar Wilfred East, to be his executors and the trustees of his estate. The executors instructed Messrs. Thorpe & Co., who subsequently became Messrs. Percy Walker & Co., solicitors, to conduct the legal business of winding-up the estate. In July, 1949, the solicitors sent to the executors a document headed: "In the estate of Edgar Louis East, deceased. Statement of receipts and payments," which showed the sum of £735 as the legal charges due to the solicitors, of which the balance of £260 9s. 7d. was still owing. On Oct. 1, 1949, the executors paid the balance to the solicitors, and on Aug. 12, 1952, they asked the solicitors for an itemised bill. The solicitors prepared a document dated Aug. 13, 1952, setting out under five headings the work performed by them with a lump sum charge against each head. By an originating summons dated Dec. 5, 1952, the executors prayed that the bill dated Aug. 13, 1952, be referred to the taxing officer to be taxed, and, further or alternatively, that the solicitors be ordered to deliver to them

a detailed bill of charges pursuant to the Solicitors' Remuneration (Gross Sum) Order, 1934, art. 1. On Feb. 16, 1953, VAISEY, J., in chambers dismissed the summons and the executors appealed.

R. Cozens-Hardy Horne for the executors.

Hunter-Brown for the solicitors.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from an order made by VAISEY, J., rejecting the application of the executors for an order, among other things, for delivery of a bill of costs by the solicitors. The solicitors were engaged to conduct the legal business necessary in the winding-up of the testator's estate. That they did, and there is no question that they did it properly, and in July, 1949, the executors received from them a document, headed: "Edgar Lewis East, deceased. Statement of receipts and payments". On the left hand side is a number of payments beginning with a payment for rates and including such matters as payments for tax and estate duty and a payment to another firm of solicitors for surrender of the leases of certain properties—the "Bentham Road" properties—an item, which amounted to £1,022 18s. 11d. The last item on the left hand side was expressed thus: "To Messrs. Percy Walker & Co., legal charges and disbursements on extracting probate, administration of estate, assents and negotiating surrender of the Bentham Road leases £735". On the right hand side of the document appeared a number of receipts, including the proceeds of sale of investments, dividends, and returned estate and legacy duty. The receipts, however, did not amount to as much as the outgoings, so that the last item on the right hand side is a balance figure expressed thus, "Balance of account due to Messrs. Percy Walker & Co., £260 9s. 7d." The executors were satisfied with the account as delivered and they paid the £260 9s. 7d. by cheque to the solicitors. Indeed, it appears that thereafter they continued to instruct the solicitors in other matters. I gather also that the estate of the testator was so disposed of that during her life the widow has a limited interest so that, in a sense, the conduct of the affairs of the estate is not concluded. In 1951 the son, the male executor, found himself in the position of being the executor of the will of somebody else who had died. That estate was not so large as his father's, but in the second case the legal charges of the solicitors acting were very much less than the figure of £735 which appeared in the document to which I have referred. This executor thereupon expressed to the solicitors his doubts whether the figure which had been charged, and paid, was a proper figure, and he asked to be supplied with details to justify it. On Aug. 13, 1952, the solicitors made out a document which was in form a bill, though it was not delivered as such. This document showed under some five headings the various main subject-matters with which they had dealt on behalf of the executors with lump sums against each head, the effect of the document, broadly, being that when the permitted fifty per cent. increase was added to the remuneration and a sum of approximately £20 for disbursements had also been added, the total charge would have been, if delivered in accordance with this document, £887 9s. That shows on the face of it that the figure put in the first document was appreciably less than the actual sums which the firm could have charged if they had strictly adhered to their rights under the Solicitors Act, 1932, and the orders made thereunder. The executors, however, were still not satisfied with the matter, and they have, therefore, started the present proceedings with a view to obtaining an itemised bill, and, I take it, having obtained the bill, to having it taxed.

The question which is raised in the case turns on the language and proper interpretation of the order made under the Solicitors Act, 1932, s. 56, known as the Solicitors' Remuneration (Gross Sum) Order, 1934. So far as relevant, the order proceeds as follows:

"1. Without prejudice . . . to the powers conferred upon the solicitor

or the party chargeable with the bill under s. 66 of the Solicitors Act, 1932, the remuneration of a solicitor in respect of all business regulated by cl. 2 (c) of the General Order of 1882, as amended by any subsequent general order may at the option of the solicitor be by a gross sum in lieu of by detailed charges: Provided that within six months after delivery of a charge made under this order whether it has been paid or not, the client may require that a detailed bill of charges shall be delivered . . .”

A The matter, as it was argued before VAISEY, J., turned, as I follow it, on whether the inclusion of the last item on the left hand side of the first document amounted to a “delivery of a charge” within the meaning of the order which I have read, for if it did, then manifestly on the facts the client had not required the delivery of a detailed bill within the period stated in the order. The client not having exercised his privilege, it was contended on the solicitors’ behalf that it was too late to come now, after three years, and ask for an order under s. 64 or s. 66 of the Solicitors Act, 1932. VAISEY, J., came to the conclusion that, by putting forward this item on the left hand side of the document, the solicitors had “delivered a charge” within the meaning of the order, and he, therefore, declined to accede to the executors’ application. For reasons which will
B presently appear, I do not myself desire or find it necessary to express an opinion on that matter, not the least because we have not heard argument on it from counsel for the solicitors.

Before us another point has arisen which was not considered by VAISEY, J., and which, in my judgment, is fatal to the contention of the solicitors that delivery of a bill cannot now be ordered by the court. It is this. The item
D which I have already read is, on the face of it, a composite item, £735, to cover not only legal charges, that is, profit costs and remuneration, but also disbursements. It is quite true that, as shown in the document dated Aug. 13, 1952, the disbursements included in the £735 represented but a small part of that sum, viz., £19 10s. 6d., but they might have been more; it would have been possible, if the argument of counsel for the solicitors is correct, to have
E lumped together the sum paid to the other firm of solicitors in respect of the surrender of the leases of Bentham Road, the remuneration in respect of which is, undoubtedly, included in the last item, and so to have given a lump figure, not of £735, but of £1,757 18s. 11d. The question, however, is not what might have been done, but whether what has been done is within the language of the order of 1934. It is, no doubt, a narrow point, but I have come to the conclusion
F that the order does not authorise the delivery of a charge including both profit costs and disbursements and without distinguishing between them, and then, having done that, to say that, if the client does not choose to ask for an itemised bill in six months, there is no obligation to deliver a bill of costs at all.

In the first place, as ROMER, L.J., observed during the argument, this order of 1934 is by way of exception to the general statutory obligation on all
G solicitors to render a bill in conformity with the provisions of the Act of 1932, a bill which would contain detailed charges in respect of all the several matters in respect of which the solicitor was entitled to charge remuneration. Its operation is further limited, according to the terms of the order itself, by reference to art. 2 (c) of the General Order, 1882. It is unnecessary for me to take up time by reading the whole of that order, but art. 2 (c) covers such
H matters as are not comprised in art. 2 (a) and art. 2 (b), such, for example, as sales, purchases, and mortgages, leases and agreements for leases for all of which there are scales under sched. I to that order. Article 2 (c), in other words, may be treated as covering classes of non-contentious business for which the scales are inapplicable and for which the solicitor is entitled to charge in accordance with sched. II. Schedule II, speaking broadly (and with reference to the relevant time to which this matter relates), provides that the solicitor may charge for the various separate pieces of business that he does the several

amounts indicated in the schedule. It is, I think, quite plain that the General Order of 1882 and the order of 1934 are directed to remuneration as distinct from disbursements, which are not, of course, remuneration at all, but are sums paid out by the solicitor as agent for the client which, on general principles, he is entitled to get back from the client. Until the order of 1934 was made, a solicitor, in default of express agreement, was bound to deliver to his client a bill which, although it related to matters within art. 2 (c), showed in detail the exact charges made for every piece of work the solicitor had done. The order of 1934 was made to enable a solicitor in cases where no scales were applicable to avoid having to show in detail each charge he made for his professional services, but entitled him, instead, to charge for his remuneration a lump sum.

It follows, I think, plainly from what I have said and from the purposes of the order and its history and background, that the order was only concerned with remuneration and there was nothing in it which justified a solicitor charging a lump sum to cover both remuneration and expenses, and, in the absence of some express authority so to do, he cannot, under the Act or under any other order, justify his having so done. It, therefore, seems to me necessarily to follow that the item which I have read "To Messrs. Percy Walker & Co., legal charges and disbursements . . . £735", is not a charge which falls within the terms of the order of 1934 and cannot be justified by reference to that order. If that is right, no bill—and counsel for the solicitors was disposed to agree—has, in fact, ever been delivered. Subject to the question of discretion, therefore, it is plain that the right of the executors under the Act of 1932 is now to call for an itemised bill. Having reached that conclusion it will appear that it is unnecessary to express an opinion on the general, and not unimportant, matter which was, in fact, decided in favour of the solicitors by VAISEY, J., namely, whether the inclusion of this item in this account was the delivery of a charge.

There remains, therefore, only this further point. The court has a discretion whether, in a given set of circumstances, it will order the delivery of a bill. Counsel for the solicitors relied on *Re A Solicitor. Re Taxation of Costs* (1), as indicating that where there has been a lapse of time such as passed here, it would not be right for the court to order delivery of a bill on the application of a client who, during the period which has elapsed, did not take the trouble to avail himself of his statutory right, and, until he received inspiration from another case, made no complaint whatever about the bill, which he had, in fact, paid. The matter, being one of discretion, must obviously be decided by the court according to the facts of the particular case before it. I say no more about *Re A Solicitor* (1) than that the length of time which had passed, the circumstances relating to the actual charge said to have been delivered, and the communications which passed during an interval of six years, were all of a nature which make that case wholly different in its general aspect from the present case. All that can be said against the clients here is that they did not challenge the bill in 1949, although the male executor raised a query about it, and that for three years they continued to treat the solicitors with confidence, and, indeed, instructed them in certain other matters, but beyond that, I do not think it could be possibly said that, by their conduct, they have deprived themselves of the right, which otherwise they would possess, to have a proper bill. At any rate, exercising my discretion to the best of my ability in this case, I think it would be right to make the order for the delivery of an itemised bill of costs for which the executors have asked. I, therefore, have come to the conclusion that on the narrow point with which I have tried to deal and which, as I have said, was not debated before VAISEY, J., or taken into consideration by him, this appeal should be allowed and an order made for delivery of an itemised bill in the ordinary way.

BIRKETT, L.J.: I agree.

ROMER, L.J.: I also agree.

Appeal allowed.

Solicitors: *Pennington & Son*, agents for *Church, Bruce & Co.*, Gravesend (for the applicant); *Henry Boustred & Sons*, agents for *Percy Walker & Co.*, Hastings (for the respondents).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re SUTHERLAND SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Harman, J.), April 22, 23, 1953.]

Settled Land—Repairs—Expenditure by assign of tenant for life—Recoupment out of capital money—Improvements—Repairs to agricultural property executed before Mar. 1, 1948—Settled Land Act, 1925 (c. 18), s. 73 (1) (iv) (as amended by Agricultural Holdings Act, 1948 (c. 63), s. 96 (1)).

Expenditure on repairs done to agricultural land before Mar. 1, 1948, not being within the Agricultural Holdings Act, 1923, is not money expended by a landlord "under or in pursuance of the Agricultural Holdings Act, 1948, or any similar previous enactment, or under custom or agreement or otherwise", and may not be repaid out of capital under s. 73 (1) (iv) of the Settled Land Act, 1925, as amended by the Agricultural Holdings Act, 1948, s. 96 (1). The words "or otherwise" in s. 73 (1) (iv) of the Settled Land Act, 1925, must be construed as ejusdem generis with the preceding words and mean "otherwise by reason of some obligation". By reason of the provisions of s. 107 (1) of the Settled Land Act a tenant for life, in giving directions to the trustees for the application of capital money under s. 75 (2) of the Settled Land Act, is acting as a trustee and may not allow his interest to conflict with his duty.

Between 1945 and Mar. 1, 1948, expenditure amounting to over £4,000 was made out of income by an estate company, the assigns of the tenant for life, on repairs to agricultural property. In 1952 the tenant for life, purporting to act under s. 75 (2) of the Settled Land Act, 1925, directed the trustees of the settlement to apply capital moneys in recouping this expenditure. The trustees declined to do so. On an application by the company for directions to the trustees,

HELD: the trustees had rightly declined, the expenditure having been incurred before the amendment of the Settled Land Act, 1925, s. 73 (1) (iv), by the Agricultural Holdings Act, 1948, s. 96 (1).

Re Duke of Northumberland ([1950] 2 All E.R. 1181), not followed on this point.

FOR THE SETTLED LAND ACT, 1925, s. 73 (1), s. 75 (2), s. 107, see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 161, 173 and 229.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 96, see *ibid.*, Vol. 28, p. 96.

Cases referred to:

- (1) *Re Sherborne's (Lord) Settled Estate*, [1929] 1 Ch. 345; 98 L.J.Ch. 273; 141 L.T. 87; 30 Digest, Replacement, 318, 82.
- (2) *Re Northumberland (Duke)*, [1950] 2 All E.R. 1181; [1951] Ch. 202; 30 Digest, Replacement, 319, 87.
- (3) *Re Borough Court Estate*, [1932] 2 Ch. 39; 101 L.J.Ch. 316; 147 L.T. 476; 30 Digest, Replacement, 319, 83.

ADJOURNED SUMMONS asking that the trustees of the settlement, the Royal Bank of Scotland, be directed to pay to the applicant, the Staffordshire and Shropshire Estates Co., Ltd., out of capital money, costs incurred between 1945 and Mar. 1, 1948, by the applicant on improvements authorised under the Settled Land Act, 1925, s. 73 (1) (iv).

Denys B. Buckley for the applicant.

E. I. Goulding for the trustees of the settlement.

E. G. Wright for the tenant in tail in remainder and the Law Reversionary Interest Society, Ltd., an incumbrancer on the interest of the life tenant.

HARMAN, J.: This is an application under s. 84, s. 93, and s. 113 of the Settled Land Act, 1925, by a company who are the assigns of the life estate of the Duke of Sutherland under a settlement dated Sept. 13, 1909. It seeks a direction to the Royal Bank of Scotland, who are trustees of the settlement, to recoup to the applicant money expended between 1945 and 1948 on what are said to be improvements of a nature authorised under the Settled Land Act. The applicant argues that the trustees were wrong in declining to pay that money, and, moreover, that they have no option but to make the repayment once they are satisfied, first, that the work done comes within the category of improvements, and, secondly, that it was the cause of the expenditure. The points at issue are twofold: first, whether in fact the trustees have no discretion in the matter, and, secondly, supposing they have none, whether these works, which were executed before an amendment to the Act of 1925 by s. 96 of the Agricultural Holdings Act, 1948, come within the Act of 1925 as amended.

The facts are as follows. The settlement was a real estate settlement originally made in 1909 under which the duke is, and has been for a number of years, the tenant for life. There is a jointure outstanding to his mother, and the only remainderman before me is the respondent, his niece, Mrs. Janson, who is tenant in tail in remainder if the duke have no issue. The respondent, the Law Reversionary Interest Society, Ltd., is incumbrancer on the life interest of the duke, he, or the company on his behalf, having sold to that society a slice of the settled income for the duke's life. Therefore, under s. 104 of the Settled Land Act, no application of capital money can be made except for certain purposes without its consent. That consent, as also that of the remainderman, is given, the latter being *sui juris*, and entitled to take the view that she does not wish to oppose the application. By my direction the case was argued by counsel for the trustees as representing a possible unborn infant who may displace the interest of Mrs. Janson, and, also (her tenancy in tail not having been barred) any issue of hers.

The Lilleshall and South Staffordshire estates comprised in the settlement have long since been sold and the settled property now consists of a comparatively large sum in gilt-edged securities and also an estate in Surrey called the Sutton Place estate, which is partly agricultural land and partly land let for other purposes. The duke, as life tenant under the settlement, by an instrument of Mar. 29, 1927, conveyed his life interest to the applicant, a family company controlled by himself. It appears from the evidence that, in the course of their management of the Sutton Place estate, the company in the years before 1948 spent moneys amounting to some £4,000 odd in repairs and improvements to the property which are set out in an exhibit before me. They were of such a character that nobody would then have considered them to be payable out of capital. It was, therefore, the ordinary act of a landowner repairing or maintaining the property of which he was the owner. It is to be observed that a very large amount of the repairs in question was done to properties which were let by the company to the duke himself and were, therefore, in effect, properties in hand. For instance, I find that in 1947 the largest single item in the whole application, £1,688, was spent on Ladygrove Farm—the occupation of which is in the duke's hands—for repairing roofs to farm buildings, building brick pillars to replace wooden supports, and so on. Many of the items are of a comparatively trivial nature, for example, one finds that repairing the water closet pan and joint to soil pipe in 1946 is said to be the type of improvement which may be paid for out of capital. The whole matter has given me a good deal of disquiet. If repairs of this sort can be done at the expense of capital,

it is a complete revolution of all ideas that lawyers have had for many years about the relation between capital and income under the Settled Land Acts. It is well known that certain improvements might be done at the expense of capital, and under sched. III to the Act of 1925 there were three categories of such improvements. The first, from their permanent character, were allowed to be paid for out of capital; the second was an intermediate class which the trustees or the court might require the tenant for life to repay by instalments spread over a period of twenty-five years; and the third was a class the costs of which the trustees must, if spending capital, require to be so recouped. Even in the third class one does not find anything in the nature of what one may call running repairs.

The applicant contends that this revolution has been brought about by an alteration of the Settled Land Act, 1925, by a side-wind in the shape of s. 96 of the Agricultural Holdings Act, 1948. Since July, 1948, when that Act came into force, the trustees have allowed certain moneys year by year to the company as the duke's assign at his request. I am not concerned with those expenses. The trustees have been advised, no doubt, that they are acting within their powers, and I have no cause to question anything they have done, but the trustees declined to pay for the repairs executed before this Act came into force on the ground that they were executed at a time when there was no thought that they would be paid for out of capital and that there is no power under the Act as it stands to recoup repairs perfected before the Act of 1948 came into force and at a time when they were not legally payable out of capital.

This entails a certain amount of investigation of the two Acts. Section 73 (1) of the Settled Land Act, 1925, provides:

"Capital money arising under this Act . . . shall, when received, be . . . applied wholly in one . . . or others, of the following modes . . . (iii) In payment for any improvement authorised by this Act; (iv) In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923, or any similar previous enactment, or under custom or agreement or otherwise, in or about the execution of any improvement comprised in Part I or Part II of sched. I to the said Agricultural Holdings Act."

One finds nothing in Part I or Part II of sched. I to that Act of 1923 which would justify payment under this sub-section of any of the repairs specified here. Section 75 (1) of the Settled Land Act reads:

"Capital money arising under this Act shall, in order to its being . . . applied as aforesaid, be paid either to the trustees . . . or into court . . . and shall be . . . applied by the trustees, or under the direction of the court . . . accordingly. (2) The investment or other application by the trustees shall be made according to the direction of the tenant for life . . ."

The applicant relies on this last section to show that the trustees have no discretion where they have a direction from the tenant for life which is mandatory and binding on them. Under s. 83 "improvements" are described, and they are set out in sched. III to the Act. When one looks at that schedule, one finds nothing in the nature of repairs even though the matters specified must be recouped in any event out of income over an extended period. Under s. 84 (2) the old obligation on the tenant for life to introduce a scheme of improvements before setting out on his work is abolished, and, instead, the trustees are exonerated if they act on a certificate of a surveyor to the effect that the work comprised in the improvement has been properly executed and what amount is properly payable in respect thereof. They must have either that certificate or an order of the court directing or authorising them so to apply a specified portion. One of the features of this case is that there is certainly not at present a certificate

on which the trustees could safely act under that sub-section. The works having been done so long ago, nobody can now certify much about them because of the lack of vouchers and the impossibility of seeing, eight years later, whether a tap has been re-washed or a water closet pipe renewed. It is, therefore, a matter for an order of the court. Section 107 (1) provides:

"A tenant for life . . . shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

It follows from that sub-section that, in giving a mandate to the trustees under s. 75, the tenant for life is acting as trustee and must, as trustee, have regard, not only to his own interests and those of his assign, but also to the interests of the remainderman.

That was the position of the law when these works were done, and, as I say, nobody anticipated that there would be any application to pay for them out of capital because it was quite obvious at that time that they could not be so defrayed. But, in 1948 the Agricultural Holdings Act was passed, which was partly a consolidating Act and partly enacted new law. One finds in s. 1 that agricultural land means land used for agriculture which is so used for the purposes of a trade or business. Section 81 (1) reads:

"Where under powers conferred by the Settled Land Act, 1925 . . . capital money is applied in or about the execution of any improvement specified in sched. III to this Act no provision shall be made for requiring the money . . . to be replaced . . ."

In other words, all money applied under the Settled Land Act by reference to this Act is to be a Part I improvement—that is to say, the most permanent sort of improvement—and there is to be no obligation to repay by instalments. In s. 94 (1) one finds this odd definition of what is called "fixed equipment":

"'Fixed equipment' includes any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of produce thereof, or amenity, and any reference to fixed equipment on land shall be construed accordingly."

In s. 96 (1) one finds this:

"References in any enactment . . . to sched. I to the said Act of 1923, shall be construed as follows, that is to say—(a) references to Part I, II or III thereof shall be construed respectively as references to sched. III to this Act, to Part II of that schedule and to sched. IV to this Act."

That is a method whereby s. 73 of the Settled Land Act, 1925, is amended and it is a very strange way of doing it. One must now read s. 73 (1) (iv) of the Settled Land Act as referring, not to the Agricultural Holdings Act, 1923, but to the Agricultural Holdings Act, 1948. The resulting paragraph reads: "In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1948, or any similar previous enactment . . . in or about the execution of any improvement comprised in sched. III to the Act of 1948". The title to sched. III reads:

"Improvements begun on or after Mar. 1, 1948, for which compensation is payable if consent of landlord or approval of the Minister is obtained to their execution."

"Landlord" here means the life tenant, and, consequently, if he is the one to be paid, of course, his consent is not required. The improvements are in two parts. Part I includes "Improvements to which consent of landlord

required", and are comparatively permanent improvements to farming land, and Part II includes: "Improvements to which consent of landlord or approval of the Minister required", and that instances a number of comparatively large agricultural works of drainage and cultivation, but under para. 23 one finds an altogether different category in these words:

- A "Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding, other than repairs which the tenant is under an obligation to carry out."

B It is well known that in agricultural leases there were, at any rate until 1948, a number of matters in respect of which neither the landlord nor the tenant was under an obligation, but under the Act of 1948, as I understand it, the Minister has produced a code in the form of a statutory instrument putting all those liabilities on one side of the line or the other so that they are the liabilities of either the landlord or of the tenant. One must find, therefore, in order that para. 23 of Part II of sched. III shall apply, that the repairs are not repairs which the tenant is under an obligation to carry out. It is certified that none of the repairs in this case was a repair which the tenant was under an obligation to carry out. Nor were they, it appears, repairs which C the landlord was under an obligation to carry out. They were carried out for the duke and for other tenants by the company as a good landlord in the course of good estate management, and were, therefore, voluntarily done.

D It will be observed that these new types of improvement, so far as the Agricultural Holdings Act is concerned, must have been begun on or after Mar. 1, 1948, and that would exclude altogether the repairs with which I am concerned. It is said, however, that all that is imported into the Settled Land Act is the category of improvement in question, and that when one speaks of "any improvement comprised in Parts I and II of sched. III to the Act" it has only to be comprised in the sense that if you look down the items you find it. For that there is the authority of *Re Lord Sherborne's Settled Estate* (1). That was a case under the Act of 1925 and concerned with improvements done E before that Act came into force. The language there was quite different, but I will assume it covers the present case. First, therefore, were these costs incurred under or in pursuance of the Agricultural Holdings Act, 1948? It was conceded in the course of the argument that one could not say that these costs were incurred under or in pursuance of an Act which was not in existence when the money was expended and that, therefore, the applicant could not rely F on that part of the section.

The following words of s. 73 (1) (iv) of the Act of 1925 are "or any similar previous enactment". The previous enactment similar was the Act of 1923, and it was not suggested that these repairs were within the provisions of that Act. Then follows "or under custom or agreement". It was not suggested G that it was either a custom or that there was an agreement that these repairs should be done, and the applicant was eventually driven to the words "or otherwise". He said that "or otherwise" meant "or not"—in other words, that the whole of the reference to the Agricultural Holdings Act or the previous enactment or custom or agreement were surplus and that all that was needed were the words "money expended and costs incurred by a landlord in or about the execution of any improvement comprised in the schedule". It seems to H me that "or otherwise", in the ordinary course of construction, must mean otherwise connected in some way with what has preceded it. The ejusdem generis rule must apply, and, in my judgment, if I was free so to construe it, I should construe it as "or in some other way analogous to custom, agreement, or a previous enactment". There may well be other ways. For instance, an Act of Parliament not being an Agricultural Holdings Act. I accept the view put forward by counsel for the trustees that "otherwise" means otherwise under some obligation, and these repairs were not done, I am told, under any

obligation whatsoever. Consequently, if I were free to do so, I should hold that these repairs, being done before Mar. 1, 1948, did not come within s. 73 (1) (iv) of the Act of 1925 at all.

It is said, however, that I am precluded from so holding by a decision of VAISEY, J., in *Re Duke of Northumberland* (2). Assuming that I am wrong, the question will arise whether the trustees had any discretion, and it was said that this decision of VAISEY, J., obliges me to say that they had no discretion. I am not sure that that is so. That decision, to which I will refer later, does, indeed, say that they are bound to act on the direction of the tenant for life, but the learned judge held himself free to limit the time over which the application might extend, and that must have been, as I understand it, putting it on the footing that there was a discretion so to do. It is said by the applicant here that there is no limit to the time to which an application may go back. I suppose 1926 is a limit, but, at any rate, to that extent a demand for recoupment may go back so far as the tenant for life thinks desirable. The consequences are, of course, very serious. When works of this sort were done so many years ago it is impossible to tell whether the money was spent or not. It seems to me that, if there be a discretion, the trustees could rightly say that such repairs ought not to be paid for on the ground that they were not done by the tenant for life in the faith that they would be repaid, and that, having been done voluntarily and paid for by the tenant for life, it was a discretion which ought not to be exercised. In *Re Borough Court Estate* (3) MAUGHAM, J., held that, as the applicant must at the time have expected himself to pay the sums spent on improvements which after 1925 came within Part II of sched. III to the Settled Land Act, 1925, the jurisdiction ought not to be exercised. Therefore, if it is a discretionary jurisdiction, it seems to me that it is one that ought not to be exercised. It is said that it is not discretionary because the duke has, in exercise of his powers under s. 75, directed the trustees to apply the capital money in this way, but, as I have already pointed out, the duke, in giving that direction, was acting as a trustee for all parties, and, in my view, he cannot properly give a direction which puts money into his own pocket and the pockets of his own assign in respect of farmhouses and other property which he is himself occupying, and the repairs to which would be no good to the inheritance whatever, but merely to relieve his own pocket. It seems to me that as a trustee those are not directions which he can properly give. He can ask the trustees whether they will pay, and they must have a discretion whether they will or not, and, in my judgment, if that applied, they ought to decline, as they have done. I would come to the conclusion in this particular case, if the repairs be within the schedule and if the duke purports to direct them to be done, that he is allowing his duty as a trustee, he having a duty towards the remaindermen, to be overridden by his interest, which is to have them done at capital expense in order that he as tenant of the farm may be better off. I, therefore, think it is not a case in which he can give such a direction.

In *Re Duke of Northumberland* (2) the tenant for life had been spending on repairs since 1945 moneys in excess of the rents he received, and he applied to have the moneys recouped. Some, but not all, of the repairs, as I understand it, could only be charged as improvements under s. 96 (1) of and sched. III to the Agricultural Holdings Act, 1948. Some of them had been done before Mar. 1, 1948, and some after, and the learned judge was asked whether those done before that date came within the Act, so that the point was, I think, taken. The learned judge held that it was possible to go back to January, 1945, but he did not deal with the question whether they were repairs done under or in pursuance of the Act. In that case the date of Jan. 1, 1945, was applicable, because (a) the evidence did not cover any earlier period, and (b) the recoupment of expenditure made more than six years previously appeared to be inconsistent with the principles laid down in *Re Borough Court Estate* (3),

The point taken here, therefore, does not appear in the headnote at all, but it was also held that the trustees must comply with the directions of the tenant for life on being satisfied that the application of capital money was or would be within the relevant provisions of the Settled Land Act, 1925, and consistent with the judgment. Therefore, he did hold that improvements going back to 1945, and, apparently, although it does not appear clearly, justified only under the schedule to the Act of 1948, were, nevertheless, within the powers of the trustees to pay for, and which it was their duty to recoup if so directed by the tenant for life. During the argument counsel said that on Mar. 1, 1948, a new list of improvements came into force, and the old list was not preserved for any transitional purposes. It could not, he said, have been intended that capital money should not be applied in repayment of past expenditure. The date had relevance, not to the expenditure of the money by the tenant for life, but to the recoupment of the money by the trustees. That point, apparently, was not met by counsel in answer. The learned judge reserved his judgment, in which he read part of s. 73 (1) (iv) of the Settled Land Act in this way ([1950] 2 All E.R. 1184):

“Turning to the relevant statutory provisions, I observe, first, that capital money is applicable under s. 73 (1) (iv) of the Settled Land Act, 1925: ‘in payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923 . . .’”

He does not read the “custom or otherwise” part of the section at all. He then mentions that for “1923” he must read “1948” and assumes in his judgment that the repairs before him were repairs done under or in pursuance of the Act of 1948. With due deference, I think that was, perhaps, a slip on his part, because, as I understand from counsel for the trustees, who argued the case before VAISEY, J., he had suggested, he could succeed, not on that footing, but only under the words “or otherwise”, and the learned judge in his judgment nowhere deals with the point of those words, but assumes that all the repairs were done under or in pursuance of the Act of 1948. The learned judge had a number of other difficult questions to decide, and it is not surprising that, taking them all together as he did, and after criticisms which I heartily indorse of this kind of method of legislating by reference, he says this (*ibid.*, 1185):

“ . . . applying as best I can the law as it seems to me to emerge from this welter of confused and confusing enactment, I will answer the question raised by the summons as follows. Under paras. (i), (ii) and (iii) of the summons [i.e., both in respect of the period before and the period after Mar. 1, 1948, which he takes together] I will declare that under the enactments mentioned in para. (i) [that included the Act of 1948] the plaintiffs, as trustees . . . are entitled to apply capital moneys of the said settlement in payment (as for an improvement authorised by the Settled Land Act, 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life under the said settlement in or about the execution on or after Jan. 1, 1945, on such repairs as are specified in para. 23 of sched. III to the Act of 1948 in relation to agricultural land . . .”

It is quite true that that is an authority for recoupment of expenditure before 1948, but it seems to me that the learned judge overlooked that particular detail. It is only one of a number of other matters which he had to decide, and I do not think I am bound to follow it: *quandoque bonus dormitat Homerus*. As to the other point on s. 75 of the Settled Land Act with which he dealt, he did not have s. 73 called to his notice, nor were the circumstances identical, for the cottages repaired were not occupied by the tenant for life though some

were in the hands of estate employees. Where improvements are executed in the period after 1948, the tenant for life may properly give the direction because the statute contemplates that he shall do so and because the expenditure is, no doubt, incurred initially in reliance on its being repaid, but in a case where the expenditure has already been made with no such reliance, it does not seem to me that the tenant for life is entitled to say: "Now that the law has been changed, I do not see why I should not have the money out of capital". In my judgment, this application ought to be refused and the trustees ought not to apply the capital money as requested in paying for these particular improvements.

Order accordingly.

Solicitors: *Taylor & Humbert* (for the applicant, the trustees and the tenant in tail in remainder); *J. R. H. Chisholm* (for the Law Reversionary Interest Society, Ltd.).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. HAYS WHARF CARTAGE CO., LTD.

[QUEEN'S BENCH DIVISION (Gorman, J.), April 14, 15, 16, 1953.]

Street Traffic—Licence—Rate of duty—Haulage vehicle—Unladen weight—Ballast block—"Loose equipment"—Tractor carrying tools and ballast—Road Traffic Act, 1930 (c. 43), s. 26—Finance Act, 1933 (c. 19), s. 25, sched. VII, Part II, para. 4 (e) (ii).

The owners of a heavy duty tractor fitted to it a cast iron block, some fifty hundredweights in weight, which was held in position by angle-irons, and was used as ballast. Other pieces of metal, heavy chain, and similar articles were also carried on the vehicle.

HELD: (i) the carriage of tools or ballast, or any other object to assist its propulsion or render it fit for the purposes of haulage, did not detract from the essential character of the tractor as a haulage vehicle, and the tractor, being used for "haulage solely", fell within the Finance Act, 1933, sched. VII, Part II, para. 4 (e), and the rate of excise duty was at the rate laid down in para. 4 (e) (ii).

(ii) the iron block, when fixed to the vehicle was not "loose equipment" within the Road Traffic Act, 1930, s. 26, but formed part of the vehicle, and, therefore, must be included in its weight unladen, thereby increasing the rate of excise duty payable on it from that paid by the defendants.

Darling v. Burton (1928 S.C. (J.) 11) and *Lowe v. Stone* ([1948] 2 All E.R. 1076), considered.

EDITORIAL NOTE. The Vehicles (Excise) Act, 1949, consolidated certain enactments relating to excise duties on mechanically propelled vehicles, including, inter alia, the Finance Act, 1922, s. 14, the Finance Act, 1933, s. 25 and sched. VII, the Finance Act, 1935, s. 3, and the Finance (No. 2) Act, 1945, s. 4 and sched. II.

AS TO CLASSIFICATION OF MECHANICALLY PROPELLED VEHICLES FOR LICENCE AND DUTY PURPOSES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 427-430, paras. 926, 927, and 1952 Supp.

FOR THE VEHICLES (EXCISE) ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1433.

Cases referred to:

(1) *Darling v. Burton*, 1928 S.C. (J.) 11; Digest Supp.

(2) *Lowe v. Stone*, [1948] 2 All E.R. 1076; [1949] L.J.R. 797; 113 J.P. 59; 2nd Digest Supp.

ACTION for the balance of excise duty alleged to be owing by the defendants in respect of a motor vehicle, and a declaration that the vehicle was either a haulage vehicle under the Finance Act, 1933, sched. VII, Part II, para. 4 (e) (ii), or a goods vehicle under Part III, para. 5 (c) and (d), of the same schedule, as amended.

A The defendants, Hays Wharf Cartage Co., Ltd., were the owners of a Scammell heavy duty tractor. On the platform behind the driver's cabin, and over the rear axle, was fitted a strong wooden box frame covered with tarpaulin. On July 18, 1946, the plaintiffs, the London County Council, inspected the vehicle on the ground that the defendants had failed to pay the proper rate of excise duty on it. On that day, there was fixed to the vehicle, in the box behind the cab, a cast iron block, some fifty hundredweights in weight, fastened by angle-irons. There were also on the vehicle some pieces of heavy plate steel, some short lengths of heavy chain, "D" shackles, and ship jacks. The plaintiffs contended that the block was attached to the vehicle as fixed ballast, and that the other articles were also used as ballast. They also contended that the vehicle was either a "haulage" vehicle under the Finance Act, 1933, sched. VII, Part II, para. 4 (e) (ii), or that it was a "goods" vehicle under the Finance Act, 1933, sched. VII, Part III, para. 5 (c) and (d), as amended by the Finance Act, 1935, s. 3 (2), and the Finance (No. 2) Act, 1945, s. 4 (3), and sched. II, Part II. They claimed that, into whichever category the vehicle fell, the defendants had not paid the appropriate rate of excise duty. The defendants, in their defence, admitted that the vehicle was a haulage vehicle, but denied that they had ever used fixed ballast, though they had used ballast on occasions, and they contended that the ballast ought not to be taken into account in determining the weight unladen of the vehicle under the Road Traffic Act, 1930, s. 26.

Lloyd-Jones, Q.C., and R. J. S. Harvey for the plaintiffs.

Karmel, Q.C., and S. B. R. Cooke for the defendants.

E GORMAN, J., stated the facts and considered the evidence, and found as a fact that on July 18, 1946, there was in use on the vehicle a fixed ballast block, weighing some fifty hundredweights, and that other articles were primarily on the vehicle for use as loose tools or equipment and not as ballast, and continued: The first matter that I am concerned with is whether this vehicle was a haulage vehicle or not. The Finance Act, 1933, sched. VII, Part II, para. 4 (e), contains this definition of haulage vehicles:

F "Vehicles . . . which are constructed and used upon roads for haulage solely . . ."

In Part III, para. 5, of the same schedule there is a definition of "goods vehicles". Counsel for the plaintiffs asks me to say that the two definitions are not necessarily exclusive, but at any rate, so far as a haulage vehicle is concerned, the governing words of that definition are "constructed and used upon roads for haulage solely". Paragraph 4 (e) continues:

G ". . . and not for the purpose of carrying or having superimposed upon them any load except such as is necessary for their propulsion or equipment."

H Endeavouring properly to interpret that, the governing words are "haulage solely", but it is conceded that even though a vehicle is "constructed and used for haulage solely" it may be necessary to "carry or superimpose" something on it. But that which is carried or superimposed on it must not take away the essential nature and function of that vehicle, i.e., construction and use for "haulage solely". It seems to me that it is not straining the words of that definition to put it in this way: ". . . and not for the purpose of carrying or having superimposed upon them any load except such as is necessary for their

propulsion or their equipment". There is a difference between what one might call a common noun and an abstract noun. "Equipment" might refer to particular items, and, on the other hand, it might refer to a state of being equipped. It seems to me that what is postulated in that definition is that the vehicle must be used for "haulage solely", but that if anything is put on it which is necessary either for its propulsion or properly to render it fit for purposes of haulage that shall not prevent its being a haulage vehicle. You might, for instance, have tools, or such things as blocks or ballast being added, in order to render it in a fit state of equipment for its work as a haulage vehicle. I have also considered the definition of "goods vehicle" in the Finance Act, 1933, sched. VII, Part III, para. 5. There are two expressions which add greatly to the width of it. One is, "for the conveyance of goods or burden of any description", and the other is "whether in the course of trade or otherwise". Having heard counsel for both sides, my view is that this vehicle comes within the definition of a haulage vehicle, i.e., within the description of vehicles in para. 4 (e) of Part II of sched. VII to the Act of 1933. There might be, as counsel for the plaintiffs says, some overlapping of these two definitions, but, in my judgment, this is in fact a haulage vehicle.

The next matter I have to consider is the application to this vehicle of the Road Traffic Act, 1930, s. 26. It is submitted by counsel for the defendants that the ballast (using the word in its widest possible form) must be excluded from the weight unladen of a vehicle. He divided the section up into the positive and the negative parts, the positive part going down to the word "but" and the negative part following thereafter, and he contended that the section is inapt to include anything by way of ballast. He said that, to start with, ballast is not "parts" but it is "equipment". On the other hand, counsel for the plaintiffs says that the section is apt, having regard to the whole of its terms, to include ballast. I have been referred, so far as this section is concerned, to two authorities. The first was *Darling v. Burton* (1), which was an action brought under the Roads Act, 1920, s. 7 (6), which provided, in the same words as now appear in s. 26 of the Act of 1930, that:

" . . . the weight unladen of any vehicle shall be taken to be the weight of the vehicle inclusive of the body and all parts . . . which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of the weight of . . . loose equipment . . ."

It was held (1928 S.C. (J.) 11):

"that movable shelving, fitted to slide on brackets in a baker's van, and used to facilitate the delivery of goods to customers, was loose equipment within the meaning of the section, and did not fall to be included in the weight unladen of the vehicle."

In his judgment, the Lord Justice-General (LORD CLYDE) said (*ibid.*, 13) that the respondent

"had brackets affixed to the inside of the body—which thus became undoubtedly parts of the body, and consequently added to 'the weight unladen' of the vehicle. By means of these brackets he was able to slide or run into the inside of the body trays, shelves, or boards containing his products, and made of a size to fit the inside of the body."

Then the question was whether they had to be included in the weight of the vehicle (*ibid.*, 14):

"It will be observed that they play no part except as a facility for loading the van, and perform no function except as holders, or containers of the goods transported. Boxes, baskets, trays of one kind or another, and cans are familiarly used in tradesmen's delivery vans; but it would hardly occur to anyone to regard them as parts of the unladen vehicle . . . What then are they, in the phraseology of the section? I see

no difficulty in regarding them as included under the statutory term 'loose equipment', and loose equipment is not to be included in the unladen weight."

LORD BLACKBURN said that he agreed. I think it is important in considering that case to bear in mind what LORD CLYDE said (*ibid.*, 14):

A " . . . that they play no part except as a facility for loading the van, and perform no function except as holders, or containers of the goods transported."

In *Lowe v. Stone* (2) the headnote is ([1948] 2 All E.R. 1076):

B "To enable a motor lorry to carry coal slack without scattering it on the road, boards were fitted to the sides of the vehicle by means of slots. The unladen weight of the vehicle was just under three tons without the boards and just over three tons with the boards, and the boards were not fitted when the vehicle was used for other purposes. The vehicle was licensed as a three ton vehicle and the appellants were charged, under the Finance Act, 1922, s. 14 (2), with unlawfully using it in an altered condition which brought it within a class of vehicle to which a higher rate of duty was applicable under s. 14 (1). The appellants contended that, under the Road Traffic Act, 1930, s. 26, the boards should not be included in calculating the weight of the vehicle as they were 'loose equipment' within the meaning of that section. *Held*: since the result of fixing the boards to the vehicle was that the vehicle was capable of carrying much larger loads, the boards could not be regarded merely as 'loose equipment' within the meaning of the Road Traffic Act, 1930, s. 26, so as not to be included in the weight of the vehicle . . ."

Darling v. Burton (1) was cited, and LORD GODDARD, C.J., said (*ibid.*, 1078):

E "In support of his argument that the boards should be regarded as loose equipment, counsel for the appellants relied on *Darling v. Burton* (1), a Scottish case, in which the question was whether the trays with which bakers' vans are fitted should be regarded as loose equipment or as part of the van. The court held that those trays, which are merely put in the van to contain the bread, should be regarded as loose equipment. I respectfully agree that the judgment of the Lord Justice-General, LORD CLYDE, sitting in *Justiciary*, was right."

F Then (and this is, in my view, the important part) LORD GODDARD, C.J., said (*ibid.*):

G "The trays were no part of the van. They were shelves which were put into the van merely for holding the bread which was to be carried in the van. Their presence or absence made no difference to the van as a van, and they must necessarily be regarded as loose equipment. In fact, the presence of the shelves would tend to decrease, and not to increase, the load that was carried in the van, because, if the shelves were not in the van the bread could be packed much tighter than when it was placed in the ordinary manner on the shelves. In the present case the boards are affixed by means of slots to the sides of the van, with the result that the van is capable of carrying a much larger load . . . I think that if we held that the justices were wrong in this case and that the boards must be regarded merely as loose equipment, we would be opening a very wide door to evasions . . ."

H It seems to me that, if one considers this section on the findings which I have arrived at, one has to consider whether this ballast block, fixed and fastened as it was on July 18, 1946, was a part of the vehicle. I am satisfied that, in the condition in which it was on that day, July 18, 1946, it was a part of the

vehicle, and was necessary to or ordinarily used with the vehicle when working on the road.

That does not exhaust the matter, because there then follows what counsel for the defendants has called the negative part of the Road Traffic Act, 1930, s. 26:

“ . . . but exclusive of the weight of water, fuel or accumulators . . . and of loose tools and loose equipment.”

Counsel for the defendants suggests that this block was in fact “equipment”. A
In my view, it was not equipment. It was not “loose equipment”. It was a
part of the vehicle, and it was proper for that ballast block to be included in
the weight unladen of the vehicle at that time.

Judgment for the plaintiffs.

Solicitors: *J. G. Barr* (for the plaintiffs); *Mawby, Barrie & Letts* (for the
defendants). B

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

DEFIANT CYCLE CO., LTD. AND OTHERS v. NEWELL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), C
April 28, 1953.]

*Statutory Instrument—Printing—Certificate of exemption—“Certificate”—Letter
from Ministry of Supply stating that price schedules “have been certified
to be exempted from printing”—Effect of failure to print instrument—
Defence of absence of publication—Statutory Instruments Act, 1946 (c. 36), D
s. 2 (1), s. 3 (2)—Statutory Instruments Regulations, 1947 (S.I., 1948,
No. 1), reg. 7.*

The appellants were charged with selling iron and steel in excess of
prices permitted by the Iron and Steel Prices Order, 1951, as amended,
these prices being set out in deposited schedules. A copy of the order
was sent by an assistant secretary in the Ministry of Supply to the editor
of statutory instruments at the Stationery Office together with a letter E
stating, inter alia, that “the deposited schedules have been certified under
reg. 7 [of the Statutory Instruments Regulations, 1947,] to be exempted
from printing and sale as part of the copies of the instrument”. It was
conceded by the Crown that if there were no certificate of exemption from
printing, the onus lay on the Crown to show that reasonable steps had
been taken to bring “the purport of the instrument to the notice of the
public, or of persons likely to be affected by it, or of the person charged”, F
within the meaning of the Statutory Instruments Act, 1946, s. 3 (2).

HELD: the letter to the editor of statutory instruments did not constitute
a certificate within the meaning of reg 7. of the regulations of 1947; therefore,
the Crown was not exempted from printing the deposited schedules as
required by s. 2 (1) of the Act of 1946; and, as the Crown had not proved
that reasonable steps had been taken to bring the purport of the deposited
schedules to the notice of the persons mentioned in s. 3 (2) of the Act of
1946, the appellants were entitled to rely on the provisions of that sub-
section and to be acquitted. G

Quaere, per PARKER, J., (i) whether the effect of a contravention of s. 2 (1)
of the Act of 1946 in not causing to be printed a statutory instrument which
was required to be printed was that the instrument was wholly invalid, and
(ii) whether the defence under the Statutory Instruments Act, 1946,
s. 3 (2), was available even if a certificate under the Statutory Instruments
Regulations, 1947, reg. 7, had been issued. H

EDITORIAL NOTE. The Iron and Steel Prices Order, 1951 (S.I., 1951,
No. 252), as amended, was revoked and replaced by the Iron and Steel Prices

Order, 1952 (S.I., 1952, No. 361) which was in turn revoked and replaced by the Iron and Steel Prices Order, 1953 (S.I., 1953, No. 169).

FOR THE STATUTORY INSTRUMENTS ACT, 1946, s. 2 and s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 442.

CASES STATED by Middlesex justices.

A On Oct. 16, 1952, at a court of summary jurisdiction sitting at Tottenham, informations were preferred by the respondent, Leonard Newell, a higher executive officer of the Ministry of Supply, against each of the appellants, the Defiant Cycle Co., Ltd., and one MacNay and one Simmonds, directors of the company, that they on divers dates between May 18, 1951, and Aug. 30, 1951, sold steel of a class mentioned in the schedule to the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended by the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 1423) and the Iron and Steel Prices (No. 3) Order, 1951 (S.I., 1951, No. 1549), at a price which was in excess of the scheduled maximum price, contrary to art. 1 (A) of the said order, as amended, and to reg. 55AB of the Defence (General) Regulations, 1939.

C It was proved or admitted that the appellant company carried on business as dealers and merchants in steel; that the company made the sales referred to in the informations; that, on the publication of the Iron and Steel Prices Order, 1951, and the said amending orders, the Minister of Supply caused to be distributed to each of the regional offices of the Ministry in the United Kingdom one copy of the schedules referred to in the orders; that the original signed deposited schedules were retained by him and were available for inspection by the public at Steel House, London; that none of the deposited schedules was D printed by the Queen's printer; that one Mrs. Silverston, an assistant secretary in the Ministry of Supply, whose duties included the making of arrangements for the printing of statutory instruments made by the Minister, decided, having regard to the provisions of the Statutory Instruments Regulations, 1947, reg. 7, that the printing and sale of the schedules referred to in each of the orders was unnecessary; that, in so deciding, she had regard primarily to the bulk E of the schedules, secondly, to the fact that copies thereof were to be made available through the regional offices, and, thirdly, to the fact (of which she was aware) that trade associations would be distributing to the trade copies of the schedules, or, at least, of such parts thereof as related to types of iron and steel most in demand; that Mrs. Silverston, when sending a copy of each of the said statutory instruments, also sent a letter to the editor of statutory F instruments, but that, save as aforesaid, the Minister of Supply did not give a certificate in writing in respect of the order or the amending orders; that many thousands of persons were involved in the iron and steel trade and were affected by these orders; and that, having regard to the bulk of the deposited schedules, it was impracticable for all to acquire the information therein contained.

G It was submitted on behalf of the appellants (i) that the orders were of no force, effect, or validity, on the ground that, as the deposited schedules which formed part of the orders had not been printed, and the Minister had failed to issue his certificate pursuant to the Statutory Instruments Regulations, 1947, reg. 7, exempting the schedules from the requirement of being printed, the orders had not been issued or published within the Statutory Instruments Act, H 1946; (ii) that the Minister of Supply had not proved that at the date of the purported issue of the orders he had taken reasonable steps to bring them to the notice of the public, or of persons likely to be affected thereby, or of the persons charged; and (iii) that on the evidence admitted or proved no offence was shown to have been committed. It was contended on behalf of the respondent (i) that by virtue of the Price Control and Other Orders (Indemnity) Act, 1951, any invalidity affecting the Iron and Steel Prices Order, 1951, was removed; (ii) that, in any event, the orders were valid even if (which was not admitted)

there had been any irregularity regarding the printing thereof; (iii) that each of the orders had been duly issued by Her Majesty's Stationery Office at the dates of the appellants' contraventions thereof; and (iv) that the letters sent by Mrs. Silverston to the editor of statutory instruments were or included certificates for the purpose of the Statutory Instruments Regulations, 1947, reg. 7.

The justices were of the opinion (i) that the Iron and Steel Prices Order, 1951, and the amendments thereof were validly made and of full force and effect in respect of the whole of the period covered by the said informations; (ii) that, if the orders were not valid apart from any irregularity in printing, then (a) by virtue of the Price Control and Other Orders (Indemnity) Act, 1951, the defects, if any, in regard to the orders had been validated, and (b) the letters referred to above were a sufficient compliance with the Statutory Instruments Regulations, 1947, reg. 7, and (iii) that, accordingly, the fact that the deposited schedules were not printed did not invalidate any of these statutory instruments.

Viscount Hailsham, Q.C., and J. C. G. Burge for the appellants.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: The point we have to decide arises under the Statutory Instruments Act, 1946. The scheme of the Iron and Steel Prices Order, 1951, is to set out in a schedule prices which are said to be "basis prices per ton for the representative-basis-pricing specification". What that means I do not know, but it does not matter. In the body of the order reference is made to the deposited schedules, and, apparently, the price at which any sort of iron or steel can be sold is to be found in the deposited schedules.

By art. 6 (1):

" 'Deposited schedule' means any one of the ninety-seven deposited price schedules for any class of iron or steel mentioned in the schedule to this order lodged with the Minister of Supply and certified to be a deposited schedule accepted for the purpose of this order by the indorsement 'Iron and Steel Prices Order, 1951'."

Then there comes the rest of the indorsement which is to be "signed (with the date of signing) by an under-secretary or a principal assistant secretary in the Ministry of Supply". The printing of the ninety-seven deposited price schedules would, no doubt, be a very great burden, and would make one of these orders very bulky, and the Statutory Instruments Act, 1946, has dealt with the probability that some orders will contain schedules of such a bulk or length that it would be undesirable to print them.

It is provided by s. 8 (1) of that Act:

"The Treasury may, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, by statutory instrument make regulations for the purposes of this Act, and such regulations may, in particular:—(a) provide for the different treatment of instruments which are of the nature of a public Act, and of those which are of the nature of a local and personal or private Act . . . (c) provide with respect to any classes or descriptions of statutory instrument that they shall be exempt, either altogether or to such extent as may be determined by or under the regulations, from the requirement of being printed and of being sold by the [Queen's] printer of Acts of Parliament, or from either of those requirements."

It is also provided in s. 3 (2):

"In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by [Her] Majesty's Stationery

Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

The regulations which were issued by the Treasury under the Act, namely, the Statutory Instruments Regulations, 1947, provide by reg. 7:

A "If the responsible authority considers that the printing and sale in accordance with the requirements of s. 2 (1) of the [Statutory Instruments Act, 1946] of any schedule or other document which is identified by or referred to in a statutory instrument and would, but for the provisions of this regulation, be required to be included in the instrument as so printed and sold, is unnecessary or undesirable having regard to the nature or
B bulk of the document and to any other steps taken or to be taken for bringing its substance to the notice of the public, he may, on sending it to the [Queen's] printer of Acts of Parliament, certify accordingly; and any instrument so certified shall, unless the reference committee otherwise direct under these regulations, be exempt from the requirements aforesaid so far as concerns the document specified in the certificate."

C In this case, it is said, among other contentions that have been put forward, that no certificate was given by the responsible authority that the printing of the deposited schedules to this order was unnecessary. The first question which we have to consider, therefore, is: Was a certificate given by the responsible authority dispensing with the printing of these schedules?

D The only document that was proved at the trial and relied on as a certificate was a letter in these terms—I suppose it is a common form letter used in the Ministry of Supply to be filled in as the case may require:

"I am directed by the Minister of Supply to inform you that he has made a statutory instrument, of which one copy is annexed hereto, entitled——— and to request you to number it in accordance with reg. 3 of
E the Statutory Instruments Regulations, 1947, and to be good enough to insert the number: (i) in all the copies of the instrument contained in this folder, and (ii) at (a) of para. 3 of the letter to the Stationery Office below. This instrument has been certified to be a general instrument under reg. 4 of the Statutory Instruments Regulations, 1947, and I am to request you to treat it accordingly. The documents identified in this instrument
F as deposited schedules have been certified under reg. 7 to be exempted from printing and sale as part of the copies of the instrument; but subject thereto, copies of this instrument are to be printed and sold by the [Queen's] printer of Acts of Parliament. I am to request you to be good enough to complete and sign part 1 of the receipt sheet contained in this folder."

That letter is addressed to the editor of statutory instruments at the Stationery
G Office. It can hardly be contended, and it has only been faintly argued by the Solicitor-General, that that letter is a certificate. It is a letter which says there is a certificate, but the certificate was never produced. The letter clearly is not a certificate. Therefore, we have no difficulty in holding that no certificate under reg. 7 was ever issued.

H What is the effect of that? That is a point which it seemed to the court might deserve a very careful argument and very full consideration, but the Solicitor-General has accepted the position that the result is that, if no certificate has been given exempting the Queen's printer from printing the whole of the order, while it does not affect the validity of the order itself, it throws on the Crown the burden of proving that at the date of the commission of the offence reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or the person charged. It is abundantly clear from the Cases Stated

that there was no evidence before the justices that the steps required by s. 3 (2) of the Act of 1946 to be proved by the prosecution had been taken, and that, therefore, the appellants were entitled to rely on that as a defence. No evidence was given on that point because, at the hearing, the Crown were relying on the letter (to which I have referred) as a certificate and as exempting them from the necessity of proving these facts. What was before the justices was evidence that an assistant secretary in the Ministry of Supply

“whose duties included the making of arrangements for the printing of statutory instruments made by the Minister, decided, having regard to the provisions of reg. 7 of the Statutory Instruments Regulations, 1947, that the printing and sale of the said deposited schedules referred to in each of the said statutory instruments . . . was unnecessary; that in so deciding she had regard primarily to the bulk of the schedules: secondly to the fact that copies thereof were to be made available through the regional offices; and, thirdly, to the fact (of which she was aware) that trade associations would be distributing to the trade copies of the said deposited schedules or at least of such parts thereof as related to types of iron and steel most in demand.”

No doubt, she thought that those things were to be done, and her anticipation may have been correct. It may be she knew enough to be satisfied that in due course these things would be done, but that does not discharge the burden which the statute places on the Crown in the event, as the Solicitor-General has admitted, that there is no certificate exempting the Queen's printer from printing part of the order. The appellants contended that the Minister of Supply had not proved that at the date when he purported to issue the said statutory instruments he had taken reasonable steps to bring the purport of the said statutory instruments to the notice of the public, and, on the other hand, the Crown never contended that they had given any such evidence. The appellants were entitled to rely on the fact that this evidence had not been given, and, accordingly, the justices ought to have dismissed the informations.

LYNSKEY, J.: I agree that this letter does not amount to a certificate, and no certificate, therefore, has been proved to have been given by the responsible authority, the Minister. The result is that, on the Solicitor-General's admission, s. 3 (2) applies and gives a defence to the appellants. They have proved that the order was not printed as, under s. 2 (1) of the Act of 1946, it ought to have been in full by the Stationery Office at the time of these alleged offences. No attempt was made, because of the contentions put forward by the Crown, to prove that

“reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.”

There is no finding by the justices that that had been done, and it would be rather remarkable in view of the contentions put before them if they had ever addressed their minds to that question, having regard to the fact that they accepted the argument of the Crown on the first contention—that s. 3 (2) could not apply because of the certificate of exemption from printing which had been given. The result is that there was no certificate, there should have been printing, no printing had been done at the time of the commission of these offences, and there was no evidence on which the justices could be asked to find that the Crown had discharged the burden imposed under s. 3 (2) of the Act of 1946. The result is that these appeals must be allowed.

PARKER, J.: I agree, and would only add this. When counsel for the appellants opened this case, he submitted that the effect of a contravention of the Statutory Instruments Act, 1946, s. 2 (1), in not causing to be printed

a statutory instrument which was required to be printed, was that the instrument was wholly invalid. He also contended that the effect of s. 3 (2) of that Act was that in every case, whether a statutory instrument was required to be printed or not, it was a defence to the subject if it had not been proved that reasonable steps had been taken for bringing the purport of the instrument to the notice of the public. Those matters clearly raise very important questions of principle, but, as the case has developed, it has become unnecessary to determine either of them. Once it appears that there has been no valid certificate exempting the deposited schedules from being printed, it is conceded that s. 3 (2) comes into operation. It is clear that no evidence was given—and, accordingly, there was no finding by the justices—that at the date of the alleged contraventions the reasonable steps required had been carried out. For these reasons I agree that these convictions should be quashed.

Appeal allowed.

Solicitors: *Lucien Fior* (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CUMMINGS v. RICHARD THOMAS AND BALDWIN'S, LTD.

[COURT OF APPEAL (Singleton, Hodson and Morris, L.J.J.), April 23, 24, 1953.]

Factory—Dangerous machinery—Transmission machinery—Duty to fence—Machinery dismantled, guard removed and power cut off—“In motion”

Movement by hand—Factories Act, 1937 (c. 67), s. 13 (1), s. 14 (1), s. 16.

The Factories Act, 1937, s. 13 (1), provides that “Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced”. Section 16 provides that “All fencing or other safeguards . . . shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . .” The plaintiff, a fitter employed by the defendants, was instructed to carry out work of adjustment on a power-driven grinding machine in the defendants’ factory. Part of the machine, which consisted of a face plate rotated by belts and pulleys by which the motion of a prime mover was transmitted, was, when in normal use, “transmission machinery” within s. 152 (1) of the Act of 1937. At the material time the machine was dismantled, the motive power from the prime mover was cut off, and the guard which was normally provided in accordance with s. 16 had been removed. In order to do his work, the plaintiff pulled one of the belts by hand and so caused the face plate to revolve, and in so doing he injured his hand. In an action for breach of statutory duty and negligence,

HELD: transmission machinery did not cease to be such by reason only of the fact that no power was being transmitted to it by a prime mover, and (MORRIS, L.J., dissentiente) the transmission machinery was “in motion” within the meaning of s. 16 even though it was put into motion by the hand of an operator and not under the power derived from the prime mover; and, therefore, the defendants were in breach of their duty under s. 13 (1) and s. 16 in failing to provide a guard.

Per SINGLETON, L.J.: If the machinery on which the accident happened was not “transmission machinery” within s. 13 (1) and s. 152 (1), then it was a “dangerous part of . . . machinery” within s. 14 (1), and the requirements of s. 16 were equally applicable.

FOR THE FACTORIES ACT, 1937, s. 12-s. 16 and s. 152 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 9, pp. 1008-1011 and p. 1113.

Cases referred to:

- (1) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (2) *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; Digest Supp.
- (3) *Parvin v. Morton Machine Co.*, 1950 S.C. 371; 2nd Digest Supp.
- (4) *Thorogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; *sub nom. Thurogood v. Van Den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 2nd Digest Supp.
- (5) *Smith v. Morris Motors, Ltd. & Harris*, [1949] 2 All E.R. 715; [1950] 1 K.B. 194; 113 J.P. 521; 2nd Digest Supp.
- (6) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 2nd Digest Supp.
- (7) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549; [1949] L.J.R. 727; 2nd Digest Supp.

APPEAL by the defendants from an order of PEARSON, J., at Swansea Assizes dated Nov. 26, 1952.

The plaintiff, William Cummings, was an experienced fitter employed by the defendants, Richard Thomas and Baldwins, Ltd. On Feb. 12, 1951, the plaintiff was engaged in work of adjustment on a power-driven Waldrick grinding machine, part of which consisted of a face plate rotated by belts and pulleys by which the motion of a prime mover was normally transmitted to the machine. At the material time the machine was not in use; it had been dismantled so that work of repair and adjustment could be done on it, and the power from the prime mover had been cut off. The guard, which was attached when the machine was used for its normal purpose, had been removed. The plaintiff had been instructed to drill two holes by means of a pneumatic drill in the face plate, one on either side, so that after drilling the first hole it was necessary to turn the face plate 180 degrees in order to drill the second hole directly opposite the first. The plaintiff, in order to turn the face plate, had to pull on the belt and so cause the shaft of the main machine to revolve. He was assisted by another fitter whose duty it was to tell the plaintiff when the face plate was in the correct position. After the first hole had been drilled, the plaintiff pulled on the belt and in so doing caught the little finger of his left hand between the belt and the pulley, thus suffering injury. He brought an action against his employers alleging breach of statutory duty under the Factories Act, 1937, and negligence at common law. PEARSON, J., held that the defendants were in breach of statutory duty and gave judgment for the plaintiff. The defendants appealed.

Marven Everett, Q.C., and *R. Geraint Rees* for the plaintiff.

Nelson, Q.C., and *G. P. Thomas* for the defendants.

SINGLETON, L.J., stated the facts and continued: The plaintiff's case in this court and before the learned judge is based on the safety provisions of the Factories Act, 1937, s. 12 to s. 16. Section 12 (1) provides for the fencing of flywheels directly connected with any prime mover and every moving part of any prime mover. Section 13 deals with transmission machinery. Section 13 (1) provides:

"Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

It is said that the machine in which the plaintiff's hand was caught was transmission machinery. It was submitted by counsel on behalf of the defendants that, although it might properly have been regarded as transmission machinery

at other times, it was not transmission machinery within the meaning of this section at the time the accident took place. Section 14 deals with machinery other than transmission machinery. Section 14 (1) provides:

“Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.”

- A Thus, by s. 12 prime movers must be securely fenced, and by s. 13 transmission machinery must be securely fenced, the reason being that it is assumed for the purposes of s. 12 and s. 13 that flywheels on prime movers are dangerous parts of machinery and that transmission machinery is a dangerous part of machinery. By s. 14, every dangerous part of machinery in a factory is to be securely fenced.
- B It is a question of fact in the case of s. 14 whether or not the machinery with which the court is concerned is dangerous machinery. The submission on behalf of the plaintiff is that, if the machinery on which this accident happened was not transmission machinery, then it was dangerous machinery within the meaning of s. 14. Section 16 provides:

- C “All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . .”

The object of s. 16 is to ensure that the guard or safety device is of substantial construction and is constantly maintained and kept in position while the parts required to be fenced are in motion or in use.

- D It was submitted by counsel for the plaintiff that when the plaintiff pulled the belt he caused motion within the machinery, or he moved a part of the machinery, and that consequently it was either (a) transmission machinery in motion, or (b) dangerous machinery in motion. The submission made by counsel for the defendants was that this was not transmission machinery or dangerous machinery, and that in any event it could not be said that it was machinery of either class in motion at the time of this accident.

Transmission machinery is defined in s. 152 (1) of the Act:

- F “‘Transmission machinery’ means every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling clutch, driving-belt or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance.”

It is not disputed that this machine was transmission machinery within that definition at the time that it was coupled up and working by means of mechanical energy. Prime mover is defined in the same section:

- G “‘Prime mover’ means every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other source.”

“Machinery” is defined by the same section to include any “driving-belt”. I have reached the conclusion that this was transmission machinery although power had been cut off from it some time before the accident happened. I do not think that it thereby ceased to be transmission machinery.

- H The argument of counsel for the defendants was that there must be some limit imposed on the defining words, otherwise one must regard machinery of this kind as transmission machinery if it was on its way to the works or if it had reached the factory yard and had been placed there, or, again, if it were dismantled wholly or in part, one part could still be regarded as a part of transmission machinery. It seems to me that that is a question of fact for the judge to consider on the precise words of s. 13 whether or not a machine on which an accident happens is a part of *the* transmission machinery at *the*

time the accident happened, not a moment before or after. If the machinery is in the factory ready for use by mechanical energy, I consider, as the learned judge thought, that it remains transmission machinery. If it were dismantled to some extent, the court would decide whether in the circumstances some part of it which was still there was a part, not of transmission machinery, but a part of the transmission machinery, taking the precise words of s. 13 of the Act. In my view, this was a part of the transmission machinery.

It is said that the machinery was not in motion, and s. 16 provides that the safeguard or fencing shall be constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use. It was not contended that the transmission machinery was "in use" at the time, but it was submitted on behalf of the plaintiff that it was "in motion" when it was put into motion by the plaintiff pulling the belt. To that counsel for the defendants replied: "You must look at the definition of 'transmission machinery' and of 'prime mover', and you find then that the whole outlook is based on movement by mechanical energy". That is an interesting argument, but I find myself unable to read that meaning into s. 16. Transmission machinery is presumed to be dangerous machinery. It has to be fenced or guarded, and the fence has to be maintained when that machinery is in motion or in use. There may be equal danger, or at least a considerable degree of danger, if part of that transmission machinery is moved by hand. Once it is established that it is transmission machinery I do not regard it as necessary to show that the movement or motion of that machinery, or of some part of it, is by means of mechanical energy. The words in s. 16 are:

"shall be . . . constantly maintained and kept in position while the parts required to be fenced . . . are in motion or in use",

not "in motion by mechanical energy or in use." It seems to me that the submission which counsel makes on this point is equivalent to asking the court to read into the section words which are not there, and I do not think that that is necessary in order to give a meaning to the section. In my view, this was at the time of the accident transmission machinery, and it was in motion, and, therefore, the provisions of s. 16 apply. There was no guard or fencing at the time, and an accident occurred. *Prima facie* there is a breach of s. 16 of the Act, although a proper guard had been supplied for the machine and was used when the machine was working for its normal purpose.

If I am wrong in the view which I have formed, that this was transmission machinery, then I think that it was dangerous machinery. There were belts and pulleys, usually worked by mechanical energy but which could be moved by hand. The occurrence of this accident shows that there was danger to someone who moved a belt by hand, for the little finger of the plaintiff's left hand was caught between belt and pulley. If it was a dangerous part of machinery, fencing was necessary under s. 14 (1) of the Act, and the requirements of s. 16 are equally applicable to a machine within the provisions of s. 14 as to transmission machinery within s. 13. Therefore, under one section or the other this part of machinery should have been fenced at the time the accident happened.

A further question arises, and that is on the submission made by counsel for the defendants that the plaintiff himself was guilty of negligence and it was that negligence that caused the accident. The learned judge, after dealing with the question of a breach of the safety provisions of the Factories Act, 1937, said:

"The much more difficult problem I have to face is whether there was such carelessness or want of skill as should properly be regarded as constituting negligence on the part of the plaintiff, and if so, whether that was a cause of the accident. I think that if it is to be regarded as constituting negligence it should be regarded as a cause, but the problem is whether it constitutes negligence or not. It is a very difficult question,

and a matter mainly of degree obviously. On the whole, having regard to the factory conditions and what has been said about them in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1), I think, on balance, it does not constitute negligence on his part. It is the kind of inadvertence, the kind of inaccurate operation which is to be expected of workmen in factories, in the conditions of hard work and noise and fatigue, and so on, which they have to encounter. On the whole, although it is a difficult question, I hold that there was no negligence on the part of the plaintiff. Therefore the cause of the injury is wholly ascribable to the breach of statutory duty."

When the plaintiff was asked about his occupation, he described himself as an upgraded fitter. [His LORDSHIP referred to evidence given by the plaintiff, and continued:] The law is clearly stated by LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (2) and in passages from the speeches of LORD ATKIN and LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1). It is perfectly clear that one ought not too readily to find negligence against a workman in a factory. The decisions in those cases were, of course, before the passing of the Law Reform (Contributory Negligence) Act, 1945, and the result of negligence on the part of an injured workman is not the same now as it would have been then. However, the test whether there was negligence on the part of the workman remains the same. It must be remembered that a workman in a noisy factory may do things which are foolish. He may cause an accident to himself or to someone else by inadvertence. But the plaintiff was an experienced fitter. He was not an ordinary workman in the factory, he was a man employed on work of adjustment and at the time of the accident he was doing something to the machine in the nature of repair or adjustment. He was a man fifty-one years of age who was being paid £10 a week because he was an experienced fitter, and he was engaged in a very simple operation of moving the face plate of the machine. One other man was working with him whose duty it was to tell him to stop when the face plate was in the correct position. Having given my best attention to what has been said in years gone by on the subject of negligence, and being, I hope, always slow to find a workman in a factory guilty of negligence, I have come to the conclusion that this workman was guilty of negligence. Had I been sitting as judge of first instance in this case I should have taken the view that this accident was very largely due to the workman's own negligent act. The judge had witnesses before him, and the only witness on this issue of negligence was really the plaintiff himself. The judge, although he felt considerable doubt, reached the conclusion that the plaintiff was not negligent. This court should hesitate before interfering with the view of a judge who sees and hears the witnesses when all that we see is a transcript of the evidence. I am inclined to think that with that in mind I should still have said that the plaintiff ought to have borne some considerable part, or, indeed, the greater part, of the responsibility for this accident, but one member of the court takes the same view of the position as PEARSON, J., and if there be a division of opinion in this court on that matter, I am satisfied that this court ought not to interfere with the view of the judge of first instance. For those reasons, I have reached the conclusion that this appeal must be dismissed.

HODSON, L.J.: I deal first with the question of contributory negligence raised by the defendants. I confess that, having read the evidence only, I should be inclined to arrive at a conclusion that the accident was, to a very great extent, attributable to the negligence of the plaintiff. But in this matter one is bound to remember that the reading of the evidence is not enough. When considering the conduct of a workman in a factory the man himself has to be considered, and the learned judge who tried the case had in mind the

observations of LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (2) ([1934] 2 K.B. 140), approved by LORD ATKIN and LORD WRIGHT in *Caswell's case* (1):

" . . . the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."

Having seen the plaintiff and having that passage in mind, PEARSON, J., came to the conclusion that he was not prepared to find the plaintiff guilty of negligence. For reasons which my Lord has given I feel that we ought not to disturb his finding, although in the cold light of the transcript it does look as if he and I would have arrived at a different conclusion if we had tried the case.

The other part of the case depends on the question whether or not the employers are in breach of the Factories Act, 1937, Part II, the material sections being s. 12 to s. 16, and the chief relevant sections being s. 13 and s. 16. The breach complained of is that the defendants failed constantly to maintain and keep in position the guards or casing while the machinery was in motion. The accident occurred when the machinery was being moved by the man's hand and not by mechanical energy. Counsel for the defendants very rightly says that in construing these sections one has to consider them as a whole and decide what is the proper meaning to be attached to particular words without necessarily confining oneself to their literal meaning. [His LORDSHIP read the material parts of s. 12, s. 13 and s. 14 of the Act of 1937, and continued:] It is clear from the wording of s. 12 (1), s. 13 (1), and s. 14 (1) that prime movers and transmission machinery are presumed to be dangerous, whereas in s. 14 parts of machinery other than prime movers and transmission machinery are mentioned which have to be shown to be dangerous. [His LORDSHIP read s. 16 of the Act of 1937, and continued:] The exception mentioned in s. 16 does not apply in this case. The accident happened when the guard had been removed in order that the plaintiff and another fitter could turn round the face plate and drill a hole in order to make an alteration in the set-up of the machine. Two holes had to be drilled, one on each side, and after one hole had been drilled the face plate of the machine had to be turned 180 degrees in order to get the machine in position to drill another hole. It was in performing that operation that the plaintiff pulled the belt.

The first argument put forward by the defendants was that on the facts as found by the learned judge, the power being off, the machinery was not transmission machinery at all. I think the argument was stated in this way, that, as no power was being transmitted from the prime mover, the transmission machinery ceased to be transmission machinery, and the regulations did not apply. That argument was not very strongly pressed, and I think counsel for the defendants recognised that it was a sound view of the sections and the definitions which I have read, that s. 12, s. 13 and s. 14 were descriptive of the machinery to which the sections were to apply and of the required safety precautions, and that when one speaks of transmission machinery, including various things by which the motion of a prime mover is transmitted, one is describing something by reference to the manner in which power is used to move the parts in the ordinary way, and the description is not limited to what is actually happening at a given moment. Therefore, in my view, there is no difficulty in arriving at a conclusion that this was transmission machinery. I think that s. 20 also supports that view:

" A woman or young person shall not clean any part of a prime mover . . . while the prime mover . . . is in motion . . . "

The transmission machinery remains transmission machinery whether the power is on or not, and that, I think, covers the position in this case.

The more serious argument put forward by the defendants was that, even if this is transmission machinery, yet it is not machinery "in motion or in use", within the meaning of the phrase as used in s. 16, and, therefore, there is no breach, because at no material time was the guard required to be on. It is not argued here that the machine was in use, but the question remains: "Was it in motion?", and this is the vital question. In so far as one can gather a general indication from these sections, their object is to prevent people being hurt by moving machinery. The word "motion" must obviously be given some limit in its interpretation. It cannot be interpreted literally. Counsel for the defendants reinforces his argument by referring to a Scottish case, *Parvin v. Morton Machine Co.* (3), which turned on s. 14 and s. 20 of the Act. I will read a passage from the judgment of the Lord Justice-Clerk (LORD THOMSON) (1950 S.C. 378) which appears in *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (4) ([1951] 1 All E.R. 688) and will explain the nature of the argument:

"At first blush I should have thought that the purpose of this part of the Factories Act was to lay down general provisions for ensuring the safety of the plant and equipment which is installed in the factory for the purposes of manufacturing whatever is the product of the factory and that the nature and character of the product was a separate matter, calling for separate treatment in appropriate cases. Indeed it is only where the product of the factory is machinery or machines that the problem arises. The argument is that the words 'any machinery' which occur in s. 14 (1) and 'any machine' which occur in s. 20 are unequivocal and adequate to cover the dough-brake and that, as the purpose of this part of the Act is the safety of the employees, we should lean to a construction which promotes safety. This argument seems to me to lay too much stress on the particular use of 'any' and to put out of view the general context in which the words 'any machinery' and 'any machine' are found. The significance of apparently general words must be governed by the setting in which they are found'."

He came to the conclusion that the words "any machinery", wide and general as they are, were not apt to cover machinery in the course of manufacture in the factory.

Counsel for the defendants used that case as an illustration of the point he was putting before this court, viz., that the word "motion" must not be translated absolutely literally, because if that is so it would cover, for example, the raising of the apparatus from the floor by crane, and that would clearly not be within the language of the section. I agree that the difficult question to be decided is where the line is to be drawn? One has to consider what effect the definitions contained in s. 152 of the Act have in construing s. 16, and, in particular, the words, "in motion or in use". I think the argument of counsel for the defendants may be put shortly in this way, that machinery is not in motion within the meaning of s. 16 if it is not in motion under the power derived from the prime mover, and that this is clear when one looks at the definition of "prime mover" in s. 152 (1). In my view, there would, apart from the definition, be no warrant for implying after the words, "are in motion or in use", the words "under mechanical power". The question is whether the definition drives one to do so. In my judgment, it does not so do. If one bears in mind that the definitions are merely describing the transmission machinery in the one case and the prime mover in the other, and describing them by reference to the manner in which they work, they do not, to my mind, cease to be transmission machinery and a prime mover because they are not at the material moment working in the manner contemplated by the definition in that the power is cut off. They can, in my view, still be in motion within the language of the section even though they are put into motion by the hand of the operator



and not by the power. In those circumstances, I find that I agree with my Lord and with the learned judge that the machine was in motion, and that the regulations apply. I should, perhaps, add that I have no difficulty in arriving at the same conclusion as the learned judge, that if there is a breach of the regulations it was the cause of the accident.

The further point as to negligence at common law on the part of the employers has been kept open by counsel for the plaintiff without any elaborate argument, but I confess I feel in the same position as the learned judge, that it is by no means obvious to me that there is any evidence of negligence apart from the breach of statutory duty against the employers. For those reasons I agree that the appeal fails.

MORRIS, L.J.: I regret to find myself in this case unable to share the conclusions which have been expressed by my Lords. The circumstances of this case were special and particular, and the case depends on its own facts. The accident on this grinding machine happened at a time when it was dismantled, and when it had been out of action for some five or six weeks. The machine was not in use: it is not suggested that it was. Work was in progress on it in order to effect partly alteration and partly repair. The accident occurred to a fitter in whom was vested some discretion as to how he should operate.

[HIS LORDSHIP referred to the plaintiff's evidence in which the plaintiff described the condition of the machine, and said that the guard had been removed from the pulleys. The plaintiff had said that he had been given instructions to drill two holes in the face plate, and for that purpose used a pneumatic drill. HIS LORDSHIP continued:] The plaintiff described how the pneumatic drill was fixed in a stationary position. Two holes had to be drilled in the face plate, one hole being immediately above the other, and the positions of the holes had to be accurate. The result was that when one of the holes was drilled the face plate had to be turned a half-circle. Before the first hole was drilled the face plate had to be put into position. The plaintiff caused the correct position to be achieved by moving the face plate by pulling on the belt and causing the shaft on the main machine to revolve. He was one of three people doing work on this machine, who were all described as skilled workmen and were expected to do work of repair and adjustment. The plaintiff when questioned by the learned judge admitted that it was an ordinary occurrence in the course of his job as a fitter to pull on the belt of a pulley to rotate it. The photographs which have been put before us to demonstrate the working of this machine show that its purpose is to grind rollers. The rollers are put into the machine and are fixed to what is called the face plate. The face plate is caused to revolve at speed, and the grinding or polishing process is achieved by the part of the machine by which pressure is applied to the side of the roller as it is rotated at speed, the rotation being caused by electrical energy from a dynamo and being transmitted to the main part of the machine by means of belts. This accident occurred at a time when the machine was out of commission, when it had been dismantled and stripped down, and when work was being done on it by fitters who did not normally operate the machine.

My Lords have referred to the relevant sections of the Factories Act, 1937, and I do not, therefore, pause to read them. I think it is right to say that, while some of the sections impose a duty, s. 16 defines the duty. The matter was so expressed in *Smith v. Morris Motors, Ltd. & Harris* (5), and I will read a part of the judgment of LYNKEY, J. He says ([1949] 2 All E.R. 718):

"The effect of s. 16 is to indicate how and when the duty imposed under s. 12, s. 13 and s. 14 is to be carried out. That duty is to be carried out, so far as the provision of fencing is concerned, by providing fencing of

substantial construction, by constantly maintaining the fencing, which means keeping it in good and efficient working order, and repair and also keeping the fencing in position while the parts required to be fenced or guarded are in motion or use, with certain exceptions."

In my view, those words clearly state the position. The exceptions to which the learned judge referred are the exceptions set out in s. 16, and it is not

A contended that they apply in the present case.

I have come to the conclusion that the belts and that part of the machine where the upper part of the belts are attached would be correctly described as transmission machinery, and I do not accept the submission of counsel for the defendants that those parts cease to be transmission machinery merely because they are not in motion. Section 16, which defines the duty, provides

B that:

"All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use . . ."

C with an exception which does not apply. A consideration of s. 20 lends support to the view that the description of "transmission machinery" is one that still applies even though the transmission machinery is not in motion or in use. Counsel for the plaintiff has not submitted that the transmission machinery in this case was in use. It, therefore, seems to me that the question in this case resolves itself into the question: Was this transmission machinery "in motion"? The purpose of the transmission machinery was to transmit the motion of a

D prime mover. At the time of the accident the power was turned off, and there was no question of any operation of the prime mover. "Prime mover" is defined to mean:

E "... every engine, motor or other appliance which provides mechanical energy derived from steam, water, wind, electricity, the combustion of fuel or other source."

It is not necessary to express an opinion on the point, but it suffices to say that counsel for the plaintiff did not contend that the words "other source" included manual power. Transmission machinery is defined to mean,

F "every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling clutch, driving-belt, or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance."

In this case there was no motion of the prime mover, there was no mechanical energy, there was nothing to transmit, and no transmission was taking place. What happened was that the plaintiff, in his discretion, thought that the right way to get the face plate in position was to pull on the belt. The point is a

G short one, and my opinion can be briefly expressed. It is unreal to say that the transmission machinery was in motion, and I do not think that in any practical sense it can be said to have been in motion. The facts in the present case do not, in my judgment, come within the scope, or the spirit, or the intention of the words, transmission machinery "in motion". For those reasons, I have reached the view that it was not shown here that there was

H any breach of statutory duty by the defendants. Our attention was called to certain phrases in some of the speeches in *Carroll v. Andrew Barclay & Sons, Ltd.* (6), which seem consistent with the view that I have endeavoured to express.

As my Lords have said, counsel for the plaintiff stated at the end of his submissions that he desired to keep open the point that there was negligence on the part of the defendants, and that he could succeed on that ground even if he did not establish a breach of statutory duty. We have had no argument

in regard to that matter. I am certainly not persuaded that any negligence was shown. I would, therefore, have allowed this appeal on the ground that there was no breach of statutory duty and that I am not satisfied that there was any negligence on the part of the defendants.

Had I been of the contrary opinion, then I would have had to consider the question whether there was negligence on the part of the plaintiff, and on this part of the case I share the conclusion reached by the learned judge. The guidance given by the House of Lords in *Grant v. Sun Shipping Co., Ltd.* (7) was expressed by LORD PORTER ([1948] 2 All E.R. 242) in these words:

"This matter is largely a question of fact and, if there was evidence from which a tribunal could fairly come to the conclusion that the pursuer was not himself negligent, and if the judge or jury before whom the case was tried came to that conclusion, I imagine your Lordships would not interfere with the decision. It is, I think, not in dispute that the decision has to be made in the light of the characteristics of the type of men affected."

Having re-read the evidence of the plaintiff, I form the view that he was not a very shrewd man and, perhaps, not very alert in answering questions. It seems to me that the note of the plaintiff's evidence revealed a man zealous in his work, and I think that what happened here was aptly described in the words of the learned judge as being "inadvertence" or "inaccurate operation". There was, perhaps, an error of judgment in the mode of operating at the particular moment, but I would not consider that it was an error amounting to negligence. I would, therefore, not have felt that the plaintiff was guilty of negligence. It seems to me that this unfortunate, but, happily, not serious, accident is just the sort of accident which should be covered by the provisions that are made in regard to industrial injuries.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

THEOCHARIDES v. JOANNOU.

[CHANCERY DIVISION (Roxburgh, J.), April 28, 29, 30, May 1, 4, 1953.]

Practice—Shorthand note—Right of judge to require transcript—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 14 (3).

The discretion of a judge at a trial to require a transcript of the shorthand note of the evidence taken by the official shorthand writer is unfettered, except that the requirement is subject to appeal to the Court of Appeal, and the discretion is not affected by the Legal Aid (General) Regulations, 1950, reg. 14 (3) (b).

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 14 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 214.

Case referred to:

(1) *Griffiths v. Howard*, [1939] 3 All E.R. 56; 55 T.L.R. 814; Digest Supp.

WITNESS ACTION.

The plaintiff, a Cypriot, gave his evidence rapidly and volubly in broken English. On Friday, May 1, when the plaintiff had been giving evidence for two days, the learned judge, realising that his own note would be inadequate, informed the official shorthand writer that he would require a transcript of the plaintiff's evidence and of the evidence to be given by the defendant. As the plaintiff was an assisted person, his solicitor, instead of immediately authorising the cost of the transcript, referred the matter to the legal aid committee who requested that certain information should be supplied to the

judge, and, when the trial was resumed on Monday, May 4, the judge was not supplied with a transcript.

Bell, Q.C., and Martin Roth for the plaintiff.

J. G. Strangman, Q.C., and M. Nesbitt for the defendant.

ROXBURGH, J.: This is an action between two Cypriot brothers relating to two restaurants. Both are legally aided. A shorthand note of the evidence is being taken under the scheme envisaged by R.S.C., Ord. 66A, r. 1, which is printed in *THE ANNUAL PRACTICE*, 1939, p. 1276 [in a note to R.S.C., Ord. 58, r. 11]. It does not appear to be printed in the current edition. The note reads in part as follows:

"Heretofore, although shorthand notes of proceedings in the court below have been used in certain circumstances in the Court of Appeal . . . there has been no provision for the taking of 'official' shorthand notes of evidence or other proceedings in civil actions. Now, however, in a notice issued from the Lord Chancellor's Department provision is made for a note to be taken in practically every case. This notice is in the following form:—The scheme contemplated by ATKINSON, J.'s committee for official note-taking in all witness actions . . . in the courts of the Chancery and King's Bench Divisions will be in operation as from Oct. 12, 1937 . . . In the absence of special instructions of the judge, the Association [of Official Shorthand Writers, Ltd.] will depute one shorthand writer to attend each court to take a note of the evidence, summing-up and judgment. The fee for taking the note will be borne by public funds. The cost of transcripts for use during the hearing of the case will be borne by the parties, who will be entitled to make their own arrangements with the Association for the supply of transcripts. If the trial judge requires a transcript of any part of the evidence, the transcript required will, unless the judge otherwise directs, be provided and paid for by the plaintiff in the first instance, the cost being part of the costs in the cause."

It has been my practice to take in longhand only such note as appeared likely to be necessary for my purposes, realising that there might be cases in which it would turn out to be insufficient, but relying on what I believed to be my right to require a transcript of the whole or some part of the evidence if that event occurred. On balance, this leads to a large saving of costs, because it is seldom that my note is insufficient for my own purposes, whereas, if I adopted the policy of writing out everything in longhand in every case which might turn out to be material, in most cases a great deal of time would thus be wasted. For this practice I have today found good precedent in *Griffiths v. Howard* (1), an action concerning certain rights in watercress beds. At the conclusion of the plaintiff's evidence on the first day, the learned judge sent a note to the plaintiff's solicitor by the usher of the court saying that he required a note of the evidence taken by the shorthand writer under the notice issued by the Lord Chancellor's Department. The solicitor instructed the shorthand writer to prepare a transcript, and it was supplied the next day. The case was ultimately settled. On taxation the taxing master said that he had no evidence before him that the judge had required a transcript within the meaning of the notice. SIMONDS, J., said that he had required a transcript, and he went on to say (55 T.L.R. 814):

"Accordingly the costs of it would be paid by the plaintiff in the first instance, and would be costs in the cause. The taxing master should be so informed. Where the request was made by the judge in court, it would automatically go on the shorthand writer's note, but if, as sometimes happened, it was made through the officer of the court or the usher after the court had risen, it would be the duty of counsel to draw the attention

of the court to the fact and to ask for a direction that the costs of the note be made costs in the cause."

It will be observed that it is essential to the adequate working of this system that the judge's discretion as to requiring a transcript should be unfettered except that his requirement is subject to appeal to the Court of Appeal. I cannot share with any committee, however eminent, responsibility for the actual conduct of any particular case. If my right to require a transcript can be questioned otherwise than in the Court of Appeal, then the shorthand note is useless to me, though, no doubt, useful in the Court of Appeal. I must write down everything remotely relevant in longhand. In this case the plaintiff had already been in the witness box for two days. He speaks fast and volubly in broken English, clipping most words in modern Greek fashion. I came gradually to realise that my note would prove inadequate for my purpose. On Friday morning, May 1, I stated to the shorthand writer—and I have no doubt that he duly recorded it on his note—that I required a transcript of the plaintiff's evidence so far given and should require a transcript of the remainder of his evidence and one of the defendant's evidence. After the rising of the court I was informed by the official shorthand writer that no one was prepared to accept responsibility for his charges. I informed him that I would not pay them out of my Victorian salary and that he need not proceed with the transcript until someone would undertake to pay him for it. The plaintiff's solicitors then consulted the appropriate legal aid committee.

At this stage considerable misunderstanding seems to have arisen. I am by no means sure that the plaintiff's solicitor made it plain to the committee that I had already that morning required the transcript under the power to which I have referred. It is quite certain that he did not make plain to the committee all the purposes for which I required the transcript, and for that last matter he is in no sense to blame. I said that I should require the transcript to deliver judgment, but I did not think it proper to state (though in the abnormal circumstances that have arisen I think it proper to state it now) that I also required the transcript to compare what the plaintiff was going to say today with what he said last Thursday. That the solicitor had no reason to know, and, accordingly, he could not inform the committee of it. I have some reason to doubt whether the committee ever consciously intended to raise the issue which has arisen. What the committee appear to have thought is that I was in some way inquiring whether a transcript should be provided, which, of course, is not what I was doing or intended to do. I gave the direction on Friday morning, and that was the beginning and end of the matter so far as I am concerned. Whatever the committee understood or whatever the plaintiff's solicitor may have said to them, the fact of the matter is that the plaintiff's solicitor did not immediately authorise the expenditure and that the legal aid committee did not immediately authorise the expenditure, but, on the contrary, requested that certain information should be supplied to me.

In my judgment, my discretion to require a transcript is unfettered unless the Court of Appeal should hold that in a particular case I am acting arbitrarily or unreasonably. It is a question relating to the conduct of business in my own court. Apart from statute, no outside body, however distinguished, is entitled to send messages to a judge about a case which he is conducting. It seems to me that someone must have misunderstood the Legal Aid (General) Regulations, 1950, reg. 14 (3), which provides:

"Where it appears to the assisted person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely . . . (b) to bespeak any transcript of shorthand notes of any proceedings . . . he shall (unless the certificate provides for the act in question to be done) apply to the appropriate area committee for authority so to do, and no payment

shall be allowed on taxation for any such step taken without their approval."

I do not know whether the plaintiff's solicitor thinks the transcript necessary or not, but I am not prepared to discuss that matter either with him or with the committee. It seems to me that that regulation has no application at all to a case in which a judge directs or requires a transcript in the circumstances

A in which I have required a transcript in the present case. Therefore, I do not propose, at this stage, to state all my reasons. If the Court of Appeal require to know my reasons I will willingly state them, and I think I could show that the requirement was essential to the proper administration of justice and likely to save costs in the end.

I think that the whole matter is probably due to some misunderstanding.

B The area committee have treated me with every courtesy, but an important constitutional principle seems to me to be involved. I have no right to intervene in the question whether counsel are supplied with a transcript, but I shall require, if the case proceeds to its ultimate destination, both counsel to deal with the evidence in detail, and I would indicate the opinion that much time will inevitably be wasted if they each use their own notes (which, in the

C difficult circumstances of this case, and, in particular, the difficulty of understanding at least one of the witnesses, may well differ) while I use a transcript. Nor am I concerned with the plaintiff's solicitor's position under the Legal Aid and Advice Act, 1949, though I may, perhaps, express the opinion that the costs of any transcript which I require must be made part of the costs of the action and it seems to me that he is entitled to recover them out of the

D legal aid fund pursuant to his authority from the legal aid committee to conduct the action for the plaintiff. What I decide is that, as the plaintiff has not yet ordered and accepted responsibility to pay for the transcript which I required on Friday morning, and as I require it before I can further proceed with the case, this action do stand over until the transcript is available for me, with liberty to apply to restore when it is available. As the plaintiff is an assisted person,

E I propose to reserve the costs of the adjournment.

Order accordingly.

Solicitors: *Lucien A. Isaacs & Maxwell Simon* (for the plaintiff); *Joynson-Hicks & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

CRABTREE v. CRABTREE.

[COURT OF APPEAL (Denning and Hodson, L.JJ.), April 29, 1953.]

Divorce—Desertion—Termination—Agreement to pay maintenance—“If [the spouses] shall so long live separate and apart from each other.”

A husband who had deserted his wife entered into an agreement with her under which he undertook “during the joint lives of himself and the wife, if they shall so long live separate and apart from each other” to pay weekly sums for the maintenance of herself and of the child of the marriage. The sums were to cease to be payable if the parties came together again or if the marriage was dissolved.

Held: the agreement merely defined the duration of the payments of maintenance and did not bind the parties to live separate and apart, and it did not, therefore, prevent the husband's desertion from running.

Dictum of SIR WILFRID GREENE, M.R., in *Lord Long of Wraxall v. Lady Long of Wraxall* ([1940] 4 All E.R. 233), applied.

AS TO THE EFFECT OF A SEPARATION AGREEMENT ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 966, and p. 835, para. 1338; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 347-353, Nos. 2878-2915.

Case referred to:

- (1) *Long of Wraxall (Lord) v. Long of Wraxall (Lady)*, [1940] 4 All E.R. 230; 110 L.J.P. 17; 27 Digest, Replacement, 355, 2941.

APPEAL by the wife from a decision of Mr. Commissioner REWCASTLE on Nov. 24, 1952, whereby he dismissed the wife's petition for divorce on the ground of the husband's desertion, holding that that desertion had ceased to run by reason of an agreement made between the parties which amounted to a separation agreement.

L. A. Pratt for the wife.

Petrie for the husband.

DENNING, L.J.: The parties married on Sept. 23, 1944, and there is one child, a girl born on June 17, 1945. In 1947 the husband left the home, and when the wife's mother went to try to get him back, he refused with some emphasis to return. In these circumstances he was clearly guilty of desertion, but the question is whether his desertion came to an end by reason of the terms of an agreement made on Jan. 3, 1948. The material clause of that agreement is cl. 1 which was as follows:

“The husband and the wife having for some time past lived separate and apart from each other and the wife having the custody of and control of the said child of the marriage, the husband agrees with the wife that he will during the joint lives of himself and the wife, if they shall so long live separate and apart from each other, pay to her for the support and maintenance of herself the weekly sum of £1 and for the maintenance of the said child the weekly sum of £1 until the said child attains the age of sixteen years.”

The wife agreed to maintain herself with the help of that allowance, and there was a clause whereby, if at any time the parties came together again or if the marriage were dissolved, the sum should cease to be payable.

The question is whether, as a result of that agreement, the desertion ceased to run. That is a question of interpretation. If it was an agreement binding the parties to live separate and apart it would stop the desertion running, but if it was only an agreement to pay maintenance it would not. In *Lord Long of Wraxall v. Lady Long of Wraxall* (1) it was held that an agreement

to live separate and apart had brought the desertion to an end. SIR WILFRID GREENE, M.R., said ([1940] 4 All E.R. 233):

“ It appeared from the evidence of the appellant that the real purpose of the separation deed was, in the minds of both parties, to regulate the financial position and to make provision with regard to the child. If the deed had been confined to these matters, no difficulty would have arisen.”

- A SIR WILFRID GREENE there recognises that on or after separation the parties can regulate the financial position between them without bringing the desertion to an end. On its true interpretation, I think that the present agreement was such an agreement as SIR WILFRID GREENE had in mind. It is confined to maintenance. The words “ if they shall so long live separate and apart ” simply define the duration of the payment and do not amount to a bargain binding them to live separate and apart. The agreement does not stop the desertion from running. The petition should be granted and a decree nisi pronounced on the ground of the husband’s desertion.

- C HODSON, L.J.: I agree. The desertion began to run in November, 1947, and the only question which arises on this appeal is whether it was terminated on the execution of an agreement dated Jan. 3, 1948, which was entered into between the parties. The learned commissioner thought that, on its true construction, this agreement was a separation agreement, and, accordingly, that desertion ceased to run from the moment when the parties put their hands to it. I think the position is correctly set out in *RAYDEN ON DIVORCE*, 5th ed., p. 113, in this way:

- D “ A deed which contains no express or implied stipulation that the petitioner agrees to the respondent living apart will not prevent desertion from running.”

- E That there may be deeds of a kind which will not prevent desertion from running is plain from the passage from the judgment in *Lord Long of Wraxall v. Lady Long of Wraxall* (1) which my Lord has read. The words which were thought to stand in the way of the petitioning wife here are those which follow the agreement by the husband to pay—“ if they shall so long live separate and apart ”. If those words imply a stipulation that the wife agrees to the husband living apart from her, they prevent desertion from running, but otherwise they do not. In my judgment, on their true construction these words are merely a conditional clause defining the duration of the payment and do not imply such a stipulation, and they come within the exception which appears to have been contemplated by SIR WILFRID GREENE, M.R., in *Lord Long of Wraxall v. Lady Long of Wraxall* (1). I agree, therefore, that the appeal should be allowed.

- F Solicitors: *Wood, Nash & Co.*, agents for *Wilkinson*; *Woodward & Ludlam*, Halifax (for the wife); *Williamson, Hill & Co.*, agents for *Clarkson, Thomas & Hanson*, Halifax (for the husband).

Appeal allowed.

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HAZELL, WATSON & VINEY, LTD. v. MALVERMI.

[QUEEN'S BENCH DIVISION (McNair, J.), April 29, 30, May 1, 4, 1953.]

Rent Restriction—Premises within the Acts—Change of identity—Premises originally not within 1939 Act—Damage by enemy action—Reduction of rateable value—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1) (a).

The defendant was tenant of premises consisting of a café on the ground floor, with a kitchen in the basement and three floors above. From 1940 onwards he had used the first floor of the premises as living accommodation. In 1942 the defendant's lease expired, but he held over and eventually a new tenancy was negotiated between him and the landlords for the term of one year, to continue thereafter as a quarterly tenancy. In this agreement the defendant covenanted "not to use the premises other than and except as a café and dining room only." The defendant continued to live on the premises, and, with knowledge of this, the landlords accepted rent from him. The premises were damaged by bombs in 1940, so that two party walls cracked on the third floor, some ceilings were broken and bulging, and certain window sashes and panes of glass were broken. The rateable value of the premises at the material times was as follows:—Apr. 6, 1931, £147, reduced to £132 and to £117 in March and October, 1941, due to the falling off in trade during the war, and in August, 1948, the figure of £147 was restored. In 1950 the rateable value was reduced to £96 in view of the war damage to the premises, this being the first assessment which had taken that damage into consideration. Notice to quit was served on the defendant, expiring on Sept. 29, 1951, but the defendant continued in possession. In an action for possession,

HELD: (i) there was no ground on which the tenancy agreement should be rectified so as to exclude the clause which restricted the user of the premises, but in the circumstances the landlords, by accepting the rent with knowledge, had assented to the user of the premises as a dwelling-house and the agreement had become an agreement for the tenancy of a dwelling-house.

Observations of EVERSLED, L.J., and DENNING, L.J., in *Wolfe v. Hogan* ([1949] 1 All E.R. 574, 575), applied.

(ii) for damage to premises to amount to a change of their identity, serious damage alone was not sufficient; the facts must be such that it could be said that in substance the house under consideration had ceased to be the same house as that with which it was being compared; there was here no such degree of damage; as a result the appropriate date on which to calculate the rateable value for the purposes of the Rent Acts, was Apr. 6, 1939, on which date the rateable value of the premises in question was £147; and, therefore, the defendant was not entitled to the protection of the Acts and the plaintiffs were entitled to possession.

Per curiam: Even if there had been a change of identity caused by war damage the first assessment of the premises after the war damage had occurred was in 1948, when the rateable value was restored to £147, and that was the appropriate assessment for determining whether the premises came within the Acts, even though that assessment did not take into account the damaged condition of the premises.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1077.

Cases referred to:

- (1) *Crane v. Hegeman-Harris Co., Inc.*, [1939] 1 All E.R. 662; *affd.* C.A., [1939] 4 All E.R. 68; Digest Supp.

- (2) *Wolfe v. Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194; 31 Digest, Replacement, 640, 7477.
- (3) *Eyre v. Haynes*, [1946] 1 All E.R. 225; 31 Digest, Replacement, 643, 7497.
- (4) *R. v. Sidmouth Rent Tribunal. Ex p. Sellek*, [1951] 1 All E.R. 107; [1951] 1 K.B. 778; 31 Digest, Replacement, 657, 7593.
- A (5) *Langford Property Co., Ltd. v. Batten*, [1950] 2 All E.R. 1079; [1951] A.C. 223; 31 Digest, Replacement, 645, 7503.
- (6) *Langford Property Co., Ltd. v. Sommerfeld*, [1948] W.N. 287; 92 Sol. Jo. 501; 31 Digest, Replacement, 674, 7697.

ACTION for possession.

B The defendant, Luigi Malvermi, was the tenant of premises at 54 Long Acre, London, consisting of a café on the ground floor with a kitchen in the basement and three upper floors. On Oct. 1, 1928, the premises were let by one Arthur Sergeant, as lessor, for a term of fourteen years from Sept. 28, 1928, to Giuseppe Giacomazzi, Severino Berzolla, and Settembrino Berzolla, as tenants, and by the terms of the lease the tenants were permitted to use the premises or part of them as living accommodation. On Apr. 2, 1931, the unexpired portion of the lease was assigned to the defendant and the two Berzollas. The first, second and third floors were then being used as living accommodation. By November, 1940, due to enemy attacks on London, the two Berzollas and their families had left the premises, and on Nov. 14, 1940, the defendant began to live on the first floor. On Sept. 8 and Nov. 1, 1940, the premises were damaged by bombs, and the landlord agreed to abate the rent which had been £300 per annum to £160 per annum. On Sept. 28, 1942, the lease of Sept. 28, 1928, expired by effluxion of time, but the defendant held over at the reduced rent of £160 per annum. In January, 1943, a Miss Tweed purchased the reversion of the lease from Mr. Sergeant, and in February, 1943, on her instructions, Mr. Spagnoletti, an estate agent, opened negotiations with the defendant for a new lease, and, by a letter of Mar. 10, 1943, offered him a term of one year and thereafter a quarterly tenancy—"You to be responsible for payment of all rates, taxes and other outgoings and to keep the property in good tenantable repair, in other words, on the same terms as were contained in the former lease . . ." The lease was executed on May 14, 1943, cl. 10 containing a covenant by the defendant "not to use the premises other than and except as a café and dining room only".

F The lease was assigned by Miss Tweed to the plaintiffs on Nov. 10, 1943, and Mr. Spagnoletti continued to manage the premises as agent for the plaintiffs. The defendant continued in occupation of the premises, and, to the knowledge of the plaintiffs' agents, used the first floor as living accommodation. The agents, however, accepted rent from him until they served on him a notice to quit on June 22, 1951.

G The war damage to the premises consisted in the cracking of two party walls in the front room on the third floor, cracked plaster, bulging and broken ceilings, broken window sashes, and some panes of glass missing.

The rateable values of the premises at various periods during the tenancies were as follows:—On Apr. 6, 1931, the rateable value was increased to £147. On Mar. 7, and Oct. 1, 1941, there were reductions to £132 and then to £117.

H These reductions were made because of the general falling off in trade during the war. On Aug. 3, 1948, the figure was restored to £147. The valuation of premises for rating purposes was transferred to the valuation officer of the Inland Revenue department in 1950 and a proposal was put forward that the rateable value of the premises should be reduced owing to the effect of war damage. As a result the rateable value of the premises was reduced later in the year to £96, this being the first assessment which had taken into consideration the war damage to the premises.

M. R. Hoare for the plaintiffs.

Wilson, Q.C., and *S. N. Bernstein* for the defendant.

McNAIR, J.: This case raises the following questions. First: Does cl. 10 of the tenancy agreement, which contains a covenant by the tenant "not to use the premises other than and except as a café and dining room only", have the result that the premises comprised in the agreement were not let as a separate dwelling-house within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920? Secondly: If so, have the plaintiffs, by accepting rent from the defendant with knowledge that he was using part of the premises for the purpose of living accommodation, assented and agreed to such user so as, in effect, to convert the tenancy into a new contract for the letting of a separate dwelling-house, having regard to the fact that s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, provides that the application of the principal Acts by virtue of this section to any dwelling-house

"shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . ."?

Thirdly: If the answer to the first question—the question of construction—be in the affirmative, and the answer to the second question—that as to the assent to the user of the house as a dwelling-house—is in the negative, the defendant claims that the tenancy agreement should be rectified so that on its true construction as rectified it would contain no prohibition against the defendant occupying the premises in part at least as a dwelling-house. Fourthly: If the tenancy agreement, either by reason of the plaintiffs' acceptance of the defendant's user of part of the premises for the purpose of living accommodation or by reason of the tenancy agreement being rectified, is to be treated as a letting of a separate dwelling-house, was the rateable value of the premises at the appropriate date less than £100 so that the Rent Acts would be applied by virtue of s. 3 of the Act of 1939? The answer to the last question depends in turn on two issues of fact: (a) Had the premises, by virtue of the damage they received by enemy action during the war, changed their identity so as to be different from the premises bearing the same description in the relevant valuation list, which, on Apr. 6, 1939 (the appropriate date for London under s. 3) had a rateable value in excess of £100, and (b) If there was such change of identity after Apr. 6, did the first assessment of the premises after that date, or after the change of identity, show a rateable value below £100 per annum?

[His LORDSHIP stated the facts and continued:] In as much as there is a plea for rectification, the defendant alleging that cl. 10 should be deleted from the tenancy agreement and the tenancy agreement re-written so that on its true construction it permitted the use of the premises as a dwelling-house, it is convenient that I should at this stage state my conclusions on that matter. The defendant, in support of his plea, relies in particular on the letter of Mar. 10, 1943, from Mr. Spagnoletti, in which the offer of the tenancy is made "on the same terms as were contained in the former lease", which, the defendant says, means "on the terms that living in the house was permitted". Looking at that letter purely as a matter of construction, I have very grave doubts whether Mr. Spagnoletti ever had that intention in mind at that time. He was directing his mind more to summarising the lease generally and pointing out two particular matters of variation which had been negotiated, but, in my judgment, on the evidence it is plain that no case for rectification can be made out. I bear in mind the classic statement of the matter in the judgment of SIMONDS, J., in *Crane v. Hegeman-Harris Co., Inc.* (1). I need not read it in detail, but I point out that in any case it is extremely difficult to get rectification where the matter has been dealt with through professional advisers, as in this case. The matter, however, does not rest there, because on the evidence it is quite

clear that Mr. Hawkins, the solicitor who prepared the draft agreement, stated that cl. 10 was inserted by him deliberately to secure that the premises would be used for business purposes, and so be outside the protection of the Rent Acts, in view of the lessors' desire to resume possession of No. 54 at such time as suited their re-building programme. The defendant, on the other hand, left the whole matter in the hands of his solicitors, whom he trusted implicitly, and who, as stated above, accepted the draft tenancy agreement, with this cl. 10 in it, without objection. Whether or not the lessors' solicitor was right in his view of the law that cl. 10 would keep the letting outside the Rent Restrictions Acts is immaterial for present purposes. Viewing the evidence as a whole, I have no hesitation in saying that the defendant's claim for rectification is not made out.

Under the tenancy agreement of May, 1943, the defendant continued in occupation of the whole of the building. I am satisfied that Mr. Spagnoletti, who was managing the property, first for Miss Tweed and subsequently for the plaintiffs, knew that the defendant was living on the premises, and accepted the rent from him with this knowledge, though he told me—and I accept this—he was not shown a copy of the tenancy agreement, and had not in mind this cl. 10 restricting the user. In 1947, at the instance of the plaintiffs, Mr. Spagnoletti attempted unsuccessfully to persuade the defendant to leave the premises and give up possession, and on this occasion he reported to Col. Viney, a director of the plaintiff company, that the defendant was living on the premises and was unwilling to give them up as he had nowhere to go. Notwithstanding this, the plaintiffs continued to accept rent from the defendant until the notice to quit was given on June 22, 1951.

The first of the four points which, I stated in opening, were raised by this case related to the question of construction, namely, whether the effect of cl. 10 of the tenancy agreement was to restrict the use of the premises as a whole to their use as a coffee room and dining room only. Counsel for the defendant has urged that, if cl. 10 is given that construction, it is inconsistent with cl. 12, which contemplates that, with the landlord's permission, part of the premises might be sub-let, and, on the facts, he says that the only division that could be made would be between the business premises and the living accommodation. He has also urged that it is inconsistent with the description of the parcels as "the shop, messuage or dwelling-house". For my part, I see no reason for construing this clause otherwise than according to its express language, namely, that it contains a covenant by the tenant "not to use the premises"—which are the premises as a whole—"other than and except as a coffee and dining room only". The construction which the defendant contends for involves reading into cl. 10 words which are not there, namely, "in so far as it is used for business purposes". I think, accordingly, that on its true construction this lease did provide for the limited user of the whole of the premises merely for coffee and dining room purposes and did not permit that any part of the premises should be used as a dwelling-house.

Having already early in my judgment stated that I did not feel that any case for rectification had been made out, the next question is whether, by their conduct since 1943, the landlords can be taken to have assented to the use of these premises as a dwelling-house, or part of them, so that there is in effect a new contract permitting such use. The guiding case on this kind of topic is *Wolfe v. Hogan* (2), and the passages from which I get guidance are to be found in the judgments of EVERSLED, L.J., and DENNING, L.J. EVERSLED, L.J., said ([1949] 1 All E.R. 574):

"Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that, if a tenant does change the user and creates a dwelling-house out of what was formerly a shop, and if that fact is fully known to and accepted by the other party to the contract

(whether or not there is a prohibition), the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed."

DENNING, L.J., said (*ibid.*, 575):

"Indeed, in the case of a continuing breach the acceptance of rent after knowledge is only a bar to a claim for forfeiture if it goes on for so long or is accepted in such circumstances that it can be inferred that the landlord has not merely waived the breach but has also affirmatively consented to the tenant continuing to use the premises as he has done . . ."

The learned lord justice continues with a warning against paying too much attention to the mere acceptance of rent. I am quite satisfied that the landlords for a considerable time before they gave the notice to quit knew perfectly well that their tenant was continuing to live in these premises in order that he might be able to run his café business, that they were content to accept that position, and that, when they continued to allow him to stay there after, in 1947, they had tried unsuccessfully to persuade him to leave, they must be taken to have assented to his using the premises as a dwelling-house.

Accordingly, when I approach the fourth question which I stated, it is on the basis that the tenancy agreement has, by the landlord's action, become a tenancy agreement for a dwelling-house. That being the factual position, one has to consider whether there had been at Apr. 6, 1949, such a change of identity in the premises that one can say that the appropriate date for the purposes of s. 3 of the Act of 1939 is not Apr. 6, 1939, but is some later date after the war when the identity was changed. I have been referred to a number of cases on this question of change of identity of a house, by reason either of structural change or of damage. The question sometimes arises in connection with the apportionment of the standard rent, which is not quite the same problem as I have to consider here, although it may well be that the principles are the same. I think the only case to which I have been referred where the critical question has been: What is the date of the first assessment after the change of identity? is *Eyre v. Haynes* (3), where the Court of Appeal (SCOTT, MACKINNON and TUCKER, L.JJ.) dismissed an appeal from the county court judge who had held that on the facts before him the premises which had been damaged by enemy action had not changed their identity. It appears from that report that before the war the house was rated at £113 per annum, and was, therefore, outside the Act, but on Mar. 8, 1943, the tenant made a new agreement with the landlord at a reduced rent, and in August of that year the rateable value was reduced to £76 per annum, which, if it is the appropriate rateable value for the purposes of the Rent Acts, would make the Acts applicable to that tenancy. The Court of Appeal refused to disturb the finding of fact by the learned judge that the damage was not enough to prevent the house remaining the same house as before the damage.

I need not go through the cases in detail to which I have been referred, such as *R. v. Sidmouth Rent Tribunal. Ex p. Sellek* (4), *Langford Property Co., Ltd. v. Batten* (5), and *Langford Property Co., Ltd. v. Sommerfeld* (6), those being cases where the primary question at least was the apportionment of the standard rent. It is quite clear that the principle one has to apply is that it is not sufficient that there has been serious damage to a house; the facts must be such that one can say that in substance the house under consideration has ceased to be the same house as that with which it is being compared. Identity may be changed, of course, although the four walls and the roof still stand, by reason of conversion of the interior of the premises into flats or matters of that kind. Again, identity may be changed by the addition of some new structure to the house, such as a garage. But I have been referred to no case in which it has been held that the mere fact that the premises have become

damaged by enemy action, even though seriously damaged, is sufficient in itself to cause this notional change of identity. The description of the premises given by a surveyor who made a survey in May, 1943, does not, to my mind, indicate anything at all approaching a change of identity. The most serious damage there referred to is the cracking of two party walls close to the front wall on the third floor in the front room. In the other rooms the plaster is cracked, the ceilings are bulging and broken, and there are a few instances of broken window sashes and three or four panes of glass missing. If it is to be said that every house in London that received damage of that nature by enemy action during the war changed its identity or ceased to be the same house as it was before, that would be a conclusion which, in my judgment, it would be quite unreasonable to come to. I am satisfied that the effect of the damage to this building, which was, undoubtedly, substantial, was sufficient to make the second and third floors unusable and uninhabitable by any reasonable standards until they were repaired, though I am not saying that their state was not such that many people in May, 1943, might have been glad to have the shelter afforded by them. The fact that the upper floors were not used was, as I see the position, primarily because the defendant did not desire to use them. He had a perfect right under his lease to use them, although it may be that, if he had used the upper floors, the landlords might then have had to consider whether the rent should be reviewed. The conclusion I have come to shortly is that the defendant has not established that there was any change of identity.

That strictly renders it irrelevant for me to consider the question of the change in the rateable value, but, if it be material, it is sufficient for me to say that, first, as a matter of law, I think that when the court has to find the rateable value of the house for the purposes of these Acts, it is confined to looking at the rateable value as shown in the valuation list, and is not at liberty to speculate whether that valuation was right. Parliament has made the rateable value as shown in the valuation list the criterion. Secondly, I think it is quite clear that the first assessment of these premises after the war or after the new tenancy was created in May, 1943, was the assessment in August, 1948, when the rateable value was restored to the same figure as it was at before the war, and that, though it is true that the first assessment after the war which took account of the war damaged condition was that made in May, 1950, that is not to say that the assessment made in August, 1948, was not an assessment of the rateable value of the building at that time even though account was not then taken of its physical condition. Therefore, if it had been proved that there had been a change of identity, and, accordingly, it had been necessary to consider the date of the first assessment after that change of identity, I would have been forced to the conclusion that the relevant assessment was that of August, 1948. It follows that, in my judgment, the plaintiffs are entitled to possession.

Judgment for the plaintiffs.

Solicitors: *Denton, Hall & Burgin* (for the plaintiffs); *Stanley S. Levene* (for the defendant).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

JOHN HUDSON & CO., LTD. v. KIRKNESS (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Upjohn, J.), April 28, 29, 1953.]

Income Tax—Deduction against profits—Wear and tear—Balancing charge—Wagons of coal merchants—Vesting in British Transport Commission—"Sale"—Income Tax Act, 1945 (c. 32), s. 17 (1)—Transport Act, 1947 (c. 49), s. 29, s. 30 (1).

On Jan. 1, 1948, railway wagons which until that date had been owned by the taxpayers and had been requisitioned by the Minister of Transport under the Defence (General) Regulations, 1939, reg. 53, vested in the British Transport Commission under the Transport Act, 1947, s. 29. Under s. 30 of the Act, the commission became liable to pay compensation in respect of the wagons to the taxpayers, the compensation being determined "by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI to" the Act. The amount of compensation was substantially higher than the written-down value of the wagons for income tax purposes as appearing in the taxpayers' books. The taxpayers had received allowances under r. 6 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and an assessment was made on the taxpayers under the Income Tax Act, 1945, s. 17 (1), in order to give effect to a balancing charge in respect of a sum equal to the amount of the said allowances.

HELD: the transfer of the wagons under s. 29 of the Act of 1947 was not a sale at common law, and, having regard to the method of determining compensation under s. 30, was not a compulsory purchase but a compulsory acquisition and transfer, and, therefore, the wagons were not machinery or plant which had been "sold" within the meaning of s. 17 (1) (a) of the Act of 1945, and no balancing charge was required to be made on the taxpayers under that sub-section.

FOR THE INCOME TAX ACT, 1945, s. 17 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 629; and FOR THE TRANSPORT ACT, 1947, s. 29, see *ibid.*, Vol. 19, p. 1055.

Cases referred to:

- (1) *North Central Wagon & Finance Co., Ltd. v. Fifield (Inspector of Taxes)*, [1953] 1 All E.R. 1009.
- (2) *Great Western Ry. Co. v. Inland Revenue Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 39 Digest 280, 646.
- (3) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; 30 Digest, Replacement, 234, 816.
- (4) *Inland Revenue Comrs. v. Dowdall O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401.
- (5) *Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Assn., Ltd.*, [1946] 1 All E.R. 637; 175 L.T. 22; 27 Tax Cas. 331; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayers were coal merchants, who owned railway wagons used for the transport of coal in which they and subsidiary companies were dealing. They had not at any time manufactured or dealt in wagons or before 1939 hired out wagons. In pursuance of a notice (S.R. & O., 1939, No. 1085) of Sept. 3, 1939, the Minister of Transport requisitioned the wagons under the Defence (General) Regulations, 1939, reg. 53. In June, 1940, an agreement was reached as to the terms of the requisition to which the taxpayers and other wagon owners were parties. Under the agreement the government undertook the repair and maintenance of the wagons at their own cost, but not replacement.

A They were, therefore, not responsible for depreciation and wear and tear, the burden of wear and tear being conceded to fall on the taxpayers. During the period of requisition the taxpayers did not carry on a trade of hiring out coal wagons separate from the trade of coal merchants. On Jan. 1, 1948, the property in the requisitioned wagons was transferred to and vested in the British Transport Commission under the Transport Act, 1947, s. 29, and the taxpayers in due course received compensation in respect of them under s. 30 of that Act.

B The amount of the compensation was substantially higher than the written-down value of the wagons for income tax purposes as appeared in the taxpayers' books and the written-down value was substantially lower than the original cost of the wagons. The taxpayers were assessed for 1948-49 under Case I of sched. D to the Income Tax Act, 1918, in the sum of £29,021, to give effect under the Income Tax Act, 1945, s. 17 (1), to a balancing charge of that amount,

C on a sum representing, except for £963 referable to matters not in dispute, the excess of the original cost over the written-down value. The taxpayers appealed. They contended, inter alia, that the operation by which the wagons vested compulsorily in the British Transport Commission under s. 29 of the Act of 1947 did not fall within any of the events specified in s. 17 (1) of the Act of 1945, and, in particular, that the wagons were not "sold" within the meaning of para. (a) of that sub-section and, therefore, no balancing charge could be raised in respect thereof. The Crown contended that the transaction was a sale within the meaning of para. (a) of the sub-section and that a balancing charge, therefore, was required to be made. The commissioners held that the transaction was a sale and that the balancing charge was properly made and they dismissed the appeal. The taxpayers appealed.

D

Grant, Q.C., Senter, Q.C., and A. P. L. Barber for the taxpayers.

Cyril King, Q.C., and Sir Reginald Hills for the Crown.

E UPJOHN, J.: This is an appeal by the taxpayers against an assessment made on them for 1948-49 under Case I of sched. D to the Income Tax Act, 1918, in the sum of £29,021, in order to give effect to a balancing charge on them under the Income Tax Act, 1945, s. 17 (1). The taxpayers are coal merchants, and in 1947 they owned in connection with their business 663 railway wagons, which had been under requisition to the Ministry of Transport from 1939. That fact is relevant only in that it brings the matter within the Transport Act, 1947, s. 29, referred to later, and in connection with a second point which depends

F on the Finance Act, 1936, s. 22 (2), which the taxpayers are precluded from arguing in this court by reason of the recent decision of the Court of Appeal in *North Central Wagon & Finance Co., Ltd. v. Fifield (Inspector of Taxes)* (1), but which they formally reserve for argument should this case go to a higher court.

G The point I have to consider is purely one of the construction of certain Acts. Under the Transport Act, 1947, s. 29, on Jan. 1, 1948, the property in the taxpayers' railway wagons was transferred to and vested in the British Transport Commission. It is argued by the Crown, and was so held by the Special Commissioners, that that transfer was a sale for the purposes of making a balancing charge under the provisions of the Income Tax Act, 1945, s. 17 (1). The general object of that section appears to be this. If machinery or plant

H has been depreciated in the taxpayers' books and the appropriate income tax allowances have been made, and the machinery or plant is subsequently sold at a higher price than its depreciated price, then the excess of the one over the other is subject to a balancing charge on which income tax can be levied. On the other hand, if the price for which the machinery or plant is disposed of is less than its written-down price, an allowance is to be made to the taxpayers. Section 17 (1) of the Act of 1945 provides:

"Subject to the provisions of this section, where, on or after the appointed

day [Apr. 6, 1946*] any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not; or (b) the machinery or plant, whether still in use or not, ceases to belong to the person carrying on the trade by reason of the coming to an end of a foreign concession; or (c) the machinery or plant is destroyed; or (d) the machinery or plant is put out of use as being worn out or obsolete or otherwise useless or no longer required, and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as ‘a balancing allowance’ or ‘a balancing charge’) shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs.”

By sub-s. (3):

“If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys.”

The Special Commissioners seem to have thought that that reference to “compensation moneys” was a reference to a sale, and that was an element, I think, which induced them to come to the conclusion that the transfer under the Act of 1947 was a sale. But the definition of “sale, insurance, salvage or compensation moneys” in s. 68 (1) shows that the words “compensation moneys” are inserted to deal with a case in which a foreign concession has come to an end, or in which there has been some loss to the plant and compensation by way of damages or otherwise is paid. Therefore, those words do not assist in one way or the other.

It is common ground that the sole point I have to consider is whether the transfer to the Transport Commission falls within s. 17 (1) (a), i.e., whether there has been a sale. The Transport Act, 1947, s. 29, dealing with railway wagons, provides:

“Where, immediately before the date of transfer, any privately-owned railway wagon is under requisition by virtue of an exercise of the powers in that behalf conferred by reg. 53 of the Defence (General) Regulations, 1939—(a) the property in that wagon shall vest in the commission on the date of transfer, free from any mortgage or other like incumbrance, and the requisition shall then cease; and (b) the Crown shall not be liable for any compensation under the Compensation (Defence) Act, 1939, or otherwise in respect of any damage to the wagon occurring during the period of requisition”.

By s. 30 (1):

“Where under the last preceding section the property in any wagon vests in the commission, the commission shall, subject to the provisions of the three next succeeding sub-sections, pay as compensation in respect thereof an amount determined, by reference to the type of wagon and the year in which the wagon was first built, in accordance with the table set out in sched. VI to this Act.”

By sub-s. (6):

“No compensation, other than that payable under this section, shall be

* See Finance (No. 2) Act, 1945, s. 18.

payable in respect of the vesting, under the last preceding section, of the property in any wagon in the commission."

By s. 31 (1):

A "Subject to the provisions of this section, the compensation payable by the commission in respect of a privately-owned wagon vesting in them on the date of transfer shall be paid to the person who, immediately before the date of transfer, was the owner of the wagon."

By s. 32 (1), dealing with the payment of compensation:

B "The amount payable by way of compensation in respect of a wagon the property in which vests in the commission on the date of transfer shall be satisfied in the manner provided by Part VI of this Act by the issue to the person entitled thereto of British transport stock."

C Schedule VI makes provision for compensation for the acquisition of privately-owned wagons, including one, undoubtedly, very sensible provision when many thousands of railway wagons are being acquired. The compensation depends on the principle of a sliding scale governed entirely by the year in which the wagon was built, and in accordance with its specification, i.e., its weight and its tare. Thus, if the wagon was built in 1946 and was a ten-ton wagon, the amount to be paid by way of compensation was £248. It did not matter whether the wagon was in an excellent or a very bad state of repair.

D The taxpayers contended that that acquisition of railway wagons by the British Transport Commission cannot properly be described as "a sale" for the purposes of s. 17 (1). A sale at common law is defined in BENJAMIN'S SALE OF PERSONAL PROPERTY, 2nd ed., (prepared by the author himself) p. 1, as follows:

E "By the common law a sale of personal property was usually termed 'a bargain and sale of goods'. It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz.: (1) parties competent to contract: (2) mutual assent: (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised. That it requires parties competent to contract and mutual assent in order to effect a sale is manifest from the general principles which govern all contracts."

F The Crown has submitted that a transfer of property and payment of a price are sufficient to constitute a sale, and that mutual assent or consensus ad idem is not necessary. It is pointed out that a sale may be wider and have more far-reaching effects than a contract of sale. A sale itself, it is said, need not have mutual assent. The Crown concedes that there could not properly be said to be any mutual assent in the transfer in 1947 or 1948, and it did not attempt to support a finding by the commissioners that everyone must be presumed to have assented to the Act of Parliament. I cannot accept this contention of the Crown. A sale is really a shorthand way of referring to a bargain and sale, and at common law there cannot be a sale without a bargain. It follows that mutual assent is necessary. Therefore, it seems to me that what happened here cannot possibly be described as a sale at common law.

H However, that does not necessarily end the matter in favour of the taxpayers because the Crown says: "In any event here is a compulsory purchase", and that connotes a compulsory sale, which is a sale within s. 17 (1) of the Act of 1945. The taxpayers do not concede that a compulsory sale would necessarily be within the Act, but submit that, when the Transport Act is properly construed, the transaction cannot be even described as a compulsory purchase or a compulsory sale. The vesting of compulsory purchase powers in various people is a familiar part of our law. The Lands Clauses Consolidation Act, 1845,

an early and typical illustration, contains elaborate provisions for the ascertainment of price, for the matter to be referred to a jury where it has been impossible to agree, for payment in proper cases of the purchase money into court, for execution of conveyances, and, if necessary, for the execution of a deed-poll by the purchasing company where the vendor refuses or is unable to execute a deed. The Acquisition of Land (Authorisation Procedure) Act, 1946, also contains elaborate provisions for the vesting of property and for the ascertainment of the price by a panel of arbitrators. In the Transport Act, 1947, itself, s. 8 provides:

"The Minister may authorise the commission to purchase compulsorily any land which they require for any purpose connected with the discharge of their functions, and the Acquisition of Land (Authorisation Procedure) Act, 1946 (except s. 2 thereof) shall apply as if the commission were a local authority within the meaning of that Act and as if this Act had been in force immediately before the commencement of that Act."

In my judgment, the question is really one of construction of the Transport Act, 1947, i.e., whether the provisions of s. 29 and s. 30 can properly be described as effecting a compulsory purchase and a compulsory sale. Counsel for the Crown referred me to *Great Western Ry. Co. v. Inland Revenue Comrs.* (2), a stamp duty case, and to *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (3). But I do not find in either of those cases any principles laid down as to the proper canons of construction to apply in this case, and, therefore, I forbear to mention them in greater detail. In s. 29 of the Act of 1947 there is a vesting, and by s. 30 compensation, not a price, is to be paid, and that compensation is to be a fixed sum according to the age and type of wagon and has no relation to the actual worth of the wagon. In my judgment, it is not a proper use of legal language to describe such a transaction as a compulsory purchase. No doubt, Parliament could have dealt with the matter by way of compulsory purchase, but, in my opinion, it has not done so. It has dealt with the matter by way of compulsory acquisition and compulsory transfer of the property in the wagons to the commission and the payment of compensation. That cannot, in my judgment, properly be described as a compulsory purchase and a compulsory sale. It is a compulsory acquisition.

One further point taken by the Crown depended on the Finance Act, 1948, s. 34 and s. 35. It is suggested that those two sections show that Parliament thought that the foregoing provisions in the Transport Act, 1947, constituted a sale for the purposes of the Income Tax Act, 1945, s. 17 (1). In so far as it is relevant at all, s. 34 appears to me to support the case of the taxpayers rather than the case of the Crown. Section 35 does seem to proceed on the basis that a balancing charge under s. 17 would arise on a transfer of property to the British Transport Commission, but, in my judgment, that is not an element which I can properly take into account. The fact that Parliament may have proceeded on an erroneous assumption as to the effect of a taxing Act is no ground for construing that Act in a manner adverse to the taxpayer. That is well shown by *Inland Revenue Comrs. v. Dowdall O'Mahoney & Co., Ltd.* (4), in which LORD RADCLIFFE said ([1952] 1 All E.R. 544):

"What it comes to is this. Parliament has not made any enactment that requires or authorises the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be said is that it is fairly certain that those who framed the Finance Act, 1940, s. 30, believed that such allowances ought to be given or were in fact being given (which is not always quite the same thing in this field). But if that is all that can be said it is, with all respect to the Court of Appeal, a misuse of words to say that the Law Courts ought to give effect to the 'intention' of Parliament that overseas excess profits tax should be allowed. The beliefs or assumptions of those who frame Acts

of Parliament cannot make the law. Section 30 will be just as much effective in those cases when it does operate as it would be if overseas excess profits tax were not, in general, an allowable deduction, for wherever it operates it operates under the authority given by Parliament in that Act and not otherwise. This is not the first occasion on which a somewhat similar problem has been presented to your Lordships' House, and, in face of the abiding complexity of income tax legislation, I do not suppose that it will be the last. But if the House felt no difficulty in *Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Asscn., Ltd.* (5) in disregarding the plain, though mistaken, assumption of the legislature as to the prevailing law, I do not think that your Lordships need feel even as much embarrassment in the present case."

B That seems to me abundantly to cover the argument that was addressed to me on the Finance Act, 1948, s. 35.

In my judgment, for the reasons I have given, there has been no sale in this case for the purposes of the Income Tax Act, 1945, s. 17 (1) (a). Accordingly, this appeal must be allowed.

Appeal allowed.

C Solicitors: *Willis & Willis*, agents for *Taynton & Son*, Gloucester (for the taxpayers); *Solicitor of Inland Revenue*.

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

D

CORBETT v. CORBETT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 30, May 1, 4, 1953.]

E

Divorce—Appeal—Court of Appeal—Fresh evidence—Evidence obtained after trial—R.S.C., Ord. 58, r. 4.

Court of Appeal—Fresh evidence—Matrimonial cause—R.S.C., Ord. 58, r. 4. Divorce—Custody—Evidence not given at hearing of divorce suit—Admissibility.

F

The husband petitioned for dissolution of the marriage on the ground of the wife's adultery. The wife denied the alleged adultery, but pleaded, in the alternative, that, if she had committed adultery, her husband's conduct had conduced to it, and she cross-prayed for a decree on the ground of the husband's cruelty. The wife filed a discretion statement, admitting adultery with one man. On Oct. 31, 1952, the husband's petition was dismissed and the wife was granted a decree on her cross-prayer, the court's discretion being exercised in her favour. On an appeal by the husband and on a motion for leave to adduce new evidence tending to show that the wife had committed adultery with another man,

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HELD: (i) the general rule that fresh evidence will not be admitted unless either it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available, or that the fresh evidence, if true, would have had or have been likely to have had a determining influence in the court below, is applicable to matrimonial as to other cases, and, therefore, the new evidence would not be admitted, nor a new trial, at which it could be adduced, ordered.

Winter v. Winter ([1942] 2 All E.R. 390), distinguished.

H

(ii) in custody proceedings, however, new evidence should not be excluded merely because it did not form part of the material on which the issues of divorce were determined, for to do so would result in preventing

the court from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions would best serve the interests of the children themselves.

AS TO APPEALS, RE-HEARING AND NEW TRIAL IN DIVORCE CASES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 775-780, paras. 1226-1233; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 592-602, Nos. 5533-5635.

AS TO FURTHER EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 13, p. 758, para. 834; and FOR CASES, see DIGEST, Replacement Vol. 22, pp. 471-477, Nos. 5188-5243. A

Cases referred to:

- (1) *Howarth v. Howarth*, (1884), 9 P.D. 218; 51 L.T. 872; 27 Digest, Replacement, 600, 5612. B
- (2) *Sanders v. Sanders*, (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 32 Digest 458, 1250.
- (3) *Leeder v. Ellis*, [1952] 2 All E.R. 814; [1953] A.C. 52.
- (4) *Prince v. Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 27 Digest, Replacement, 597, 5580.
- (5) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 27 Digest, Replacement, 599, 5604. C
- (6) *Shedden v. Patrick & A.-G.*, (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631; 22 Digest, Replacement, 116, 994.
- (7) *Nash v. Rochford Rural Council*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 22 Digest, Replacement, 471, 5194.
- (8) *Wilkinson v. Wilkinson & Seymour*, (1921), 126 L.T. 29, n.; 27 Digest, Replacement, 428, 3586. D

APPEAL by the husband against a decision of COLLINGWOOD, J., dated Oct. 31, 1952, and MOTION for leave to adduce new oral evidence of the deponents to those affidavits.

The husband presented a petition for divorce on the ground of the wife's adultery with the co-respondent. The wife, by her answer, denied the adultery alleged in the petition, but alleged, in the alternative, that, if she had committed adultery, that adultery had been conducted to by the husband's conduct, and she cross-prayed for divorce on the ground of the husband's cruelty. The wife filed a discretion statement. On Oct. 31, 1952, COLLINGWOOD, J., dismissed the husband's petition, and, exercising his discretion in her favour, granted the wife a decree on her cross-prayer. The husband now appealed and moved for leave to adduce new evidence, tending to show that the wife had committed adultery with another man and that she had committed perjury in her discretion statement. The husband's motion was supported by affidavits of the proposed witnesses, but the Court of Appeal, having read these affidavits de bene esse, considered that the general rule laid down in *Shedden v. Patrick & A.-G.* (6) and other cases had not been satisfied, that is to say, that it had not been shown (i) that the proposed fresh evidence was not available to the husband at the trial or that reasonable diligence would not have made it so available, and (ii) that the proposed fresh evidence, if true, would have had, or would have been likely to have had, a determining influence on the court below. Counsel for the husband, however, submitted that the rule should not be so strictly applied in matrimonial causes. E F G H

Simon, Q.C., and *E. D. Lewis* for the husband.

Sir Charles Doughty, Q.C., and *D. C. Humphreys* for the wife.

SIR RAYMOND EVERSLED, M.R.: Counsel for the husband raised this formidable point, that, since the court has a particular interest in matrimonial causes and in the sanctity of marriage, the general rule is not or should

not, be so strictly applied in matrimonial causes. It is clear that there is no direct authority to that effect. Counsel referred us to a dictum of COTTON, L.J., in *Howarth v. Howarth* (1) and to *Sanders v. Sanders* (2), and also to what was said of the latter case in the Privy Council recently in *Leeder v. Ellis* (3), but I think the most forceful judicial utterance on this matter comes from the decision of this court delivered by myself in *Prince v. Prince* (4). In that case the court had to consider the precise construction of r. 36 (1) of the Matrimonial Causes Rules, 1947, and, in particular, what was the exact significance of the phrase "where no error of the court at the hearing is alleged", and the question was whether the application for a re-hearing under that rule had been rightly rejected by the Divisional Court. We thought that it had. The present matter, therefore, was not directly under consideration, but in the course of the judgment, which involved a historical review of the rule, reference was made to a judgment of LANGTON, J., in *Winter v. Winter* (5). One paragraph of my judgment I think I should read ([1950] 2 All E.R. 380):

"The next reported case on the application of the rule is *Winter v. Winter* (5). In that case the husband asked for a re-hearing of the wife's petition on the ground that the decree which she had obtained by reason of his alleged desertion was against the justice of the case in that it was untrue that he had ever deserted her, and that he now wished to put the real facts before the court. The wife's petition had been duly served on the husband, who had deliberately decided to do nothing to oppose it and had not entered an appearance, so that the petition was undefended and the wife obtained her decree. The Divisional Court ordered a re-hearing, although, as LANGTON, J., said, the application, so far as the husband personally was concerned, had no vestige of merit. The order for re-hearing was made on the specific ground that in matrimonial matters there was always something more to be considered than the mere individual merits of the parties and it was the duty of the court to consider the interests of the State as well as the private interests in such cases."

What counsel for the husband says is that in a case where a party has not appeared to defend, a re-trial may be granted when the respondent comes to the Divisional Court and says: "Although I had my opportunity before and did not take it, now I want to bring evidence before the court to show that what the petitioner said was untrue," and it is illogical that, where the respondent did attend and where there was evidence, he should not be permitted to obtain a second hearing if he can show that there is important new material which he can lay before the court which would have seriously affected the first decision. I am not persuaded that such a conclusion follows from what was said by LANGTON, J., and approved by this court in *Prince v. Prince* (4), and I do not think there is a complete parallel between, on the one hand, the case where a petitioner comes and gives evidence which is not contested so that the judge can do nothing but act on that evidence, and, on the other, the case in which both parties attend and give their evidence and are cross-examined and the judge makes up his mind at the hearing which is the truthful witness. I think that to accede to the broad proposition of counsel for the husband would be to make an exception of the most startling character to the general rule which, let it not be forgotten, is itself founded on public policy, namely, the public interest that there should be an end to litigation. I think, if the view for which counsel for the husband contended was accepted, then in every matrimonial case where one party or the other afterwards found that he could present a better case than he had succeeded in doing in the court below, this court might have no option but either to hear the matter over again or grant a re-trial. That, I think, would plainly be quite contrary to public policy and would not be a proper consideration of the interest of the State.

I do not say that there may not be cases of an exceptional character from which it appears quite plainly that the court has been deceived (and, in particular, deceived as regards the discretion statement) and that an exception should not then be made to the rule which would otherwise be applicable. But, in the first place, I have come to the conclusion that this is not such a case, and, in the second place, the existence of the office of the Queen's Proctor must not be forgotten. In the present case, as I understand from counsel for the husband, the Queen's Proctor, who had been informed of the proposed new evidence, expressed the view that, since the husband was proposing to appeal and to serve this notice of motion, he did not himself intend to intervene. I must not be taken to be criticising the decision made by the Queen's Proctor, but the existence of that office seems to me *prima facie* to cover this sort of case in the interest of the State, and, if there is evidence, albeit evidence that one party or the other could with proper diligence have produced before, and if the Queen's Proctor feels able to show that the decree was obtained on some false evidence, he is there to protect the public interest by his intervention and to see that the process of the court is not abused. *Prima facie*, therefore, the interest of the State will be protected in that way, and for that reason, though there may be exceptions to the general rule, they will, in my judgment, be rare. I need not, however, pursue this matter further, because I have given, I hope, sufficient reasons already for the conclusion which I reached (after, I confess, some doubt and anxiety because of the force of the argument which counsel for the husband presented to us) that this is not a case in which the fresh evidence should be admitted. I have treated the motion throughout my judgment as being a motion to admit fresh evidence now. I think, however, it was properly conceded by the parties or their counsel that, if the fresh evidence ought to be allowed, in the interests of everybody the best course would have been to direct a new trial so that this evidence could then be given and challenged by cross-examination or otherwise, for it would be very difficult in a case of this kind to deal with the evidence piecemeal—indeed, I think it would be impossible. I conclude, therefore, that this motion ought to be refused and that the husband ought not to be allowed now to produce this new evidence, nor should he be entitled to obtain a new trial based on the existence and availability of that new evidence.

BIRKETT, L.J.: I agree. The motion with which we are dealing is for leave to produce and read certain affidavits in addition to the evidence which was given before COLLINGWOOD, J., and for leave to adduce the oral evidence of those witnesses who have made affidavits at the hearing of this appeal. But counsel for the husband made it plain that, in his view, the ultimate thing to be achieved was a new trial based largely on the new evidence which he hoped to be able to produce.

The principles have been enunciated by my Lord, but they are conveniently set out in the *ANNUAL PRACTICE*, 1953, p. 1252:

"It is an invariable rule in all the courts . . . that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

Those were the words of LORD CHELMSFORD, L.C., in *Shedden v. Patrick & A.-G.* (6) (L.R. 1 Sc. & Div. 545), cited by SCRUTTON, L.J., in *Nash v. Rochford Rural Council* (7) ([1917] 1 K.B. 393). Then later (*ibid.*):

"The new evidence is admissible if it would have formed a determining factor in or an important influence on the result . . . A fortiori where it would be conclusive . . . Sed quære if it is admissible if there is only

a reasonable probability that, if it were given, a different decision would be reached . . .”

[HIS LORDSHIP considered the contents of the affidavits and continued:] I say no more than that, so far as this motion is concerned, I am content to put reliance on the first ground, namely, that it is not shown here on behalf of the husband that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured.

At an early stage in this case I asked counsel for the husband why the Queen's Proctor had not intervened. Perhaps I may quote the words of LORD BIRKENHEAD, L.C., when sitting as a divorce judge, when he said in *Wilkinson v. Wilkinson & Seymour* (8) (126 L.T. 29, n.):

“It is the duty of every petitioner in this court to place the facts of his or her case most fully before the court, and the wholesome and well-established rule that on the intervention of the [Queen's] Proctor a decree may be rescinded, if there is a failure to deal with the court with the utmost good faith, is one that is not to be relaxed.”

Therefore, where part of the case (and I think probably the principal part of the case) sought to be made by counsel for the husband was: “Here a decree has been granted to the wife by the exercise of the discretion vested in the learned judge, and that discretion has been wrongly obtained, not merely by concealment, but by deliberate perjury”, I should have thought that it was pre-eminently a matter for the intervention of the Queen's Proctor. But it would appear from what we were told that the Queen's Proctor had said that he was content to leave it to the husband to proceed with this matter himself.

The submission made by counsel for the husband that the invariable rule, to quote the words of LORD CHELMSFORD about the admission of fresh evidence, did not apply in its strictness to matrimonial causes because the State had a peculiar and particular interest in matrimonial causes, has been fully dealt with by my Lord. The rule itself is based on public policy and I know of no authority which says that in matrimonial causes there is to be some particular and special rule as apart from the rules which normally apply.

I do not doubt that the battle between the husband and wife is going to be about the custody of the child of the marriage. All I desire to say is that there was an argument whether on the custody proceedings before the registrar or before the judge, if it appeared that an attempt was made to introduce in the custody proceedings in order to influence the decision many of the facts contained in these affidavits, the registrar or the judge could say: “I cannot deal with this. I must deal with the matter as it came from COLLINGWOOD, J.” All I would desire to say, without making any pronouncement about so difficult a matter, is that the question of the custody of the child will, of course, be in the complete discretion either of the registrar or of the judge, and he will decide what evidence he will hear and what he thinks relevant to the particular issue which he then has to determine. In all the circumstances of the case I think that this motion for the introduction of fresh evidence on the hearing of this appeal in the hope that it might lead to a new trial as a result of the hearing of the appeal ought to be dismissed.

ROMER, L.J.: I agree. It was suggested during the discussion before us that, unless the proposed new evidence could be introduced in the divorce proceedings, the facts which are adumbrated by the affidavits could not be brought to the attention of the court when it deals with an application regarding the custody of the child of the marriage. Some at least of the evidence contained in these affidavits would, if true, be of some relevance in the custody proceedings, and, in my opinion, it should not be excluded merely because it did not form part of the material on which the issues of divorce were determined. To exclude evidence on a custody application on that ground would

result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions will best serve the interests of the children themselves. In its examination of this matter the court is bound to inquire into all relevant circumstances, and a circumstance, if otherwise material, is not to be regarded as irrelevant merely because it was not introduced into the divorce proceedings. I say nothing as to how the registrar or the judge before whom the custody proceedings come should deal with this evidence or to what extent he should admit it or what steps he should take to ascertain whether it is true. All I am saying is that for my part I take the view that it should not be regarded as matter to be excluded from his consideration altogether merely on the ground that it did not form part of the evidence in the divorce proceedings. I agree with the result which my brethren have indicated.

SIR RAYMOND EVERSLED, M.R.: I also agree with what has been said by my brethren with regard to the admissibility of new evidence in custody proceedings.

Application refused.

Solicitors: *Blakeney & Marsden Popple*, agents for *Cyril E. Wheeler*, Brighton (for the husband); *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Spalding (for the wife).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re CAMPBELL COVERINGS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), May 5, 1953.]

Company—Winding-up—Voluntary winding-up—Public examination of officers—Power of court to order—Necessity for “further report”—Companies Act, 1948 (c. 38), s. 236 (3), s. 270 (1), s. 307 (1), s. 334 (3).

In the voluntary winding-up of a limited company, the liquidator made a report to the Director of Public Prosecutions under the Companies Act, 1948, s. 334 (2), who referred the matter to the Board of Trade. The board, after investigation, applied to the court for, and obtained, an order under s. 334 (3) of the Act of 1948 conferring on the official receiver “all such powers of investigating the affairs of the company” as were provided by the said Act in the case of a winding-up by the court. The official receiver applied under s. 334 (3) for an order directing the public examination of a former director of the company.

HELD: although it was necessary in accordance with s. 270 (1) of the Act of 1948 before any such order could be made in a compulsory winding-up that a further report should be made to the court by the official receiver under s. 236 (2) of that Act, that requirement did not obtain in the case of a voluntary winding-up because the steps involved could arise only in a compulsory winding-up, but, in any event, the language of s. 334 (3), which was apt to enable powers of investigation to be conferred such as were vested in the official receiver in a compulsory winding-up by s. 235, did not contemplate such an order, and, therefore, the application was misconceived.

Per **SIR RAYMOND EVERSLED, M.R.:** If it should be thought appropriate in this case to make an application under s. 307 (1) of the Act of 1948 for the public examination of the former director, it would not be necessary for there to have been a “further report” before the jurisdiction under s. 270 (1) could arise, but similar information to that ordinarily contained in such a report would be required by the court.

AS TO PROSECUTION OF DELINQUENT DIRECTORS IN A VOLUNTARY WINDING-UP, see HALSBURY, 1949 Edn., Vol. 5, pp. 849, 850, paras. 1421-1424.

Case referred to:

- (1) *Re Great Kruger Gold Mining Co. Ex p. Barnard*, [1892] 3 Ch. 307; 62 L.J.Ch. 22; 67 L.T. 770; 10 Digest 870, 5892.

A EX PARTE MOTION by an assistant official receiver in a voluntary winding-up of a company under the Companies Act, 1948, s. 334 (3), for an order that a former director of the company be publicly examined.

B On Feb. 5, 1953, pursuant to s. 334 (3) of the Act of 1948 all powers of investigation into the affairs of Campbell Coverings, Ltd., as were provided by the said Act in the case of a winding-up by the court were conferred on George Frederick Morris, an assistant official receiver attached to the High Court of Justice, and it was ordered that the said official receiver or the liquidator or any creditor or contributory of the company be at liberty to apply to the court in these proceedings to determine any matter arising in the voluntary winding-up of the company. The assistant official receiver took out a summons in these proceedings for an order

C “that his report made to the court pursuant to s. 236 (2) of the Act of 1948, and dated Mar. 18, 1953, be considered and such order made thereon as the court may deem just.”

D On Mar. 30, 1953, the summons came before ROXBURGH, J., and on behalf of the official receiver an order for the public examination of a former director of the company was sought. ROXBURGH, J., refused the application on the ground that he had no jurisdiction to make such an order in the voluntary winding-up of a company. The assistant official receiver now applied to the Court of Appeal *ex parte* for a similar order.

Denys B. Buckley for the official receiver.

E SIR RAYMOND EVERSLED, M.R.: This is an application which comes before the court under R.S.C., Ord. 58, r. 10, which reads:

“Where an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* . . .”,

F within the time therein stated. The matter concerns a company known as Campbell Coverings, Ltd., which is now in voluntary liquidation, the winding-up resolution having been passed in June, 1950. The affairs of the company have caused some concern to those who are involved in the liquidation, and in July, 1952, the liquidator made a report to the Director of Public Prosecutions in accordance with the Companies Act, 1948, s. 334 (2), which provides:

G “If it appears to the liquidator in the course of a voluntary winding-up that any past or present officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter, in the case of a winding-up in England, to the Director of Public Prosecutions . . . and shall furnish to the director . . . such information and give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator

H and relating to the matter in question, as [he] may require.”

Following on that report, an order was made on Feb. 5, 1953, on the application of the Board of Trade under s. 334 (3). The substantive part of the order is:

“It is ordered that pursuant to s. 334 (3) of the [Companies Act, 1948] all such powers of investigating the affairs of the said company as are provided by the said Act in the case of a winding-up by the court be conferred upon George Frederick Morris of Board of Trade, Companies (Winding-up)

Department, Inveresk House, Aldwych, in the county of London, an assistant official receiver attached to the High Court of Justice, And it is ordered that the applicant or the liquidator or any creditor or contributory of the said company be at liberty to apply to the court in these proceedings to determine any matter arising in the voluntary winding-up of the said company as there may be occasion."

That form of order followed in its language s. 334 (3), which is referred to therein, A and which is in these terms:

"Where any report is made under [s. 334 (2)] to the Director of Public Prosecutions . . . he may, if he thinks fit, refer the matter to the Board of Trade for further inquiry, and the board shall thereupon investigate the matter and may if they think it expedient, apply to the court for an order conferring on the board or any person designated by the board for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding-up by the court."

The matter which has given rise to the order and to the present application is this. According to the investigations so far made it is said that one of the former directors of the company has been guilty of malpractices in relation to the company's affairs, and what is now particularly desired is that that individual should be directed to attend the court for a public examination. Although, therefore, the order made on Feb. 5, 1953, in terms followed the language of s. 334 (3), counsel for the assistant official receiver seeks now a further order under the same subsection having the effect that the director referred to should be required to attend for a public examination. The form of the application for that purpose is not entirely happy in its language, for it asks for an order that the report which the assistant official receiver made to the court pursuant to s. 236 (2) of the Act, and dated Mar. 18, 1953, "be considered and such order made thereon as the court may deem just". In fact the assistant official receiver made no report pursuant to s. 236 (2). Indeed, it has been the main point of the argument which counsel has presented to us that no report under that sub-section is required or could be made. ROXBURGH, J., thought that such a report was required and was, indeed, a condition precedent to the making of any order for a public examination. Delivering his judgment in open court, ROXBURGH, J., said, in effect, that orders directing the public examination of an officer or ex-officer of a company, although made in a voluntary winding-up, require as a condition precedent to the court's jurisdiction the existence of what is called a "further" report in s. 236 (2) and (3), that further report in turn requiring the existence of a preliminary report under s. 236 (1). The main contention of counsel for the assistant official receiver has been that so to hold makes nonsense of s. 334 (3), for the reason that since, in a voluntary winding-up, neither the preliminary report nor any further report such as is mentioned in s. 236 could have come into existence, s. 334 (3) becomes, on the judge's view, a dead letter. With all respect to the learned judge, I agree with counsel that the requirement of a further report as specified in s. 236 (2) ought not to be regarded as a condition precedent to an order under s. 334 (3). The legislature is saying that certain powers may be exercised in a voluntary winding-up, those powers being powers which in a compulsory winding-up are exercisable only if certain things have been done which only can be done in a compulsory winding-up.

I must now refer, though briefly, to the earlier sections of the Act of 1948. Section 235 deals with a winding-up by the court, and provides for a statement of the company's affairs to be submitted to the official receiver. Thus, s. 235 (1) provides that, unless the court dispenses therewith, there is to be made out "a statement as to the affairs of the company . . . verified by affidavit, and

showing" particulars of the company's assets, debts, liabilities, etc., and also giving "such further or other information as may be prescribed or as the official receiver may require." Section 235 (2) states who are to submit and verify the statement, and s. 235 (3) specifies the time within which it must be submitted. Section 235 (4) states that:

A "Any person making or concurring in making the statement and affidavit required by this section shall be allowed . . . out of the assets of the company . . ."

B his costs and expenses incurred in the matter. Section 235 (5) provides that if any person, without reasonable excuse, makes default in complying with the requirements of the section, he is liable to a fine, and s. 235 (6) says that a person who states in writing that he is a creditor or contributory shall be entitled as therein provided to inspect the statement. Section 235 (7) provides:

"Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of court and shall, on the application of the liquidator or of the official receiver, be punishable accordingly."

C It will be seen, therefore, that all these powers for getting information depend on there being a winding-up by the court. Section 236 (1) provides that, where there has been such a statement (and similarly in cases where the statement has been dispensed with), the official receiver is to make a preliminary report to the court in which he is to state, among other things, whether he thinks further inquiry is desirable in regard to the promotion, formation, etc., of the company: see s. 236 (1) (c). The language of s. 236 (2) is:

D "The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by an officer of the company in relation to the company since the formation thereof . . ."

E In that event, i.e., when a further report is made, the court shall have the further powers provided (inter alia) by s. 270 of the Act, which section empowers the court to order public examination: see s. 236 (3).

F Before I come to s. 270, however, I should mention that s. 245 gives a liquidator in a compulsory winding-up certain administrative powers. Section 266 empowers the court to order production of books for inspection by creditors or contributories, and s. 268 makes provision for the private examination of any person suspected of having in his possession any property of the company, and so forth. In a private examination, it may be observed, persons required to be examined may object to answer questions on the ground that they may thereby be incriminated and the answers are not available for use in a criminal proceeding. So I come to s. 270, which was foreshadowed in s. 236 (3). Section 270 (1) provides:

G "Where an order has been made in England for winding-up a company by the court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed . . . the court may, after consideration of the report, direct that that person or officer shall attend before the court on a day appointed by the court for that purpose and be publicly examined . . ."

H Section 270 (2) states that the official receiver shall take part in the examination, and s. 270 (3) entitles the liquidator, where the official receiver is not the liquidator, and any creditor or contributory also to take part in the public examination. It has been decided by this court, e.g., in *Re Great Kruger Gold Mining Co. Ex p. Barnard* (1), that in a compulsory winding-up, in accordance with the Companies (Winding-up) Act, 1890, s. 8 (3), which was then in force and which for present purposes may be taken as being in the same terms as s. 270 (1),

before the court can order a public examination there must have been what is called a further report and that report must have been considered. So the suggestion appealed to ROXBURGH, J., that the power of the court to order a public examination must always be regarded as a power limited by the condition that there must be a further report before the court which the court has had to consider. He thought also that emphasis was to be attached to the word "further" so that in turn was involved the conception that there must also have been, first, a preliminary report. As I have already indicated, it seems to me that if Parliament in terms states that powers vested in the court in a compulsory winding-up shall be available also (on application) in a voluntary winding-up, it cannot have been supposed that steps would have been taken in a voluntary winding-up which only arise and which can only be taken in a compulsory winding-up. In other words, if the matter rested on this point alone, I should not myself, with all respect to the judge, regard the language of s. 270 (1), even in the light of the decision in the *Great Kruger Gold Mining Co.* case (1), as involving the result that you must somehow or other import into s. 334 provisions only applicable in a compulsory winding-up before effect can be given to the section.

During the course of the argument, however, another point was put by ROMER, L.J., which seems to me to be fatal to the application under s. 334 (3). The assistant official receiver understandably wants an order for public examination. Expressing it more accurately, the order required is a direction by the court that the individual in question shall attend before the court on a day appointed by the court for the purpose of there being publicly examined. Is an order of that kind contemplated by the language of s. 334 (3)? I am compelled to the conclusion that the language does not contemplate such an order. I shall, I hope, be excused if I read the relevant words again because it seems to me that once they are read the answer is self-evident. Sub-section (3) provides that the Board of Trade may apply to the court, not for an order on a person to attend the court for examination, but for an order conferring on the board, or some person designated by the board,

" . . . all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding-up by the court."

It seems to me impossible to suggest that under that sub-section the court could invest the official receiver with the power on his own motion to conduct a public examination of the person whose conduct had been impugned. It appeared at first that unless by some stretch of the language some such construction was given to the sub-section, no effect could be given to it at all, but I think the answer to that suggestion is found in the language of s. 235 to which I have already alluded at some length. In other words, it seems to me that s. 334 (3) is apt to give the official receiver powers to compel persons (under penalties if they do not obey) to supply information, etc.—powers which, in a compulsory winding-up, the official receiver would have under s. 235—but I have been unable to construe s. 334 (3) as enabling the court, on the application of the Board of Trade, to set in motion the procedure for either a private or a public examination. Whether Parliament intended sub-s. (3) to produce that effect, I do not know—I can judge only from the language used, and the language used seems to me necessarily to provide a negative answer to the question. I do not think that that conclusion is, from the point of view of those concerned in this liquidation, a counsel entirely of despair. I have passed over, in my references, s. 307 (1), which provides:

"The liquidator or any contributory or creditor may apply to the court . . . to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court."

An application under that section must be by the liquidator or a contributory or a creditor, and the present applicant is the official receiver. If, therefore, it is thought appropriate to set in motion the powers of that section, another applicant will have to be found to make the application. That application is not now before the court, and, therefore, it would not be right for me to express a final view on any problem which might arise if it were. But the view which I have taken, with all respect to ROXBURGH, J., on the question, must there be a "further" report in a voluntary winding-up no less than in a compulsory winding-up, applies in the case of s. 307 as in the case of s. 334. I cannot suppose that when Parliament says that the court may, on application, exercise any of the powers in a voluntary winding-up which it may exercise in a compulsory winding-up, it was saying at the same time that, if the powers in a compulsory winding-up require the existence of conditions which could be only satisfied in a compulsory winding-up, then those powers could not in any event be available in a voluntary winding-up. Such a conclusion seems to me to be in conflict with the express purpose and sense of s. 307 (1). I am aware that in so stating I am expressing a view which is not in accordance with the note which the learned editors have made in BUCKLEY ON THE COMPANIES ACTS, 12th ed., p. 568, and I am, therefore, all the more diffident in expressing a final conclusion on the matter. Let me say also, however, that it would not follow that the court would necessarily exercise the power here in question unless at any rate there were before the court material which was in substance equivalent to the material which the court would require in a compulsory winding-up. Indeed, the contrary seems to me the right view. The court would require before, in its discretion, it exercised its power similar information to that which it would have to have if the application were one in a compulsory winding-up, but, for reasons which I have already indicated, I say no more about what might happen if an application was made under s. 307. It is possible that other points may arise which have not been discussed before us today. On this application it seems to me that the point I have mentioned is fatal. I only add that the form of the order of February, 1953, and also the form of the present application itself, seem to indicate the fallacy in the proposition that, under s. 334 (3), the court can make an order directed to a particular individual requiring him to attend the court on a day and time stated for the purpose of there being publicly examined. For these reasons it seems to me that the present application must be refused.

DENNING, L.J.: I agree, and I would only like to say that I am glad that the Master of the Rolls at present thinks that s. 307 may suit the purpose. I should be sorry to think that in a voluntary liquidation after the inquiries which have been made into this matter the court could not order a public examination of the individual concerned. It seems to me that if on the application of the liquidator the court can make such an order it would be most satisfactory. I agree with what my Lord has said.

ROMER, L.J.: I agree.

Application refused.

Solicitor: *Solicitor, Board of Trade.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT.

Ex parte CORPORATION OF LONDON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.),
April 28, 29, 1953.]

Town and Country Planning—Purchase notice—"Owner" of land—Person entitled to receive rackrent—Grant by freeholders of long lease—Confirmation of purchase notice—Duty of Minister—Town and Country Planning Act, 1947 (c. 51), s. 19 (1) (2), s. 119 (1).

In 1873 premises were leased for eighty years at a rent of £350 per annum. In 1922 an underlease of the premises was granted at £1,136 per annum. In 1925 trustees, who were the reversioners of the freehold of the premises, leased them for seventy-five years at a rent of £750 per annum, subject to, but with the benefit of, the lease of 1873. In 1940 the underlease of 1922 was transferred to H. & Sons, Ltd., and they were also granted a land certificate in respect of the lease of 1925, but subject to the lease of 1873. In 1942 H. & Sons, Ltd. acquired the residue of the lease of 1873. During the war the premises were destroyed by bombing. In 1950 H. & Sons, Ltd., gave notice to the Corporation of London, as the planning authority, asking for permission to develop the site, and, on permission being refused, they served a purchase notice on the corporation under s. 19 (1) of the Town and Country Planning Act, 1947, requiring the corporation to purchase their leasehold interest in the site. The Minister confirmed this notice, and the leasehold interest of H. & Sons, Ltd. was assigned to the corporation. In 1952 the trustees applied to the corporation for permission to develop the site, and, on permission being refused, they appealed to the Minister under s. 16 (1) of the Act. The Minister disallowed the appeal, and the trustees then served a purchase notice on the corporation under s. 19 (1) of the Act, requiring the corporation to purchase the fee simple in the site. On Dec. 31, 1952, the Minister confirmed this notice.

HELD: (i) the definition of "owner" in s. 119 (1) of the Act made it clear who was the owner of land for the purposes of applying the provisions of s. 19 (1) of the Act, and the meaning to be applied to "owner" in s. 19 (1) was the same as that placed on the word in s. 119 (1).

(ii) in view of the rent payable under the underlease of 1922 the lease of 1925 was not a letting at a rackrent, and, therefore, under the lease of 1925, the trustees were not entitled to receive a rackrent; further, since they had parted with possession of the property till 1999, they had no power to let or to collect rent, and, accordingly, even if the premises were let at a rackrent, they would not be entitled to that rent; and, therefore, they were not "owners" as defined in s. 119 (1) of the Act, and were not entitled to serve a purchase notice under s. 19 (1).

(iii) if the jurisdiction of the Minister to make an order confirming a purchase notice under s. 19 (1) of the Act was challenged, he ought to satisfy himself that he had that jurisdiction; as the notice served by the trustees was a nullity, he had no jurisdiction to confirm it; and his order of Dec. 31, 1952, must be quashed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 19 and s. 119, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 517, 635.

MOTIONS for orders of certiorari and mandamus.

On Sept. 29, 1873, the Commissioners of Sewers of the City of London, as owners of No. 69, Ludgate Hill, in the city of London, leased the premises to T. Treloar for eighty years at a ground rent of £350 per annum. Later, the commissioners transferred their reversion of the freehold of the premises

to one Alexander Jones. On May 23, 1922, the representatives of T. Treloar granted an underlease of the premises to S. T. Williamson and E. B. Williamson for the remainder of the term of eighty years less seven days at a rent of £1,136 per annum, which was approximately the rackrent which would be obtainable at that date. On Oct. 2, 1924, S. T. Williamson and E. B. Williamson assigned their underlease to E. B. Williamson and C. M. Walker. On June 23, 1925, the trustees of Alexander Jones granted a lease of seventy-five years to E. B. Williamson and C. M. Walker at a rent of £750 per annum, subject to, but with the benefit of, the original lease of Sept. 29, 1873. On Feb. 19, 1940, the underlease of May 23, 1922, was transferred to Hampton & Sons, Ltd.; on Mar. 11, 1940, they were granted a land certificate in respect of the lease of June 23, 1925, subject to the original lease of Sept. 29, 1873; and on Apr. 8, 1942, they acquired the residue of the term of the original lease of Sept. 23, 1873. In the early part of 1940 the premises were damaged by enemy action, and in May, 1941, they were completely destroyed and the site was left derelict. On Feb. 9, 1950, Hampton & Sons, Ltd., gave notice to the Corporation of London, as the planning authority, asking for permission to develop the site, but permission was refused on the ground that the land was required for other forms of development. On Aug. 17, 1950, Hampton & Sons, Ltd., served a purchase notice on the corporation under s. 19 (1) of the Act requiring the corporation to purchase their leasehold interest in the site, and the corporation, in accordance with s. 19 (2), sent the notice to the Minister. The corporation took the view that Hampton & Sons, Ltd. were the owners of the site within the Act and that the Minister was bound to confirm the notice because of the existing state of the site, and so they did not oppose the application to the Minister to confirm the notice, which he did on Nov. 9, 1950. The sum agreed to be payable to Hampton & Sons, Ltd. for their leasehold interest was £71,250. That sum was paid to them by the corporation in due course, their leasehold interest was assigned to the corporation, and the title of the corporation to the leasehold interest was registered at the Land Registry.

On Mar. 24, 1952, the trustees of Alexander Jones applied to the corporation for permission to develop the site. The corporation informed them that planning permission for development had already been refused, but they appealed to the Minister under s. 16 (1) of the Act, and, on Aug. 22, 1952, the Minister disallowed the appeal. On Sept. 1, 1952, the trustees served a purchase notice on the corporation requiring the corporation to purchase the fee simple in the site. The corporation sent the notice to the Minister under s. 19 (2), and, in opposition to the application to the Minister to confirm the notice, contended that the trustees, being freeholders of the site in respect of which there was a leasehold interest which was vested in the corporation, were not "owners" under s. 119 (1) of the Act who could serve a purchase notice under s. 19 (1). The trustees contended that the Minister was not concerned with the question of ownership, and that his duties were confined to considering whether the conditions specified in s. 19 (1) (a) and (b) were fulfilled in relation to the land which was the subject of the notice. They submitted, first, that the context was such that the definition of "owner" in s. 119 (1) was not applicable, and, secondly, that, if it was, the rent receivable by the trustees was a rackrent.

On Dec. 31, 1952, the Minister confirmed the notice and stated that he accepted the view put forward by the trustees and that his confirmation did not import any decision whether the servers of the purchase notice were owners entitled to serve such a notice or not. The corporation applied for an order of certiorari to quash the Minister's decision of Dec. 31, 1952, and that an order of mandamus should issue to the Minister requiring him to hear and determine the issue of the confirmation or otherwise of the purchase notice of Sept. 1, 1952.

Harold Williams, Q.C., and *D. C. Walker-Smith* for the Corporation of London.
J. P. Ashworth for the Minister of Housing and Local Government.

Heathcote-Williams, Q.C., and *R. E. Megarry* for the trustees of Alexander Jones' estate.

LORD GODDARD, C.J.: I will ask **LYNSKEY, J.**, to give the first judgment.

LYNSKEY, J.: This is a motion by the Corporation of London for an order of certiorari for the removal into this court

"of a decision dated Dec. 31, 1952, made by the Minister of Housing and Local Government pursuant to the Town and Country Planning Act, 1947, confirming or purporting to confirm a purchase notice served or purported to be served under s. 19 of the said Act in respect of the fee simple of land being the site of No. 69, Ludgate Hill, in the city of London",

the notice being given by or on behalf of Sir William Robert Dermot Joshua Cusack-Smith, Baronet, and Elizabeth Dora Allworth, widow, the trustees of the real estate of Alexander Jones, deceased. The Minister's order was made under s. 19 (1) of the Town and Country Planning Act, 1947, which provides:

"Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section."

By sub-s. (2):

"Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paras. (a) to (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct . . ."

By sub-s. (3):

"If within the period of six months from the date on which a purchase notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in para. (a) or para. (b) of the last foregoing sub-section, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the expiration of that period,

and the council on whom the notice was served shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period."

By s. 119 (1) the definition of "owner", "except so far as the contrary is provided or the context otherwise requires", is:

A

" 'owner', in relation to any land, means, except in Part VI of this Act, a person, other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let, and, in Part VI of this Act, has the meaning assigned to it by s. 64 of this Act."

B

Those were the sections under which the Minister purported to act in confirming the notice, and the point taken by the corporation in their motion is that the Minister had no jurisdiction to make his order confirming the notice because the person or persons who had given the notice which he purported to confirm were not owners of the land as defined in the Act and not owners within the meaning of s. 19 (1)—in other words, the trustees of the late Alexander Jones were not persons entitled to give that notice. The result is that the notice given by them was a nullity, and the Minister was, therefore, without jurisdiction to deal with the matter.

C

[HIS LORDSHIP stated the facts and continued:] It was contended on behalf of the trustees that the definition of "owner" in s. 119 (1) was not to be applied to the word "owner" when used in s. 19 (1). It was said that the context of s. 19 (1) otherwise required, and, in particular, that the use of the word "any" before the word "owner"—"if any owner of the land claims"—indicated that the context required a different interpretation of the word "owner" from that given in s. 119 (1). I do not think that one can say that the context of s. 19 (1) does require any different interpretation of the word "owner" from that which is given in s. 119 (1). In fact, when one looks at the later provisions of the Act (s. 26 and s. 27), it seems fairly clear that the Act is distinguishing between an owner and other persons having other interests, and the effect of s. 119 (1) is to make it clear who is the owner of the land for the purposes of applying the provisions of s. 19, apart from other sections of the Act.

E

F The question then arises whether the trustees can be described as being "owners" having regard to the definition of "owner" in s. 119 (1). The first point to consider is: Was this land at the time let at a rackrent? Two possibilities have been envisaged. First, it is suggested that the lease of 1925 was a letting at a rackrent, and, as the premises are still let under that lease, the trustees are persons entitled under the terms of that lease to receive the rackrent. When, however, one looks at the position in 1922 when these premises were let at £1,136 per annum to an occupying tenant, it is impossible to say that a rental in 1925 of £750 a year was anything more than a type of ground rent, and, in fact, although the argument was suggested by counsel for the trustees, I do not think it was stressed with any great vigour. On the other hand, it is said that the trustees would be entitled to the rackrent if the premises were so let—that at present these are derelict premises, and, but for the provisions of the Landlord and Tenant (War Damage) Act, 1939, the trustees would be entitled to £750 per annum, and, this being a derelict site, that would be a rackrent. That pre-supposes the fact that they are in a position to let and to receive rent if let. Their position today is that they are not entitled either to enter on the land themselves or to allow anybody else to do so. They have parted with their possession of the land until 1999. They have no power to let. They have no power to collect rent in respect of the premises

G

H

and, therefore, it cannot be said that they are persons who, if the land is let at a rackrent, would be so entitled. The persons so entitled if the premises were let at a rackrent would be the Corporation of London as the persons entitled to occupy under the lease of 1925 which had been assigned to them.

The result is that it is clear that the trustees are not "owners" as defined in s. 119 (1) of the Act, and, therefore, were not persons who were entitled to serve the purchase notice under s. 19 (1). Therefore, that notice was a nullity, the Minister had no jurisdiction to make an order confirming it, and his order doing so must be brought up and quashed.

It is submitted on behalf of the corporation as one of their grounds for asking this court to quash the confirmation that the Minister refused to inquire whether the persons serving the notice were owners or not. It seems to me that if the jurisdiction of the Minister to make the order is challenged, as it was challenged in this case, it falls on him to satisfy himself that he has jurisdiction to deal with the matter, and to that extent he must make the necessary inquiries to satisfy himself that he has power to exercise the jurisdiction which he is actually exercising at the time. Whether he ought to inquire in every case is another matter, and I do not propose to lay down any general rule about this but only to deal with the facts I have before me. All I say is that, if the jurisdiction of the Minister is challenged as to his right to make the order, he ought to satisfy himself that he has that jurisdiction. If he does satisfy himself that he has, of course, he can exercise it. If he is satisfied that he has not, he can refuse to exercise it. It may leave the person who has received the refusal in a difficult position, but that is not a matter with which we are directly concerned.

LORD GODDARD, C.J.: I agree.

PARKER, J.: I agree.

Order of certiorari.

Solicitors: *Comptroller and City Solicitor* (for the Corporation of London); *Solicitor of the Ministry of Health and Solicitor of the Ministry of Housing and Local Government* (for the Minister of Housing and Local Government); *Boxall & Boxall* (for the trustees of Alexander Jones' estate).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

HAVANT AND WATERLOO URBAN DISTRICT COUNCIL v. PAYNE (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Denning and Jenkins, L.J.J., and Vaisey, J.), April 24, 1953.]

Rates—Assessment—Deduction from gross value—Rate, charge, or assessment made by commissioners of sewers “or other like authority”—Sea defence rate levied by urban district council—Rating and Valuation Act, 1925 (c. 90), s. 22 (1) (a).

Acting under the authority of a private Act an urban district council constructed a wall for the defence of part of the district against the sea and to defray the cost levied a sea defence rate on the owners of properties in the area benefited, as defined in the Act.

HELD: the council were not commissioners of sewers “or other like authority” making a “rate, charge, or assessment . . . in respect of” a wall for the benefit of the hereditaments affected within the meaning of s. 22 (1) (a) of the Rating and Valuation Act, 1925, and, therefore, the average annual amount of the sea defence rate did not fall to be deducted from the gross value of any hereditament subject thereto under the private Act.

FOR DEDUCTIONS FROM GROSS VALUE FOR RATING PURPOSES, see HALSBURY, *Hailsham Edn.*, Vol. 27, pp. 384, 385, para. 820, o.

FOR THE RATING AND VALUATION ACT, 1925, s. 22 (1) (a), see HALSBURY'S STATUTES, *Second Edn.*, Vol. 20, p. 127.

CASE STATED by the Lands Tribunal.

The ratepayer was the owner and occupier of a shop known as “Eastwards”, Creek Road, Hayling Island. On Jan. 14, 1952, the valuation officer made a proposal to increase the assessment of the shop from £42 gross value and £32 rateable value to £75 gross value and £60 rateable value. The ratepayer objected, and on the hearing of the valuation officer's appeal against the objection contended, *inter alia*, that the average annual amount of a sea defence rate which was payable to the Havant and Waterloo Urban District Council in respect of the hereditament under a private Act, the Havant and Waterloo Urban District Council Act, 1947, ought to be deducted from the gross value in addition to the ordinary percentage deduction, as being a “rate, charge, or assessment made by any commissioners of sewers or other like authority” in respect of a wall “for the benefit of the hereditament” within the meaning of s. 22 (1) (a) of the Rating and Valuation Act, 1925. The local valuation court upheld the ratepayer's contention and determined the assessment at £75 gross value and £51 rateable value, the £9 deduction being the average annual amount of the sea defence rate. On appeal by the Havant and Waterloo Urban District Council, the rating authority, the Lands Tribunal affirmed this decision. The council appealed, contending that the sea defence rate was not deductible because it was in respect of a capital sum and because the council were not “any commissioners of sewers or other like authority” within the meaning of the sub-section.

Rowe, Q.C., and W. L. Roofs for the appellant council.

Maurice Lyell for the respondent valuation officer.

Widgery for the respondent ratepayer.

DENNING, L.J.: Hayling Island is a popular seaside resort which was at one time liable to flooding by the sea. In December, 1945, the defences were breached by the sea, and much property on the island was flooded. Thereupon the local council, Havant and Waterloo Urban District Council, obtained permission to start building a sea wall. They borrowed money for the purpose from the Public Works Loan Board, and the position was put on a statutory footing

by the Havant and Waterloo Urban District Council Act, 1947. By that Act the council were empowered to make a wall for defence against the sea, and were also empowered to charge the cost against the owners of the properties which were benefited by it. The particular part of Hayling Island which was benefited by the wall was marked out by the Act, and it was enacted that the owners of the benefited part should pay to the council the cost of construction. They were to pay it by means of a sea defence rate, and there was a provision that, if an owner of land wanted to redeem the amount of the rate, he could redeem it by paying a capital sum to the council. That was in 1947. The sea wall was completed, and the sea defence rate became payable.

The question which we have to determine is what is the effect of the sea defence rate on the general rate leviable in the district. We have a test case before us. A shop in Hayling Island known as "Eastwards", Creek Road, Hayling Island, is assessed at £75 gross value. If the ordinary percentage specified in the Rating and Valuation Act, 1925, is deducted, the rateable value of the shop will be £60, but the ratepayer has to pay a sea defence rate of £9, and he contends that he is entitled to deduct that £9 from the £60, making a rateable value of only £51. The council say that he is not entitled to deduct the £9. In this district the general rate is 23s. in the £, and it is very greatly to the benefit of the ratepayer to get the amount reduced to £51. If he succeeds in his contention it will mean that, by paying a sea defence rate of £9, he will pay £10 7s. less on his general rate. Thus, on an ordinary rateable value of £60, he would have to pay £69, but on £51 he would only have to pay £58 13s. Even adding on the £9, that only makes £67 13s. in all, so that he is £1 7s. in hand compared with other ratepayers. In short, he pays nothing for the sea wall, but gets a bonus of £1 7s. at the expense of the other ratepayers. I need hardly say that that would appear to be contrary to the intention of Parliament when it passed the Act of 1947, for it was quite clear that Parliament intended that the owners of these benefited properties should pay for the sea wall.

The question depends on s. 22 (1) (a) of the Rating and Valuation Act, 1925, which provides that in the case of certain hereditaments, of which this is one,

" . . . there shall be deducted from the gross value of the hereditament an amount representing the deduction specified with respect to hereditaments of that class in the second column of the [table contained in Part I of sched. II to the Act] and also, in the case of a hereditament subject to any rate, charge, or assessment made by any commissioners of sewers or other like authority in respect of any drainage, wall, embankment, or other work for the benefit of the hereditament (not being a usual tenant's rate), such further amount as represents the average annual amount of that rate, charge or assessment . . ."

It is said on behalf of the ratepayer that the sea defence rate of £9 is a rate made by "commissioners of sewers or other like authority in respect of" a wall "for the benefit of the hereditament" and, therefore, it is to be deducted. On the other hand, counsel for the local council has urged that, in ascertaining rateable value, the underlying principle is that the ratepayer can deduct maintenance charges, but not charges which are solely for capital improvement, and that this was a charge of a capital nature. He gives as an instance the case of a road taken over by the local authority. The cost of making up the road has to be borne by the owners of adjoining property, but they are not allowed to deduct it from their assessments. So here, he says, the owners of the benefited property should not be allowed to deduct what is really a capital charge.

I prefer to express no opinion on that point. I am content to decide this case on the narrow point that the council are not "commissioners of sewers or other like authority" within the meaning of the Rating and Valuation Act,

1925, s. 22 (1) (a). The words in the Act are not "or other authority", but "or other *like* authority". In my judgment, those words do not include the local authority themselves. They refer to ad hoc authorities, i.e., authorities which are entrusted by Parliament with a specific task such as draining a district or controlling a catchment area. An ad hoc authority often has to expend capital moneys, but it also has to maintain works for the benefit of its district, and the rate which it levies is much more for maintenance charges and interest charges than for capital repayment. It is quite understandable that such a rate should be deducted in order to ascertain rateable value. But this sea defence rate is not a rate of that kind. This urban district council is not an ad hoc authority at all. It is merely the local authority carrying on many activities in its district.

In my opinion, therefore, the sea defence rate cannot be deducted because it is not made by "commissioners of sewers or other like authority". That is a sufficient ground for determining this appeal. Any other view would mean that the charge which Parliament clearly intended in the Act of 1947 should fall on the owners of these particular houses would, in effect, be transferred from the owners of those houses to the rest of the ratepayers of the local district and of the whole county. The outside ratepayers would be subsidising the owners of the benefited houses whereas Parliament clearly contemplated that the owners of the houses should pay for the wall themselves. There is one final point. If there is any conflict between the private Act and the public Act, the private Act should prevail. I am quite satisfied that the intention of Parliament in the private Act was that the sea defence rate should be paid by the owners, and that it should not be deducted in ascertaining the rateable value. I would, therefore, allow the appeal.

JENKINS, L.J.: I agree that this appeal should be allowed. The short point is whether the sea defence rate is a

"rate, charge, or assessment made by any commissioners of sewers or other like authority in respect of any drainage, wall, embankment, or other work for the benefit of the hereditament"

within the meaning of s. 22 (1) (a) of the Rating and Valuation Act, 1925. The same Act in s. 68 (1) defines the expression "rate", and provides (by para. (a)) that the definition is not to include

"any rate which is assessed under any commission of sewers or in respect of any drainage, wall, embankment, or other work for the benefit of the land."

That formula would extend to any rate assessed in respect of any of the matters referred to, not only by any commissioners of sewers, but also by any other body whatsoever having the necessary lawful authority to make the rate. The language of s. 22 (1) (a) shows a significant difference, for there the deduction is allowed, not simply in respect of

"any rate, charge, or assessment . . . in respect of any drainage, wall, embankment or other work",

but only in respect of rates, charges or assessments of the descriptions mentioned which are made by "any commissioners of sewers or other like authority". Those words in the sub-section limit the rates, charges, and assessments which are deductible, not merely by reference to the matters in respect of which they are made, but also by reference to the character of the authority by which they are made.

The question, then, in the end resolves itself into whether the urban district council in this case is an "other like authority" within the meaning of s. 22 (1) (a). In my view, the expression "other like authority" should not be construed as meaning any other body authorised to perform like statutory functions.

In its primary significance, I do not think the language is apt to convey that meaning. Moreover, if that was the meaning of the words "other like authority", the whole of the reference to "any commissioners of sewers or other like authority" would, in effect, be otiose, for it would extend to any and every kind of body or authority which has the necessary legal power to make rates, charges, or assessments of the descriptions mentioned. I think the words "other like authority" mean a similar body authorised to make rates, charges, or assessments of those descriptions. The body making the rate, charge, or assessment must be an authority comparable in character to commissioners of sewers. In my view, it is impossible to say that the urban district council here complies with that requirement.

I should add that, as pointed out by counsel for the local council in reply, the words "commissioners of sewers or other like authority" would be a most remarkable expression to use if it was intended to include in that expression the local authority itself within whose area the hereditament to be valued is situate. Accordingly, in the view that I take, the sea defence rate in this case is not a rate, charge, or assessment which is deductible under the provision of s. 22 (1) (a), and on that ground, in my opinion, the appeal should be allowed.

VAISEY, J.: I have come to the same conclusion on the grounds already stated by my Lords. I am myself quite satisfied that the result accords with the plain sense and reason of the matter, and I agree that this appeal should succeed.

Appeal allowed.

Solicitors: *Lees & Co.*, agents for *B. R. W. Gofton*, clerk of the council (for the council); *Solicitor of Inland Revenue* (for the valuation officer); *Arthur S. Joseph & Cates*, agents for *MacDonald, Jacobs & Oates*, Petersfield (for the ratepayer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

WURZAL v. DOWKER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Parker, JJ.), April 29, 30, May 11, 1953.]

Street Traffic—Express carriage—Special occasion—Conveyance of members of club on fishing trips on seven consecutive Sundays—Road Traffic Act, 1930 (c. 43), s. 61 (2)—Road Traffic Act, 1934 (c. 50), s. 25 (1).

The respondent was charged under the Road Traffic Act, 1930, s. 72 (1), with unlawfully permitting a motor coach to be used as an express carriage without a road service licence from the licensing authority. On seven successive Sundays the respondent hired a motor coach, which was not being used under such a licence, to a working men's club to take members of the club on fishing trips.

HELD: to be a "special occasion" within the proviso to s. 61 (2) of the Road Traffic Act, 1930, the occasion must be special in the locality to which the journey was made or to the public thereof, and it was not enough that the journey was a special occasion from the point of view of the members of the party; the conditions laid down for a special occasion in s. 25 (1) of the Road Traffic Act, 1934, which were not definitive of what was a special occasion, but were merely additional conditions to what, apart from them, would amount to a special occasion, were not inconsistent with this construction of the proviso; and, therefore, the respondent was guilty of the offences charged.

Per curiam: On any view of the meaning of "special occasion" the frequency of the journeys would probably result in the occasions in question not being held to be "special".

Miller v. Pill. Pill v. Furse. Pill v. Mutton (J.) & Son ([1933] 2 K.B. 308), applied.

Observations of LORD GODDARD, C.J., in *Victoria Motors (Scarborough), Ltd. v. Wurzal* ([1951] 1 All E.R. 1016), criticised.

FOR THE ROAD TRAFFIC ACT, 1930, s. 61 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 626.

A Cases referred to:

- (1) *Miller v. Pill. Pill v. Furse. Pill v. Mutton (J.) & Son*, [1933] 2 K.B. 308; 102 L.J.K.B. 713; 149 L.T. 404; 97 J.P. 197; Digest Supp.
- (2) *Victoria Motors (Scarborough), Ltd. v. Wurzal*, [1951] 1 All E.R. 1016; [1951] 2 K.B. 520; 115 J.P. 333; 2nd Digest Supp.

CASE STATED by Sheffield justices.

B

At a court of summary jurisdiction sitting at Sheffield the appellant, Ernest Wurzal, on behalf of the licensing authority for public service vehicles for the Yorkshire traffic area, preferred seven informations against the respondent, Jethro Dowker, charging that on Sunday, Aug. 17, 1952, and on the six following Sundays, he did unlawfully permit a vehicle (registration number KOG 447 and on one occasion KPJ 249) to be used as an express carriage within the meaning of the Road Traffic Acts, 1930 to 1937, in Kelvin road and other roads in the city of Sheffield otherwise than under a road service licence granted by the licensing authority, contrary to the Road Traffic Act, 1930, s. 72.

C

It was proved or admitted that the respondent was the proprietor of a business known as Ideal Coaches and was the registered owner of two motor coaches numbered KOG 447 and KPJ 249. On the first six material dates the motor coach KOG 447 and on the seventh date the motor coach KPJ 249 were hired from the respondent by a member of the committee of the Philadelphian Working Men's Club to take members of the club on fishing trips to Boston, the Boston area, and Tattershall. The respondent had no licence to use the vehicles as express carriages on the material dates. It was agreed that all the conditions specified in the Road Traffic Act, 1934, s. 25 (1) (which deals with the conditions which must be fulfilled before a vehicle can be exempted from obtaining a licence when used on a "special occasion"), had been satisfied, and that the only issue to be tried was whether these occasions were "special occasions" within the meaning of the Road Traffic Act, 1930, s. 61 (2). The justices dismissed the informations and the appellant appealed.

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J. P. Ashworth for the appellant.
Comyn for the respondent.

F

Cur. adv. vult.

May 11. The following judgments were read.

PARKER, J.: This is an appeal by way of Case stated by justices for the city of Sheffield who dismissed seven informations preferred by the appellant on behalf of the licensing authority for public service vehicles for the Yorkshire traffic area against the respondent for that he on certain days permitted the use of two vehicles in contravention of s. 72 of the Road Traffic Act, 1930, in that on each occasion he did unlawfully permit the vehicle to be used as an express carriage.

G

The facts found by the justices were that the respondent was the proprietor of a business known as Ideal Coaches and the registered owner of the two motor coaches in question; that on each of six Sundays in August and September, 1952, the respondent hired one or other of the motor coaches to a committee member of the Philadelphian Working Men's Club to take members of the club on fishing trips to Boston or the Boston area, and in one case to Tattershall, and that on the dates in question the respondent had no licence to use a vehicle as an express carriage. It was common ground that the user of the vehicle on each of the said dates without a licence was a contravention

H

of s. 72 of the Road Traffic Act, 1930, unless the user thereof came within the proviso to s. 61 (2) of that Act. That sub-section reads as follows:

"It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

It was also common ground that on each of the said days the conditions specified in s. 25 (1) of the Road Traffic Act, 1934, had been satisfied, and that the party on each day was a private party. Accordingly, the sole question for the justices was whether on the facts found the vehicle being used on any Sunday was being used on a "special occasion", and in this connection it appears that the justices were invited to deal with the matter on the basis that, if the user of the vehicle on the first Sunday was a user on a special occasion, the user on each of the other Sundays was also a user on a special occasion.

In dismissing the information the justices said:

"We were of opinion that these journeys were made in the nature of outings and were not of a general nature, but remained special, both by reason of the distance travelled, the purpose of the outings, and the place of the outings."

On behalf of the appellant it was contended that before it can be said that a vehicle is being used on a special occasion there must be some evidence that the journey is being undertaken to partake in what is a special occasion in the locality to which the journey is made, and that it is not enough that the journey itself is a special occasion from the point of view of the members of the party. In other words, it is said that, if there had been an annual angling match at Boston on the first Sunday concerned, the vehicle would have been used on a special occasion, but that, as there was no special event in progress, the use of the vehicle could not be a use on a special occasion, even if it was the party's annual outing.

Surprising as this may sound, and whatever views I might otherwise be inclined to hold, apart from authority, I consider that we are bound by the decision of this court in *Miller v. Pill*. *Pill v. Furse*. *Pill v. J. Mutton & Son* (1). In that case the owner of a motor omnibus hired the vehicle to one Rowe to take a party from Launceston to Looe. It was an annual event, Rowe having on each of the last four years arranged a similar trip to Looe. There was nothing at Looe which could be said to be a special occasion there. In his argument for the respondent the Solicitor-General posed the question in this way ([1933] 2 K.B. 312):

"... the important question in the case is whether 'special occasion' means, as the appellant contends, an occasion special to the private party, such as a day at the seaside, or whether, as the police contend, it has a more restricted meaning confined to an occasion special to the whole locality or to the public."

He went on to contend that "special occasion" in s. 61 (2) should be given the same meaning as in s. 61 (1) where it is clear that the words have the latter meaning. LORD HEWART, C.J. (*ibid.*, 315), said:

"In my opinion, although the matter is by no means free from doubt there is great force in that argument. I think that it would be wrong and

misleading if the term 'special occasion' were used in two different senses in the space of a few lines in the same section of the same Act of Parliament. The justices found as a fact that the occasion was not a special occasion and, although there may be much to be said to the opposite effect, I have come to the conclusion that the argument for the appellant is unsuccessful and that this appeal must be dismissed."

A AVORY, J. (*ibid.*, 316), after expressing considerable doubt, said:

"My inclination at one time was to think that the words 'special occasion' in sub-s. (2) might have a different and more extended meaning than when they are used in sub-s. (1), and that the occasion under consideration should be regarded quoad the purpose of the private party to ascertain whether it was a 'special occasion' within the proviso to the sub-section.

B I am not, however, prepared to differ from the view that *prima facie* the words ought to be read in the same sense in the two sub-sections. I am satisfied to decide this case on the ground that there is no sufficient reason for differing from the finding of fact by the justices that the occasion was not a 'special occasion'."

C HUMPHREYS, J. (*ibid.*, 318), said:

"On the point whether the occasion was a 'special occasion' within the proviso to s. 61 (2), if I were dealing with that proviso alone, I should come to the conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members of the party and points to something which can be described as a special occasion in the locality and was the object of the journey being undertaken. And when I turn to the proviso to sub-s. (1) of the same section and find there the same expression as part of the phrase 'on occasions of race meetings, public gatherings and other like special occasions', it appears to me to be a strong indication that the view which I have expressed is right, because I think that the words in sub-s. (2) should be accorded the same meaning as those in sub-s. (1), from which they are separated by only a few lines of print. Accordingly, I agree that a 'special occasion' within the meaning of sub-s. (2) must be a special occasion occurring at the place which is the object of the excursion, or, in other words, something of the same nature as the kind of occasion referred to in the proviso to sub-s. (1), and that it is not enough that it should merely be a special occasion from the point of view of the persons forming the private party. I agree that the matter is by no means free from difficulty, but in the result I agree with the other members of the court."

It is to be observed that, unless the words in question had the restricted meaning contended for by the Solicitor-General, the court could not have upheld the conviction. Accordingly, I think that the decision in that case is binding on this court.

H It was, however, urged on the part of the respondent that s. 25 of the Road Traffic Act, 1934, which imposed conditions which have to be complied with before it can be said that the vehicle is used on a "special occasion" has in some way altered the position. Those conditions, however, as was held in *Victoria Motors (Scarborough), Ltd. v. Wurzal* (2), are not definitive of what is a special occasion, but are merely additional conditions to what, apart from them, would amount to a special occasion. Reading both the Acts together, as we are bound to do, I cannot see anything in s. 25 of the Act of 1934 which is so plainly inconsistent with the accepted construction of s. 61 (2) of the Act of 1930 as to necessitate one to hold that the latter sub-section has been impliedly amended. Indeed, when s. 25 (1) of the Act of 1934 was passed Parliament must be taken to have had in mind the principle enunciated in *Miller v. Pill* (1), and, if it had been desired to amend s. 61 (2) of the Act of

1930, plain words to that effect would surely have been used. Applying to the facts of this case the principle above referred to, it is plain that on no Sunday was the vehicle in question used on a special occasion.

I should add that it is, in my view, unfortunate that the justices were persuaded to deal with the matter on the basis of the concession made by the prosecution, and referred to above, namely, that, if the use of the vehicle on the first Sunday was use on a special occasion, the use on each of the other Sundays was also on a special occasion. Apart from this concession the frequency of the journeys would probably on any view of the meaning of "special occasion" have forced the justices and this court to hold that the offences had been proved. In the result, in my view, the Case should go back to the justices with a direction to convict. Sentence is, of course, a matter for them, but in the circumstances of this case they may well think that a nominal fine is appropriate.

I am to add that **LYNSKEY, J.**, agrees with this judgment.

LORD GODDARD, C.J.: I agree that this court is bound by the previous decision in *Miller v. Pill* (1), and, consequently, this appeal must succeed. That case was not brought to the attention of the court when *Victoria Motors (Scarborough), Ltd. v. Wurzel* (2) was before us and would not have affected the decision if it had been. But I regret that in dealing there with what could amount to a special occasion I gave illustrations some of which I now see could not be so regarded in view of the decision in *Miller v. Pill* (1). It seems that a day's excursion, a Sunday school or mothers' union party, cannot be treated as a special occasion so long as that decision stands, and we cannot overrule it. It is only right that I should take responsibility for having misled the justices by the illustrations I gave per incuriam. But I may, I hope, be permitted to say with all respect that I feel great doubt about the decision in *Miller v. Pill* (1), and it is apparent that **AVORY, J.**, who was a member of the court, also did, though he did not dissent. As we are bound by the decision, it is, perhaps, unprofitable to discuss it, but I desire to state quite briefly why I thought such occasions as I illustrated could be regarded as special in relation to the use of a motor vehicle by a private party. I agree that when the same words are used twice in a statute, prima facie they should be given the same construction, but the context may require a different interpretation.

The first proviso is not dealing with motor vehicles used by private parties, but with taxi-cabs or private hire cars in effect plying for hire and picking up casual travellers, thus competing with omnibuses. This is permitted only in connection with race meetings, public gatherings, and other like special occasions. To use a homely illustration, it provides for cabs at stations picking up passengers who may be travelling quite independently of one another and taking them at so much a head to a neighbouring race course or gathering. The second proviso deals with a private party who hire a motor coach for a special occasion, and the stringent provisions of s. 25 of the Act of 1934 must be satisfied before the party can be regarded as private. If it was intended to limit the use of the vehicle to journeys for attending such things as race meetings or public gatherings, I should have expected the proviso to make this clear by a reference to the previous proviso where, it will be observed, the word "like" appears, though it does not in the latter. From a common-sense angle I think most people would say that a village school treat was a special occasion, certainly in the lives of those attending it. The result of *Miller v. Pill* (1), however, seems to be that, if a treat were planned to a neighbouring seaside town and was fixed for a day on which a statue or a drinking fountain was to be unveiled as a memorial to a deceased mayor or member of Parliament, providing the children were obliged as part of their outing to attend this dismal festivity, the treat would be a special occasion, but otherwise it would not. The justices, therefore, came to a wrong decision on this matter, but it is I

and the other members of the court who heard the *Victoria Motors* case (2) who ought to take the blame, if any.

A On another matter the justices were, in my opinion, also misled, this time by the prosecutor. The concession he made to which PARKER, J., has referred was, I think, incorrect, and should not have been made. The journeys to which the information related seem to have formed part of the ordinary programme of the fishing season, and though, but for *Miller v. Pill* (1), the first trip might have been regarded as a special occasion, I cannot see how seven consecutive Sunday outings could be. They were habitual and not special. I agree that the appeal must be allowed and cordially indorse the concluding sentence of the judgment of PARKER, J.

Appeal allowed.

B Solicitors: *Treasury Solicitor* (for the appellant); *Hosking & Berkeley*, agents for *A. B. Thorneloe*, Sheffield (for the respondent).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law*.]

HUTTON v. INLAND REVENUE COMMISSIONERS.

C [CHANCERY DIVISION (Upjohn, J.), April 21, 22, 23, May 1, 1953.]

Income Tax—Interest—Interest on tax reserve certificates—Distribution to shareholders—Liability to tax—Finance Act, 1942 (c. 21), s. 29 (1).

D By the Finance Act, 1942, s. 29 (1), income tax was not to be chargeable in respect of the interest on tax reserve certificates issued by the Treasury. It was a term of the issue of the certificates that they would earn interest in so far as they were applied to payment of certain taxes, but carry no interest to the extent to which they were not so applied, principal and interest being applied in payment of tax on the surrender of a certificate. The interest was not returnable as part of the taxpayer's income or profit and so would not be liable to income tax, surtax, national defence contribution, or excess profits tax. A company purchased tax reserve certificates and surrendered them at various dates in payment of tax, being credited with interest thereon in further discharge of tax in accordance with their terms of issue. It subsequently distributed sums equal to the amount of the interest earned to shareholders in proportion to their shareholdings, without deducting tax.

F HELD: the effect of being credited with interest on tax reserve certificates was to increase the sum standing to the credit of the company's profit and loss account and not to create a separate tax-free fund, and tax was, therefore, payable on the sums distributed.

FOR THE FINANCE ACT, 1942, s. 29 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 549.

G Cases referred to:

(1) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332; Digest Supp.

(2) *Montague Burton, Ltd. v. Inland Revenue Comrs.*, (1934), 152 L.T. 8; *affd.* H.L., (1936), 105 L.J.K.B. 236; 154 L.T. 355; 20 Tax Cas. 48; Digest Supp.

H (3) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.

(4) *Glazed Kid, Ltd. v. Inland Revenue Comrs.*, (1930), 15 Tax Cas. 445; Digest Supp.

(5) *Birmingham Corpn. v. Inland Revenue Comrs.*, [1930] A.C. 307; 99 L.J.K.B. 299; 142 L.T. 633; 94 J.P. 123; 15 Tax Cas. 172; Digest Supp.

- (6) *Central London Ry. Co. v. Inland Revenue Comrs. London Electric Ry. Co. v. Inland Revenue Comrs. Metropolitan Ry. Co. v. Inland Revenue Comrs.*, [1936] 2 All E.R. 375; [1937] A.C. 77; 105 L.J.K.B. 513; 155 L.T. 66; 20 Tax Cas. 102; Digest Supp.
- (7) *Allchin v. Coulthard*, [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.* H.L., [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; *sub nom.* *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer owned half of the issued share capital of Hutton Shoe Co., Ltd. In the course of its trading years from that ended on June 30, 1942, to that ended on June 30, 1946, the company purchased tax reserve certificates and surrendered them at various dates in payment of tax, being credited with interest thereon which was also applied in discharge of tax. From 1943 to 1948 the company annually paid sums equal to the total of such interest to the shareholders in proportion to their holdings of shares. Such payments were made without deduction of tax, interest on tax reserve certificates being exempt from income tax under the Finance Act, 1942, s. 29 (1). The terms of the issue of the certificates provided (i) that they would earn interest in so far as they were applied to the payment of certain taxes (the principal and interest being so applied on surrender), but not to the extent to which they were not so applied; and (ii) that the interest would not be returnable by the holder of the certificates as part of his income or profit and thus would not be liable to income tax, surtax, national defence contribution, or excess profits tax.

On Feb. 10, 1950, being advised that the payments should not have been made in that manner, the directors resolved that the payments to the two shareholders, then totalling £708 1s. 8d. to each of them, should be treated as reducing each of their loan accounts by that amount. Additional assessments to surtax were made on the taxpayer for the years 1943-44 to 1948-49 in the gross amounts of the payments of interest he had received on the basis that such payments represented net income in the taxpayer's hands after deduction of income tax. The taxpayer appealed. He contended that the interest was a profit of the company available for distribution to shareholders notwithstanding that it was required to be, and had been, applied towards payment of tax due from the company, that the distributions were dividends from a fund which was exempt from income tax, with the result that the sums received by him were non-taxable receipts in his hands, and the assessments were, therefore, bad. The Crown contended that the payments made to the taxpayer were not distributions of interest on tax reserve certificates, since such interest came into existence only for the purpose of discharging liability to tax, but were distributions out of general profits taxed in the hands of the company, and were so taxed income in the taxpayer's hands, and were properly the subject of additional assessments. The commissioners held that the interest came into being only for the purpose of meeting a corresponding tax liability and that the shareholders had no concern in it as a prospective or possible source of dividend to themselves and it was not available for dividend, and they dismissed the appeal. The taxpayer appealed.

Tribe for the taxpayer.

Grant, Q.C., J. H. Stamp and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

May 1. UPJOHN, J., read the following judgment. This appeal raises a neat point whether a company, having made substantial savings in its cash liability to income tax by a prudent application of tax reserve certificates thereto, is entitled to distribute amongst its shareholders the amount of the interest earned by such certificates (such interest being admittedly tax free in the hands of the company) without deducting tax from such distribution.

Tax reserve certificates were created and issued as a result of a Treasury memorandum dated Dec. 22, 1941. By the terms of issue the certificates earned interest at one per cent. per annum, in so far as they were applied to payment of certain taxes, but carried no interest to the extent to which they were not so applied. The interest so earned would not be returnable by the holder as part of his income or profit and thus would not be liable to income tax, surtax, national defence contribution, or excess profits tax. Statutory authority for such exemption from tax was given by the Finance Act, 1942, s. 29 (1). There was a further issue of tax reserve certificates in 1946, but I am not concerned with that issue.

Shortly after the creation of such certificates a company known as the Hutton Shoe Co., Ltd., which I will call "the company", and in which at all material times the taxpayer was a holder of fifty per cent. of the shares, purchased tax reserve certificates to meet its income tax liabilities. It started by purchasing to the value of £10,400 certificates in 1942, and thereafter made purchases fairly regularly until the end of 1946, by which time it had purchased £148,600 of certificates. All but £2,000 of these certificates were regularly surrendered from time to time in discharge in whole or in part of its income tax liability, the last tax liability being that for the year ended June 30, 1950. The amount of interest credited to the company on payment of its tax in this way amounted to the aggregate sum of £1,456 3s. 4d. Thus, in the first year, 1943, the company applied in or towards discharge of its tax liability tax reserve certificates to the nominal value of £18,600 and was credited with interest thereon to the extent of £78 13s. 4d. and thereby discharged £18,678 13s. 4d. of its total tax liability for that year.

In the annual accounts of the company for that year, the amount of interest saved, £78, by thus discharging its income tax was shown as a separate credit in the profit and loss account. Then, by a resolution dated July 30, 1943, the company resolved that the sum of £78 13s. 4d. received in respect of interest on tax reserve certificates for the year to June 30, 1943, be paid direct to the shareholders individually in proportion to their holdings of shares as at June 30, 1943. The taxpayer, by virtue of his fifty per cent. shareholding, duly received in cash £39. This practice was regularly followed by the company throughout the relevant years. It will, however, be convenient, in dealing with the submissions made to me, to refer to the figures of 1943 by way of example.

The company claims to be entitled to distribute that sum of £78 without being bound to deduct tax pursuant to r. 20 of the All Schedules Rules on the ground that the distribution is in respect of interest on the tax reserve certificates, and, that interest not having borne tax in the hands of the company, it is neither bound nor entitled to deduct tax therefrom in making the distribution by way of dividend to the shareholders. It is not in dispute, having regard to the well-known principles laid down by LORD TOMLIN in *Neumann v. Inland Revenue Comrs.* (1) ([1934] A.C. 228, 229), that, if the company is entitled to regard the distribution of £78 as being the distribution of a sum which has not borne tax in its hands, then it is not entitled to deduct tax on making the payment, and that the sum so distributed is not subject to income tax or surtax in the hands of the payee. The sole question I have to consider is whether the company is entitled to regard the distribution as the distribution of a fund which has not borne tax in its hands.

Counsel for the taxpayer puts his case in this way. He says that the matter is one entirely of account and that it matters not that the interest on the tax reserve certificates was in fact applied, as it had to be, towards payment of the tax due from the company. In support of that submission he referred me to two cases to illustrate his general proposition: *Montague Burton, Ltd. v. Inland Revenue Comrs.* (2), and, in particular, to the observations of ROMER, L.J. (152 L.T. 16), and *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (3). In the latter case, a holding company had by contract bound

itself to pay to its bankers in reduction of a loan dividends received from certain operating companies in which it was the principal shareholder, but it was held, nevertheless, that these dividends were properly a credit to the profit and loss account of the holding company, and, accordingly, it was entitled out of other available assets to pay a dividend corresponding to the amount of the dividends received. That, says counsel, is exactly the position here. VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 621):

"As regards para. 23, I agree that the contract with the bank did not bind the company not to distribute a dividend, and, inasmuch as the company made profits in each of the years in question, the fact that it used the dividends it received (as it was bound to do) in reducing the charge on the shares, did not make it unlawful to distribute a dividend. There is nothing in law to prevent a company using an income-receipt as cash in its hands to discharge a capital liability or to purchase a capital asset, and then, after the close of its financial year, paying a dividend out of other cash, or borrowing for the purpose, to the extent of the credit balance standing on profit and loss account. This was very clearly explained by my noble and learned friend LORD ROMER, when sitting in the Court of Appeal in *Montague Burton, Ltd. v. Inland Revenue Comrs.* (2) (152 L.T. 16), and his view was affirmed on appeal to this House, particularly in the speeches of LORD HAILSHAM, L.C., and of LORD RUSSELL OF KILLOWEN (154 L.T. 359, 360). The board of referees sought to distinguish the decision of ROWLATT, J., in *Glazed Kid, Ltd. v. Inland Revenue Comrs.* (4) where the company made a very similar arrangement to borrow from a bank the purchase price of shares on the terms that it paid over to the bank the dividends as received. MACNAGHTEN, J., in reversing the decision of the board of referees, declared himself unable to see the distinction and I agree with him. The judgments of ROWLATT, J. in income tax cases deserve, in my opinion, particular attention, but in this instance, with all respect to that judge, his view cannot be upheld. He said (15 Tax Cas. 456): ' . . . it is not open to anyone to say that they [the Glazed Kid Co.] have not distributed a reasonable part, when they could not distribute any part of what were their profits, because every penny of those profits, which solely consisted of these dividends, were under contract receivable by somebody else '. This is to confuse the use made of an income receipt to discharge a capital liability with the quite distinct question of the use of a credit balance on the profit and loss account to justify the distribution of a dividend."

The Crown concedes that the matter is one of account and the fact that the interest on the tax reserve certificates has been applied in payment of the tax liability taken in isolation is irrelevant. The argument of counsel for the taxpayer proceeds: The liability to taxation having been discharged by the surrender of tax reserve certificates, the general fund standing to the credit of profit and loss in the accounts of the company is increased by the sum of £78. He poses the question: How is that increase achieved? He says the source of that increase is quite plain. It is a perfectly ascertainable figure and represents the interest on surrendered tax reserve certificates. He submits that it does not form part of the general taxed funds standing to the credit of the profit and loss account because the interest is exempted from income tax and, therefore, it cannot be said that that particular item of £78 in the profit and loss account has been taxed. He further says that this sum cannot be regarded as arising from any diminution of the company's liability to income tax for the liability of the company to income tax is in no way diminished. It remains for the first year what it always has been, i.e., £18,678 13s. 4d. which has been discharged by the surrender of £18,600 of tax reserve certificates and interest thereon. He submits that this £78 is a sum apart from the ordinary trading

and other profits made by the company, and is a sum which has not been taxed in the hands of the company. It is in truth tax-free interest on valuable securities, viz., tax reserve certificates purchased by the company. Therefore, he says, if the company likes to distribute that definite and ascertained sum by way of dividend, it is entitled to do so, and as it represents an untaxed fund in its hands it cannot deduct tax from it pursuant to r. 20, and so in the hands of the taxpayer it is free of income tax and surtax.

- A Counsel for the Crown admits that the fund standing to the credit of profit and loss account is increased by £78, and he admits that that item is available for distribution by way of dividend, but he says tax must be deducted. He submits that that is so for two reasons. First, he says that the company can only receive interest on the tax reserve certificates by applying them towards tax. Therefore, he says, the interest no longer exists, and all that has happened
- B is that the general fund of taxed profits has been increased in this sense, that a smaller sum, smaller by £78, has had to be applied out of those profits in payment of the relevant tax liability, but that sum appearing in the general fund of profit and loss never represented the interest on the tax reserve certificates. Secondly, he says that the company's action has been inconsistent, and that, having applied the interest in payment of tax, it cannot now contend that
- C that item of interest is now in the general fund of profit and loss representing that interest.

- In support of that submission he referred me to two cases. The first is *Birmingham Corpn. v. Inland Revenue Comrs.* (5). That was a complicated case and the actual decision went on an entirely different point. Briefly the facts were these. Birmingham Corporation borrowed money for a housing
- D scheme and in accordance with the Housing, Town Planning, etc., Act, 1919, they were entitled to recoupment from the Crown of loss made on that scheme, subject to a certain contribution. As part of that loss they showed, as they were entitled to, the interest on the money borrowed for the purpose of the scheme. Of course, when they had paid interest to the lenders they had deducted income tax, but they showed in their loss for the purpose of the subsidy the
- E gross amount of the interest. That would be right if they had paid the interest out of funds which had not borne tax in their hands, and they would then be accountable to the Revenue for the sum so deducted having regard to r. 21 of the All Schedules Rules. Later, for the purposes of income tax, the corporation claimed in effect that the interest on the borrowed money had been paid
- F out of their taxed funds, and, therefore, that they were entitled, pursuant to r. 19, to retain tax deducted from the interest payable to the lenders. The House of Lords said that that was quite inconsistent, and that, having claimed against one department of the Crown that they had paid the interest out of capital, they could not then claim against another department of the same person, the Crown, that they had paid the interest out of income. It was said by LORD ATKIN that the original claim to the subsidy was conclusive proof
- G that the corporation had in fact paid the interest out of untaxed funds.

The second case was *Central London Ry. Co. v. Inland Revenue Comrs.* (6), and again the decision was on an entirely different point, but it was held by the House of Lords that the taxpayers were making quite inconsistent claims. As LORD MACMILLAN said ([1936] 2 All E.R. 385):

- H "My Lords, I do not think that the same sum can be utilised by the railway company to render them those two inconsistent services in the same tax year, so as to entitle them first to attribute the £2,340 ls. 11d. to the payment of interest to their creditors and claim to retain the tax deducted therefrom as if it were paid out of revenue and then by debiting it to capital to enhance the dividend fund and claim to regain the tax deducted from their shareholders on paying them their dividends. Whatever

view be taken of the meaning of r. 19, I do not think that the railway company can bring such a case within it."

Those two cases were very special cases, as was pointed out by LORD GREENE, M.R., in *Allchin v. Coulthard* (7) ([1942] 2 All E.R. 45). That case went to the House of Lords where the judgment of the Master of the Rolls was approved in its entirety, and VISCOUNT SIMON, L.C., said ([1943] 2 All E.R. 356):

"Neither is there anything in the present case which goes to show that they have precluded themselves by inconsistent action, as was the case in *Birmingham Corp'n. v. Inland Revenue Comrs.* (5), from being treated as paying the interest out of profits and gains brought into charge. The corporation claims to be so treated, and the claim is justified."

In my judgment, those two cases relied on by the Crown have no application to the case before me. They depended on the existence of a factual inconsistency, i.e., if for one purpose a company says it has made a payment out of fund A, it cannot, at all events against the same person (the Crown) for another purpose, say it made the payment out of fund B. There is no inconsistent claim here set up by the taxpayer. He says, and relies on the fact, that he has surrendered tax reserve certificates in payment of his tax and has received interest thereon, but he says, for the reasons that I have already endeavoured to summarise, that the result of that transaction is to produce as an item in his profit and loss account a sum of £78 which is a tax-free item in his accounts. If he is right on that, he has done nothing inconsistent with his surrender of tax reserve certificates and interest in discharge of his income tax liability. In truth, this case gives rise to a short, but, to me, difficult, point.

In my judgment, the true solution is to be found in these considerations. The company in the course of carrying on its business has made profits. On those profits it has to pay tax, and it can pay tax in two ways, either by waiting for the due date and then paying cash out of its general fund standing to the credit of profit and loss, or by making an estimate of its tax liabilities and making provision by the purchase of tax reserve certificates well in advance of the due date, and in due course surrendering those tax reserve certificates and claiming interest thereon. If the company follows the latter course, the result is that its general fund standing to the credit of profit and loss is larger than it otherwise would be or, what comes to the same thing, it has had to deplete that fund by less than it would have had to had it paid its tax in cash. All that has happened is that the general fund standing to the credit of profit and loss has been swollen by the sum of £78. The case is analogous to receiving a discount on a trade debt. The company is left with a larger general fund to the credit of profit and loss and not with a separate item in its profit fund representing a tax-free item. Accordingly, in my judgment, the Special Commissioners reached a correct decision. In the result, the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Wigan & Co.*, agents for *Phipps & Troup*, Northampton (for the taxpayer); *Solicitor of Inland Revenue*.

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re WARRE'S WILL TRUSTS. WORT AND ANOTHER *v.*
SALISBURY DIOCESAN BOARD OF FINANCE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), April 28, 1953.]

Charity—Uncertainty—Absolute discretion of trustees.

Charity—Religion—Public benefit—Establishment of a “retreat house”.

A By her will a testatrix gave her residuary estate to the Salisbury Diocesan Board of Finance as holding trustee on trust, *inter alia*, to establish a scheme for the use of her residence, and, after appointing certain persons to be the administrative trustees, she directed: “The precise form of the scheme and therefore the final trusts of this my will shall be settled by the administrative trustees in their absolute discretion but for the guidance of such administrative trustees in settling such scheme I now set out a rough outline which sets out my wishes:—‘The property and income . . . to be applied to the provision and upkeep of (i) a house of residence for the Saint Andrews’ Missioners . . . and/or (ii) a retreat house . . .’” She directed further that such part of the income of the residue as should not be required for the maintenance of (i) and (ii), should be applied to making grants to certain ecclesiastical charities, and, finally, “. . . should such scheme ultimately in the opinion of . . . the trustees . . . not be found to be of the best service in furthering the spread of Christianity . . .”, then she provided certain charitable alternatives. On a summons to determine whether the trusts were valid charitable trusts,

D HELD: if the wishes of the testatrix mentioned in the “outline” were merely precatory, as appeared to be the case, then the trustees had an absolute discretion as to the nature of the scheme, and the trust was void for uncertainty; alternatively, if the wishes were mandatory, the trust was nevertheless void because a retreat house was a non-charitable object, it lacking the element of public benefit essential to render a purpose charitable: *Cocks v. Manners* (1871) (L.R. 12 Eq. 574), applied; the fact that the additional and alternative objects provided by the testatrix for the application of the income of the residue were valid charitable objects could not preserve the trusts if the preceding objects were non-charitable; and, therefore, the trusts, not being exclusively charitable, were void for uncertainty.

F AS TO CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 103-412, paras. 143-776.

Cases referred to:

- (1) *Cocks v. Manners*, (1871), L.R. 12 Eq. 574; 40 L.J. Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest 245, 48.
- (2) *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 2nd Digest Supp.
- (3) *Baddeley v. Inland Revenue Comrs.*, [1953] 1 All E.R. 63.
- (4) *Re Delany*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 8 Digest 245, 50.
- (5) *Re Flinn*, [1948] 1 All E.R. 541; [1948] Ch. 241; [1948] L.J.R. 923; 2nd Digest Supp.
- (6) *Re White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 8 Digest 249, 89.
- (7) *Re Garrard*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest 294, 716.

ADJOURNED SUMMONS to determine whether the provisions contained in the will of the testatrix with regard to her residuary estate and commencing with the words “And ultimately to establish a scheme” were (a) valid charitable trusts, or (b) void for uncertainty.

By her will dated June 10, 1937, Agnes Margaret Warre appointed the plaintiffs to be her executors and trustees, and, after giving the residue of her estate to her trustees on trust for the Salisbury Diocesan Board of Finance, and setting out a number of bequests, not here relevant, she continued:

"And ultimately to establish a scheme for the future of my present residence and its use and in such scheme it shall be provided that the holding trustee shall be the board and that the administrative trustees shall be the Bishop of Salisbury for the time being the said Gerald Burton Allen Francis Herbert Wort and Percy John Dale two persons either clergymen of the Church of England or laymen nominated by the Bishop of Salisbury and three laymen nominated by the board my idea being that so far as may be the administrative trustees shall consist as to half of clergymen and half of laymen. The precise form of the scheme and therefore the final trusts of this my will shall be settled by the administrative trustees in their absolute discretion but for the guidance of such administrative trustees in settling such scheme I now set out a rough outline which sets out my wishes:—"The property and income to be derived therefrom to be applied to the provision and upkeep of (i) a house of residence for the Saint Andrews' Missioners either as at present constituted or in any re-constituted form and/or (ii) a retreat house . . . So much of the income as shall not in the judgment of the trustees be required for the upkeep of the house church and other buildings and for the diocesan use of the premises as a house for Saint Andrews' Missioners or a retreat house and the expenses thereof with a suitable reserve for future needs shall be applied to making grants for (i) training of ordination candidates including those intending to offer themselves for missionary dioceses and (ii) to the National Society but should such scheme ultimately in the opinion of the bishop the administrative trustees and the committee not be found to be of the best service in furthering the spread of Christianity at home or abroad this alternative may be adopted (a) to use or allocate the house and as much of the property as may be required for some other religious purpose and (b) sell that not required for that purpose and devote the proceeds of sale together with the income arising therefrom to the objects above mentioned."

The testatrix died on May 21, 1946. Evidence was given that by "National Society" the testatrix was referring to the National Society for Promoting Religious Education in accordance with the Principles of the Church of England.

Rink for the plaintiffs, the executors.

Rawlence for the first defendant, the Salisbury Diocesan Board of Finance.

J. V. Nesbitt for the second defendant, one of the next of kin.

B. J. H. Clouston for the Attorney-General.

HARMAN, J., stated the facts and continued: There are two views. One is that the administrative trustees have an absolute discretion to establish a scheme for the future use of the residence, and the other is that they are limited to the purposes set out in what is called the "rough outline," which must be considered as mandatory and not merely as an expression of the wishes of the testatrix. Should the first view be right—as I am inclined to think it is—then, in my judgment, there are no limits on what the administrative trustees may direct, and the fact that the holding trustee, which is to establish the scheme in the first place, may have exclusively charitable objects, seems to me not to make any difference. Therefore, even if a gift to the Salisbury Diocesan Board of Finance for its general purposes were essentially a gift for charitable objects, this being a gift to the board purely as trustees, it is not such a gift since the board is to establish a scheme which may or may not have anything to do with its own objects. If, therefore, on the true construction of this will—that

being the view to which I am inclined—the wishes of the testatrix are merely precatory and not mandatory, I should hold the gift void for uncertainty.

A Should I be wrong in that view, and the so-called wishes are mandatory, then it remains to be seen whether those wishes themselves are exclusively charitable. The first wish expressed by the testatrix relates to the use of her residence for St. Andrews' Missioners. That I need not investigate further, because the St. Andrews' Missioners had ceased to be actively in existence well before the date of her will. Their activities were not officially wound up until a somewhat later date, but that object has always been impossible at any date when the administrative trustees could have started a scheme.

B The testatrix proposed, secondly, what she called a retreat house, and this phrase is explained as meaning a house devoted to a form of religious activity or inactivity which is known as a "retreat", and that is a form of religious experience well understood in the Church of England. It is a retirement from the activities of the world for a space of time for religious contemplation and the cleansing of the soul. No doubt that is a highly beneficial activity for the person who undertakes it, but it is not in English law a charitable activity. In *Cocks v. Manners* (1), which was recently confirmed by the House of Lords in *Gilmour v. Coats* (2), SIR JOHN WICKENS, V.-C., said (L.R. 12 Eq. 585):

C "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public . . ."

D *Gilmour v. Coats* (2) was concerned with a trust for a certain Roman Catholic priory which consisted of cloistered nuns, who devoted their life to prayer, contemplation, penance and self-sanctification within their convent and engaged in no exterior works. There was evidence as to the doctrine of the Roman Catholic Church with regard to the benefit conferred by the contemplative life, not only on those who followed it themselves, but also through the efficacy of their intercessory prayers. The House of Lords held that the element of public benefit essential to render a purpose charitable applied equally to religious as to other charities. By that decision, therefore, the House declined to go beyond the doctrine of *Cocks v. Manners* (1).

E Activities which do not in any way affect the public or any section of it are not charitable. Pious contemplation and prayer are, no doubt, good for the soul, and may be of benefit by some intercessory process, of which the law takes no notice, but they are not charitable activities. It follows, then, that if the purposes indicated by way of confining the absolute discretion given to the trustees include a purpose which is not charitable, the trustees are, on this view, enjoined to embark on a purpose which is not charitable.

G At the end of the paragraph in which the wishes of the testatrix are set out, there is a "sweeping up" clause including objects which are themselves, no doubt, charitable, but that cannot preserve the objects going before them if they are not charitable. Similarly, there is a discretion given to the administrative trustees, if they find that the wishes set out in the "rough outline" are not serving the testatrix's purpose, which she describes as "furthering the spread of Christianity", to adopt certain alternatives which on the face of them look as if they are charitable purposes. The fact that the testatrix thought her purpose would serve the cause or spread of Christianity does not make the purpose charitable and prevent these trusts from being bad.

I hold that these trusts, not being exclusively charitable, are void for uncertainty, and I conclude that this residuary gift fails, and that the residue passes as on intestacy to the representatives of the sister of the testatrix.

Order accordingly.

Solicitors: *Darley, Cumberland & Co.*, agents for *Jonas & Parker*, Salisbury (for the plaintiffs); *Taylor, Jelf & Co.*, agents for *Wilson & Sons*, Salisbury (for the first defendant); *Field, Roscoe & Co.*, agents for *Pye-Smith, Hulbert & Kildahl*, Salisbury (for the second defendant); *Treasury Solicitor*.

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

GREEN v. PORTSMOUTH STADIUM, LTD.

[COURT OF APPEAL (Denning and Hodson, L.JJ.), April 27, 1953.]

Bookmaker—Admission charge to racing track—Excessive charge—Recovery of excess by bookmaker—Betting and Lotteries Act, 1934 (c. 58), s. 13 (1), (2).

A bookmaker alleged that over a period of years he had been overcharged for admission to a licensed greyhound racing track, contrary to s. 13 (1) and (2) of the Betting and Lotteries Act, 1934, and he claimed from the occupiers of the track the excess amount so paid, as money had and received by them to his use.

HELD: as penalties for a breach of s. 13 of the Act of 1934 were provided by s. 16 (1) (d) and s. 30 (2), and as the Act contained no provision that an amount paid in excess of that permitted by s. 13 (1) should be recoverable, a civil action did not lie for a breach of the section: *Cutler v. Wandsworth Stadium, Ltd.* ([1949] 1 All E.R. 544), applied; and, therefore, as the bookmaker's claim for money had and received was based on payments alleged to have been made in contravention of s. 13 (1) and (2), he had no right of action, notwithstanding that he was not seeking to enforce directly an obligation created by the section.

Observations of LORD MANSFIELD, C.J., in *Browning v. Morris* (1778) (2 Cowp. 792), explained.

Decision of PARKER, J. ([1953] 1 All E.R. 642), reversed.

AS TO ADMISSION FEES TO BOOKMAKERS, see HALSBURY, Hailsham Edn., 1952 Supp., Gaming and Wagering, para. 927; and FOR THE BETTING AND LOTTERIES ACT, 1934, s. 13, s. 16 (1), and s. 30 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 796, 798, 808.

Cases referred to:

- (1) *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; *affg.* [1947] 2 All E.R. 815; [1948] 1 K.B. 291; [1948] L.J.R. 257; 2nd Digest Supp.
- (2) *Browning v. Morris*, (1778), 2 Cowp. 790; 98 E.R. 1364; 12 Digest, Replacement, 322, 2485.
- (3) *Groves v. Wimborne* (Lord), [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.

INTERLOCUTORY APPEAL by the defendants from an order of PARKER, J., dated Feb. 20, 1953, and reported [1953] 1 All E.R. 642, on a point of law ordered to be tried under R.S.C., Ord. 25, r. 2, in an action by the plaintiff for money paid to the defendants under a mistake of fact, or, alternatively, for money had and received by the defendants to the use of the plaintiff.

At various times between 1941 and 1947 the plaintiff, who was a bookmaker, carried on business at the Portsmouth Stadium Greyhound Racing Track, which was occupied by the defendants. He alleged that, during this period, he had been charged an admission fee of £2 per meeting, an excess charge of £1 8s. 9d. per meeting, and he had, therefore, been overcharged for admission

to the track, contrary to s. 13 (1) of the Betting and Lotteries Act, 1934. He claimed £585 as the excess amount so paid. The defendants contended, *inter alia*, (i) that any payments which the plaintiff had made were under a mistake of law and were illegal, and, therefore, irrecoverable; and (ii) that any payments which he had made were not recoverable by reason of any matter set out in the statement of claim, or by reason of the Betting and Lotteries Act, 1934, or at all, and that the statement of claim disclosed no cause of action. By an order dated Oct. 20, 1952, the master ordered that the issues raised in (i) should be tried as a preliminary point of law, and, by consent of the parties, the order was amended to include the issue raised in (ii). PARKER, J., determined the issues in favour of the plaintiff, on the ground that his claim was for money had and received and was not a claim under the Act of 1934.

Montagu, Q.C., and *McLellan* for the defendants.

R. Hughes for the plaintiff.

DENNING, L.J.: This is a proceeding analogous to a demurrer. The defendants seek to dispose of the action in limine on the ground that the statement of claim does not disclose a cause of action. The plaintiff alleges that he was a bookmaker and that the defendants were the occupiers of the Portsmouth Stadium Greyhound Racing Track, which was licensed under the Betting and Lotteries Act, 1934. He says that for many years he went to the stadium in his capacity as a bookmaker and paid £2 for admission each time that he went there. Under s. 13 (1) of the Act the racecourse authorities are not entitled to charge a bookmaker more than five times the amount of the charge to the public. In the part of the track to which the plaintiff went, the charge to the public was 2s. 3d., and he says, therefore, that the highest amount which he should have been charged was 11s. 3d. Therefore, he claims in this action the sum of £1 8s. 9d. for each occasion that he was admitted to the track, on the ground that it was an overcharge.

In considering whether the statement of claim discloses a cause of action, it must be observed that there is no allegation that the plaintiff was under any mistake of fact. Nor is there any allegation that he was under a mistake of law, or that he was oppressed or imposed on in any way. We must assume, on the pleading, that the plaintiff knew that the lawful charge was 11s. 3d., and that, nevertheless, he voluntarily chose to pay £2 to the defendants, and now he seeks to recover the excess paid. He does not, and cannot, claim for money paid on a consideration that has wholly failed, as he has had the consideration, *i.e.*, he has gone into the track and conducted his bookmaking operations there. The only ground on which he claims the money is that there was a breach of s. 13 of the Act of 1934, in that he was charged more than the amount permitted by s. 13 (1).

The question whether a breach of a statute can be made the foundation of an action depends on the interpretation of the statute itself. Section 13 (1) of the Act of 1934 specifies that no charge exceeding five times the charge to the public can be made to a bookmaker, and s. 13 (2), which is the important sub-section, provides:

"If any charge other than a charge authorised by the preceding sub-section is made to a bookmaker or an assistant of a bookmaker, or if any payment, valuable thing or favour, other than a charge so authorised, is demanded or received by or for the benefit of the occupier of a track as a consideration for facilities being given to a bookmaker for the carrying on of his business, the person immediately responsible and also the occupier of the track shall be guilty of an offence."

It is most significant that the Act does not say that the overcharge shall be recoverable. In modern statutes, such as the Rent Restrictions Acts, dealing with such things as premiums, if it is intended that an overcharge shall be

recoverable, the Act says so. Section 13 (2) of the Act of 1934 only says that the person responsible shall be guilty of an offence. By s. 30 (2) of the Act a person guilty of an offence is liable on summary conviction to a fine not exceeding £50 for the first offence, and on conviction on indictment the fine may be as much as £300. Moreover, under s. 16 (1) (d), on conviction of an offence the racecourse proprietors can have their licence taken away. On the face of the statute those are the only penalties provided in the case of an overcharge. The presumption is that, where the statute provides those consequences for a breach, no other remedy is available. A

It was sought to say, however, that by implication an action would lie to recover the overpayments. The decision of the House of Lords in *Cutler v. Wandsworth Stadium, Ltd.* (1) seems to me to make that proposition almost unarguable. There the House of Lords held that a breach of s. 11 (2) (b) of the Act, which provides that space on the track must be made available for bookmakers, did not give rise to a civil action, but could be enforced only by prosecution for a criminal offence. That was an action for a number of declarations, an injunction and damages, and it failed. The House considered the statute as a whole, and Part I of the Act [which contains s. 1 to s. 20] in particular, and they said that the Act was not passed for the protection of the bookmakers. It is not a bookmakers' charter. It is for the regulation of racecourses, and the mode of regulation is by means of the criminal courts, and not by way of civil action. B

Applying that decision to this case, it is clear that a breach of s. 13 does not give rise to an action for damages. But the point which impressed PARKER, J., was that this was not an action for a declaration, or for an injunction, or for damages. It was an action for money had and received, to which different considerations might apply. Reference was made to the judgment of LORD MANSFIELD in *Browning v. Morris* (2), where he said (2 Cowp. 792): C

"But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." D

In my judgment, those observations of LORD MANSFIELD apply only to cases where the statute, on its true construction, contemplates the possibility of a civil action. He said that it was "in furtherance of these statutes" that the action for money had and received could be brought. Just as in an action for damages, so, also, in an action for money had and received, it is a question of the true interpretation of the statute whether an action lies so as to recover the overcharge. I see nothing in the Act of 1934 to authorise such an action. I can conceive of cases where bookmakers might themselves aid and abet a breach of the statute. Some rich bookmakers might willingly pay more than the statutory amount to get a privileged position for themselves as against their poorer brethren. Clearly, such people could not recover the overpayments. Nor can the plaintiff here. The breach of s. 13, standing by itself, does not give rise to a claim for repayment. In my judgment, this appeal should be allowed, and the preliminary objection upheld. E F G H

HODSON, L.J.: I agree. The plaintiff, having been subjected to what he describes as an illegal overcharge in contravention of s. 13 of the Betting and Lotteries Act, 1934, has tried to recover the money, saying that he is not in *pari delicto* with the defendants and relying on the well-known passage from LORD MANSFIELD's judgment (2 Cowp. 792) in *Browning v. Morris* (2), which has already been read. The short answer to that point seems to me to be that

the plaintiff has not pleaded any facts tending to show that he is not in *pari delicto* with the defendants. If the defendants have broken the law, as far as the pleadings go he has been as much a party to breaking it as they have.

A The main argument was, however, based on the decision of the House of Lords in *Cutler v. Wandsworth Stadium, Ltd.* (1), in which the judgment of the Court of Appeal dealing with the Act of 1934 was affirmed. This court and the House of Lords made it plain that the Act was not passed for the benefit of bookmakers (a class of persons to which the plaintiff belongs), and that there was no reason to infer from anything in the Act, it not being so expressly stated, that civil proceedings were open to anyone who complained of a breach of the Act. Criminal proceedings are contemplated, and the obligations imposed by the Act are enforceable only by criminal proceedings. Therefore, it is not an Act such as the Factory and Workshop Act, 1878, which was described by A. L. SMITH, L.J. ([1898] 2 Q.B. 406), in *Groves v. Lord Wimborne* (3), as:

B “ . . . a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit.”

C In the present case, PARKER, J., came to the conclusion that the plaintiff was not, as was the plaintiff in *Cutler v. Wandsworth Stadium, Ltd.* (1), seeking to enforce directly an obligation created by s. 13 of the Act. The claim being for money had and received, the learned judge thought ([1953] 1 All E.R. 644) that, although the plaintiff was seeking indirectly to enforce the obligation laid down by the section, he was not debarred from putting forward his claim. D With all respect to the learned judge, I do not think that there is any escape for the plaintiff from the effect of the decision in *Cutler's* case (1). The claim for money had and received is based on the payment which is said to have been made in contravention of s. 13 of the Act. The plaintiff cannot bring a civil action for breach of that section, and that is what he is seeking to do. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

E Solicitors: *Brash Wheeler, Chambers, Davies & Co.*, agents for *Glanvilles*, Portsmouth (for the defendants); *D. H. Browne*, agent for *H. F. E. Mathews*, Portsmouth (for the plaintiff).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

JOHNSON *v.* A. H. BEAUMONT, LTD. (first defendants and third parties), and FORD MOTOR CO. (second defendants).

[QUEEN'S BENCH DIVISION (McNair, J.), April 28, 29, 1953.]

Negligence—Breach of statutory duty—Negligence—Unloading ship—Injury to trimmer during temporary absence of signaller—Defective lighting of ship—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 3, reg. 12, reg. 43.

The plaintiff, employed as a trimmer by the first defendants, was engaged in unloading iron ore from the hold of a ship at the wharf of the second defendants, the first defendants being under a contract with the second defendants to provide trimmers for the unloading. The unloading was done by means of a grab under the control of a signaller and a craneman in the employment of the second defendants, who were in general control of the unloading. When the level of the ore in the hold was reduced it was the duty of the trimmers to shovel ore into the centre of the hold so that the grab could operate on it. The unloading was proceeding and the trimmers had already shovelled some ore into the centre of the hold, when the grab in its ascent caught an electric light cable suspended from the hatch coaming and extinguished a light. The signaller shouted that he was going to get another bulb and left his post, directing the craneman to continue to grab in the centre of the hold "where you can see". The craneman lowered the grab into the half-lighted hold where it came down on and crushed the plaintiff's foot. In an action by the plaintiff for negligence and/or breach of statutory duty against both defendants,

HELD: (i) the obligation under the Docks Regulations, 1934, reg. 43, to employ a signaller when a cargo is being unloaded by a fall at a hatchway was not complied with by the mere contractual appointment of a man to act as signaller; the regulation contemplated that the signaller must be present whenever any act of unloading was taking place, and, if a workman was injured during, and by reason of, the temporary absence of a signaller, his employer was liable for breach of his statutory duty; both defendants, by themselves, their agents or workmen were carrying on the processes of unloading within para. (d) of the provisions of the regulations headed Duties, and the plaintiff had not passed from the service of the first defendants to that of the second defendants; and, therefore, both defendants were liable to the plaintiff as being in breach of their duty under reg. 43.

Ashworth v. J. McGuirk & Co., Ltd. ([1943] 2 All E.R. 446), applied.

Garrard v. Southey & Co. Davey Estates, Ltd. (Third Parties) ([1952] 1 All E.R. 597), distinguished.

(ii) but reg. 3 of the regulations, which provides for the efficient lighting of "all places in which persons employed are employed and any dangerous parts of the regular road or way over a dock, wharf, or quay, forming the approach to any such place from the nearest highway", had no application to the lighting of a ship;

(iii) nor was there any breach of reg. 12 (which provides for the efficient lighting of ships in which work is being done, the primary responsibility for such lighting being put by para. (d) of the provisions headed Duties on the owner, master or officer in charge of the ship) as, by reg. 50, it is the duty of the employers to comply with these regulations only if the persons primarily responsible do not "within the shortest time reasonably practicable after such failure", and after the sudden failure of the light prompt steps were taken to put it right.

FOR THE DOCKS REGULATIONS, 1934, regs. 3, 12, 43 and 50, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 164, 166, 172 and 173, respectively.

Cases referred to:

- (1) *Ashworth v. McGuirk (J.) & Co., Ltd.*, [1943] 2 All E.R. 446; [1944] K.B. 1; 112 L.J.K.B. 641; 169 L.T. 308; 2nd Digest Supp.
- (2) *Garrard v. Southey & Co. Davey Estates, Ltd. (Third Parties)*, [1952] 1 All E.R. 597; [1952] 2 Q.B. 174.
- (3) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- (4) *Holt v. Rhodes (W. H.) & Son, Ltd.*, [1949] 1 All E.R. 478; 2nd Digest Supp.

ACTION by the plaintiff, James Johnson, a ship's trimmer, claiming damages from his employers, A. H. Beaumont, Ltd. (the first defendants), and the Ford Motor Co. (the second defendants), in respect of personal injuries received by him as a result of the breach by the defendants of their statutory duty under the Docks Regulations, 1934, reg. 3, reg. 12, and reg. 43.

On Jan. 27, 1951, the plaintiff was engaged with others in the unloading of iron ore from the s.s. Wellington Court which was moored to the second defendant's jetty at Dagenham. The method of discharge of the ore was by means of a grab running off a gantry owned and operated by the second defendants, the grab being let down into the hold by a craneman and under the control of a "signaller" or "hatchway man" or "top man", both these men being in the employment of the second defendants. When the holds were first opened the grab operated alone and grabbed down into the bulk of the cargo in the square of the hatch, but, as the level in the hold decreased, it became necessary for trimmers in the hold to trim the ore by means of shovels from the wings and ends of the hold so as to bring the ore into the square of the hatch where the grab could operate on it. The trimmers were supplied by the first defendants under a trimming contract with the second defendants. The whole operation of unloading was under the general control of the second defendants' foreman, but the first defendants also had a foreman trimmer whose duty it was to supervise the allocation of the trimmers to the right holds and generally to supervise their work. The second defendants brought in the first defendants as third parties, and, under the contract between them, claimed an indemnity from the first defendants for any damages they were ordered to pay the plaintiff.

On Jan. 27, 1951, the plaintiff was working in No. 5 hold of the ship. The hold had been partially emptied and the trimmers had trimmed the ore from the ends of the hold into the square of the hatch. For some time before the accident the grab had been in operation under the control of the foreman and the trimmers were, or should have been, under cover. As the grab was ascending it caught the cable of one of the two electric lights which were suspended from the hatchway coamings with the result that the light suspended from the forward end went out. Thereupon the signaller shouted out: "I am going to get another bulb", and told the craneman: "You can go down in the centre and take out some ore where you can see". The signaller then left his post, and the craneman allowed his grab to descend into the half-lighted hold with the result that it came down on the plaintiff's foot and crushed it. Later, the plaintiff's leg had to be amputated below the knee. Without an admission of liability by the defendants damages were agreed at £3,500. His LORDSHIP found as a fact that the plaintiff had not been negligent, and that the effective causes of the accident were (i) the act of the signaller in leaving his post and telling the craneman to grab in the centre, and (ii) the act of the craneman in lowering his grab into the hold without signals when he knew, or ought to have known, that men might be there.

John Thompson for the plaintiff.

Faulks for the first defendants and third parties.

Ryder Richardson, Q.C., and *J. D. May* for the second defendants.

McNAIR, J., stated the facts and his findings and continued: On those findings I have first to consider whether any such breach of statutory duty, as is alleged, by either of the defendants is established. The first regulation relied on is reg. 3 of the Docks Regulations, 1934, which, so far as material, is in the following terms:

"All places in which persons employed are employed and any dangerous parts of the regular road or way over a dock, wharf, or quay, forming the approach to any such place from the nearest highway, shall be efficiently lighted . . ."

The duty of complying with that regulation is imposed by para. (a) of the portion of the regulations dealing with Duties on

" . . . the person having the general management and control of a dock, wharf, or quay . . .",

which, on the facts of this case, is quite clearly the second defendants, the Ford Motor Co., Ltd. But I feel very considerable doubt, and, indeed, the balance of my mind is quite clearly against the view, that reg. 3 has any application at all to the lighting of a ship.

I think it has not, because that subject-matter is dealt with in the next regulation, to which I will refer, reg. 12—the second regulation relied on—which is in these terms:

"When the processes are being carried on—(a) the places in the hold and on the decks where work is being carried on . . . (c) all parts of the ship to which persons employed may be required to proceed in the course of their employment, shall be efficiently lighted, due regard being had to the safety of the ship and cargo, of all persons employed and of the navigation of other vessels . . ."

The duty of complying with that regulation is imposed primarily by para. (b) of the provisions in the regulations relating to "Duties" on " . . . the owner, master, or officer in charge of the ship." That is, however, subject to the qualification introduced by reg. 50, which provides that :

"If the persons whose duty it is to comply with regs. 9, 10 and 12 fail so to do, then it shall also be the duty of the employers of the persons employed for whose use the means of access and the lights are required, to comply with the said regulations within the shortest time reasonably practicable after such failure."

On the facts of this case, the failure of the light being due to this sudden accident and prompt steps being taken to put it right, I cannot see that there is any evidence that, within the meaning of reg. 50, there had been any failure by either of the defendants to comply with the regulations "within the shortest time reasonably practicable". Accordingly, my view is that there is no breach established of either reg. 3 or reg. 12.

I now come to reg. 43, which deals with the signaller, and it is in these terms:

"When cargo is being loaded or unloaded by a fall at a hatchway, a signaller shall be employed, and where more than one fall is being worked at a hatchway, a separate signaller shall be employed to attend to each fall."

It has been established by the decision of the Court of Appeal in *Ashworth v. J. McGuirk & Co., Ltd.* (1), that the obligation to employ a signaller during certain processes of unloading ships which is imposed by the regulation I have read is not complied with by the mere contractual appointment of a man to act as signaller. The regulation contemplates that the signaller must be present whenever any act of unloading takes place, and, therefore, if a workman is injured during, and by reason of, the temporary absence of a signaller, his

employer is liable for breach of statutory duty. I need not read the passage in the judgment of LORD GREENE, M.R. ([1943] 2 All E.R. 447), where he sets out, if I may say so respectfully, in very cogent argument, why that is the proper construction of the regulation.

The next question to consider is whose duty it is to comply with reg. 43. That matter is dealt with by para. (d) of the provisions dealing with Duties, where it says it is the duty of

A "every person who by himself, his agents, or workmen carries on the processes . . . to comply with Part IV of these regulations",

in which reg. 43 finds place. It is, in my judgment, quite plain that the second defendants, the Ford Motor Co., Ltd., were persons who, by themselves or their agents or workmen, were carrying on "the processes", processes including the process of unloading, and they, in particular, were carrying on the part of the processes which above all required the presence of a signaller at all times at the hatchway. Plainly, therefore, in my judgment, the Ford Motor Co., Ltd. are liable to the plaintiff for breach of the statutory duty imposed by reg. 43. Messrs. Beaumont, too, in my judgment, were by themselves or their workmen carrying on part of the processes of unloading, i.e., the trimming in the hold. There is, as I see it, no reason at all why, at any rate, vis-à-vis their workmen, they should not be held responsible for a failure to provide and keep in position a signaller, whose presence was essential for the safety of their men below.

D It was argued on the basis of *Garrard v. Southey & Co. Davey Estates, Ltd. (Third Parties)* (2), that, in as much as the plaintiff had for the time being passed into the service of Messrs. Ford's and had left the service of Beaumont's, Beaumont's were not liable under this regulation, but, on examination, it seems to me that the facts in *Garrard v. Southey & Co.* (2) were very different from the facts of this case. In that case the electricians in question, the servants of the first defendants, who had been lent to the second defendants, had passed wholly under their control, and, therefore, it was reasonable to consider that, pro hac vice, they had become the servants of the second defendants. But, as appears from a quotation from VISCOUNT SIMON's speech in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (3) ([1946] 2 All E.R. 348), a very heavy burden of proof

F " . . . rests upon the general or permanent employer . . . to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances."

G I am quite clear on the evidence here that that burden has not been shifted, and, furthermore, in so far as PARKER, J., in *Garrard v. Southey & Co.* (2) relied, as a second ground for his judgment, on a breach of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), the particular regulation with which he was concerned were in very different terms from reg. 43. Accordingly, I hold that both the defendants are liable for breach of the statutory duty contained in reg. 43.

H It is not strictly necessary for me to consider the common law position, but, as it has been argued, it is right that I should deal with that matter shortly. In the particulars of negligence set out in the statement of claim it is said that:

"The defendants, or one of them, failed properly to supervise the said unloading or to take adequate precautions to safeguard the plaintiff in his said work."

In my judgment, on the facts I have stated, there was adequate supervision provided by Messrs. Ford's, and as regards Messrs. Beaumont, it seems to me

that, once they had satisfied themselves, as they did, that a good system of work was in operation, they were under no obligation to keep continuously a foreman supervising at each hold. I think the support for that is to be found in the judgment of LORD MERRIMAN, P., presiding in the Court of Appeal, in *Holt v. W. H. Rhodes & Son, Ltd.* (4). As regards the fourth and fifth allegations of negligence, which are allegations of negligence against Ward, the second defendants' foreman, and their craneman, I think on my findings of fact those particulars of negligence are established, and, accordingly, the second defendants would be liable at common law to the plaintiff vicariously for the negligence of their two servants, Ward, the foreman, and the craneman operating the grab. Those findings involve that there must be judgment for the plaintiff against each of the defendants for the agreed sum of £3,500. My judgment is based primarily on my finding that both the defendants were in breach of reg. 43 of the Docks Regulations.

[HIS LORDSHIP then went on to consider the contract under which the first defendants supplied trimmers to the second defendants and came to the conclusion that under the terms of that contract the second defendants were entitled to an indemnity from the first defendants for any sum they might become liable to pay and did pay to the plaintiff.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Simmons & Simmons* (for the first defendants and third parties); *Dennes & Co.* (for the second defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re ROOKE'S WILL TRUSTS. TAYLOR *v.* ROOKE.

[CHANCERY DIVISION (Harman, J.), May 1, 1953.]

Trust and Trustee—Trust for sale and conversion—Trust to sell as soon as possible

—Power to postpone—Law of Property Act, 1925 (c. 20), s. 25 (1).

Will—Substitutionary gift to issue—Whether original gift divested if gift over fails.

By his will, dated Oct. 8, 1948, a testator directed his trustees that "if my house farm lands and premises known as Woodhouse . . . and my live and dead stock have not been sold at the time of my decease to as soon as possible after my death sell the same and . . . the net proceeds shall fall into and form part of my residuary estate." He gave his residuary estate to his trustees "upon trust to permit and allow" his wife "to receive and enjoy the net income . . . thereof during her life" and on her death he directed the trustees "to sell call in and convert the same into money and . . . pay and divide the net proceeds . . . equally between" his brother S. and his three sisters M., L., and G., and provided that "in case of either of my brother or sisters shall be dead at the time of my wife's decease I give their respective share of my residuary estate to their respective issue . . ." He directed further that his trustees during the life of the widow "may . . . have full power to sell or vary all or any part of my estate and may retain any investment that my estate may consist of at my death . . ." G., a spinster, survived the testator, but predeceased the widow.

HELD: (i) the words of the testator directing a sale of the farm were sufficiently imperative in their context to make them inconsistent with a discretionary power of postponement, and, therefore, there appeared a "contrary intention" within the Law of Property Act, 1925, s. 25 (1), sufficient to exclude the power to postpone sale to be implied under that section.

(ii) on the true construction of the will, the gift to the issue of the testator's brother and sisters was merely substitutionary, and, therefore, as

the substitution was in favour of issue of the primary beneficiaries, the gift to G. should be construed as being intended to remain vested unless the substitutionary gift took effect, and, G. never having had issue, her share of residue devolved on her personal representatives.

Dictum of ~~SIR GEORGE~~ JESSEL, M.R., in *Hurst v. Hurst* (1882) (21 Ch.D. 293), applied.

Doe d. Blomfield v. Eyre (1848) (5 C.B. 713), distinguished.

A AS TO SUBSTITUTIONARY GIFTS TO CHILDREN, see HALSBURY, Hailsham Edn., Vol. 25, p. 572, para. 1020, Vol. 27, p. 748, para. 1275 and Vol. 34, p. 420, para. 467.

FOR THE LAW OF PROPERTY ACT, 1925, s. 25, see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 470.

Cases referred to:

- B** (1) *Re Doherty-Waterhouse*, [1918] 2 Ch. 269; 87 L.J.Ch. 630; 119 L.T. 298; 37 Digest 440, 450.
 (2) *Scriven v. Sandom*, (1862), 2 John. & H. 743; 70 E.R. 1258; 37 Digest 442, 462.
 (3) *Re Smith*, [1896] 1 Ch. 171; 65 L.J.Ch. 269; 74 L.T. 14; 24 Digest 558, 5982.
- C** (4) *Re Ball*, [1930] W.N. 111; 74 Sol. Jo. 289; Digest Supp.
 (5) *Doe d. Blomfield v. Eyre*, (1848), 5 C.B. 713; 18 L.J.C.P. 284; 10 L.T.O.S. 525; 136 E.R. 1058; 37 Digest 496, 889.
 (6) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 15 L.T.O.S. 557; 41 E.R. 1379; 37 Digest 99, 346.
- D** (7) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 37 Digest 105, 397.
 (8) *Robinson v. Wood*, (1858), 27 L.J.Ch. 726; 31 L.T.O.S. 311; 44 Digest 432, 2598.
 (9) *Re Bold*, (1926), 95 L.J.Ch. 201; 134 L.T. 595; 44 Digest 1106, 9569.
 (10) *Re Pratt's Settlement Trusts*, [1943] 2 All E.R. 458; [1943] Ch. 356; 112 L.J.Ch. 251; 169 L.T. 181; 2nd Digest Supp.
- E** (11) *O'Mahoney v. Burdett*, (1874), L.R. 7 H.L. 388; 44 L.J.Ch. 56, n.; 31 L.T. 705; 44 Digest 432, 2599.
 (12) *Hurst v. Hurst*, (1882), 21 Ch.D. 278; 51 L.J.Ch. 729; 46 L.T. 899; 44 Digest 433, 2600.
 (13) *Salisbury v. Petty*, (1843), 3 Hare 86; 67 E.R. 307; 44 Digest 791, 6477.
 (14) *Smither v. Willock*, (1804), 9 Ves. 233; 32 E.R. 592; 44 Digest 1075, 9274.
- F**

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Frederick James Faulkland Rooke, deceased, (a) the trustees of the said will had power in their discretion to postpone the sale of the testator's house, farm lands and premises known as Woodhouse and to retain the same as an investment of the residuary estate of the testator so long as they should think fit so to do; (b) the share in the residuary estate of the testator to which the testator's sister, Gertrude Edith Rooke, would have been entitled if she had survived the testator's widow devolved subject to the life interest of the said widow (i) on the legal personal representatives of Gertrude Edith Rooke, or (ii) as on the intestacy of the testator, or (iii) in any and if so what other way.

H By his will, dated Oct. 8, 1948, the testator, Frederick James Faulkland Rooke, after appointing trustees and bequeathing certain pecuniary legacies and a specific legacy directed his trustees "if my house farm lands and premises known as Woodhouse . . . and my live and dead stock have not been sold at the time of my decease to as soon as possible after my death sell the same" and declared that after paying the costs of such sale "the net proceeds shall fall into and form part of my residuary estate". He devised his residuary estate to his trustees "upon trust to permit and allow my said wife to receive

and enjoy the net income dividends and use thereof during her life" and on her death he gave his residuary estate to his trustees "to sell call in and convert the same into money and after paying the costs of such sale . . . to pay and divide the net proceeds with and equally between" his brother S. and his three sisters (whom he named, including the said Gertrude Edith Rooke). He further provided "in case of either of my brother or sisters shall be dead at the time of my wife's decease I give their respective share of my residuary estate to their respective issue and if more than one equally between them . . ." and he directed that "my trustees . . . may . . . have full power to sell or vary all or any part of my estate and may retain any investment that my estate may consist of at my death although the same may not be an investment allowed by law for the investment of trust funds . . ." There was no further disposition of the residuary estate. The testator died on Nov. 26, 1948. During his lifetime the testator had carried on a farming business at the property Woodhouse, which was his principal asset, and since his death his widow, one of the trustees of the will, had continued to carry on that business. The trustees had retained the said property in exercise of what they alleged to be their discretionary power of postponement, and the beneficiaries interested in the residue on the death of the widow claimed that the trustees were under a duty to carry out an immediate sale. The testator's sister, Gertrude Edith Rooke, died on Apr. 12, 1950, a spinster, predeceasing the testator's widow.

D. A. Ziegler for the plaintiff, one of the trustees of the will.

Winterbotham for the first and sixth defendants, the widow and another, both interested on intestacy.

C. G. Allen for the second, third, fourth and fifth defendants, the testator's brother, two sisters, and the personal representative of Gertrude Edith Rooke.

HARMAN, J.: The first question here is whether there is power to postpone the sale of a testator's main asset, a freehold farm. When he made his will, this farm in the Enborne Valley, Hampshire, was under the shadow of a scheme whereby the Metropolitan Water Board was to flood the land to make a reservoir for the sustenance of the citizens of London. That had had a very depressing effect on agricultural values in that district, and it seems to me quite clear that the testator at the time he made his will had been considering selling his farm. He made his will on Oct. 8, 1948, and his first bequests are certain small pecuniary legacies to employees

"in recognition of their loyal service to me, but I hereby declare that such last mentioned five legacies shall not be paid and shall be deemed to have lapsed in the event of the proposed scheme for a reservoir going through as I fear it will greatly depreciate the value of my property."

I should construe that so as to limit in some way the reference to that scheme going through, i.e., in his lifetime or before the legacies, which fall to be paid a year after his death, were due. The passage shows the state of his mind. He then went on in these words:

"I direct my trustees if my house farm lands and premises known as Woodhouse . . . and my live and dead stock have not been sold at the time of my decease to as soon as possible after my death sell the same and after paying the costs of such sale the net proceeds shall fall into and form part of my residuary estate."

That he gives to his trustees on trust to permit his wife to enjoy and receive the net income during her life.

There is no express gift of the farm to the wife or to anyone else. There is a direction to sell the farm as soon as possible and that the proceeds of sale—not the farm—shall fall into residue, which is given on trust to allow the widow to receive the income thereof. That means that she is to receive the

income of the proceeds of sale of the farm only. The testator does not contemplate that she shall ever enjoy the farm as such in specie. On her death he gives, devises and bequeaths his residuary estate, i.e., the proceeds of sale of the farm and any other assets, on trust to sell and convert into money and to divide the net proceeds in certain shares. This latter trust for sale arises only on the death of the widow, and applies to whatever investments then represent the proceeds of sale of the farm and to whatever other assets there may have been retained during the widow's lifetime. The will continues:

"My trustees during my wife's lifetime may if they deem it advantageous have full power to sell or vary . . . any part of my estate "

—that must mean assets other than the farm—

"and may retain any investment that my estate may consist of at my death although the same may not be an investment allowed by law for the investment of trust funds . . ."

To make the will read consistently, "investment" there must mean investment in its strict sense. It cannot, in my judgment, mean the farm, because the power to retain that as an investment will not, in my judgment, read consistently with the direction to sell as soon as possible. It is said that, by virtue of the Law of Property Act, 1925, s. 25, even though the power to retain to which I have referred does not apply to the farm, yet a power to postpone sale has to be implied as a proviso to the trust for sale of the farm. It is pointed out that the section is mandatory

"A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears."

The crux of this case is whether a contrary intention appears in this will. I was referred to a case decided by SARGANT, J., *Re Doherty-Waterhouse* (1), where he cites the view of SIR WILLIAM PAGE-WOOD, V.-C., in *Scriven v. Sandom* (2). The case turned on the Wills Act, 1837, s. 27, where there are the words "unless a contrary intention shall appear by the will." SARGANT, J., citing SIR WILLIAM PAGE-WOOD, V.-C., says ([1918] 2 Ch. 272):

"There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power."

Therefore, it is said here that there must be found in this will something inconsistent with the view that the statutory power of postponement was to be implied and that there is nothing inconsistent with that in a direction to sell at once.

Two further cases were cited, one a decision of NORTH, J., in *Re Smith* (3) where, in construing "a trust to sell with all convenient speed", the judge held that there was no discretion to postpone. That, however, was in 1896, before the passing of the Law of Property Act, 1925, s. 25. It has been argued that s. 25 has not altered the law, and that LUXMOORE, J., said so in *Re Ball* (4). The report of *Re Ball* (4) ([1930] W.N. 111) is a most imperfect one and another report (74 Sol. Jo. 289), though less inaccurate, is even briefer. That was a case where the property had vested absolutely and the trustees nevertheless alleged that they had a power to postpone sale although there was no unanimous request to them to postpone it made by the beneficiaries. The learned judge said that, under the old law, when all the shares were vested in this way a power to postpone lapsed and the law in that respect had not been altered by s. 25. With that everybody would agree, though not, perhaps, with the wider pronouncement as to the effect of s. 25 credited to the judge. It is clear that s. 25 did alter the law by causing a power to postpone to exist where none existed before.

I am, however, left with this question of construction: Is there here apparent a contrary intention? In my judgment, there is. The testator intended this

farm to be sold at once if it had not been sold in his lifetime, and he did not intend that there should be any power in his trustees to postpone that sale. It seems to me that the words are sufficiently imperative to make them inconsistent with a discretionary power of postponement, and, therefore, adopting SIR WILLIAM PAGE-WOOD, V.-C.'s test on the true construction of the will there is here apparent an intention inconsistent with any power to postpone this sale. The trustees, in my judgment, have no right of general postponement, and, although they are not to be forced to sell in the next month or so, they must, as soon as it is proper from an administrative point of view, sell the property.

The second question which raises a point much incumbered with authority is whether the share of Gertrude Edith Rooke, being a vested share, remained vested in her, or whether it was divested by virtue of the fact that she died before the widow's decease, notwithstanding the fact that she had no issue to take under the gift over. That is a vexed question. Since *Doe d. Blomfield v. Eyre* (5) the law has been as laid down in the judgment of the court by PARKE, B., in these terms (5 C.B. 746):

"If a testator were to devise to A.B. in fee, and to direct, that, in the event of A.B. dying in the lifetime of J.S., the estate should go over to a charity, it surely is perfectly clear, that, if A.B. died in the lifetime of J.S., he, A.B., or, rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case, by his will says: 'If A.B. dies in the lifetime of J.S., I do not mean that A.B. or his heirs should any longer have the estate.' The estate of A.B. is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over. So, in the case before us: the testatrix (for, for this purpose, she may be treated as an ordinary testatrix,) says, in substance: 'If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property; but I give it over to strangers.' That which defeats the estate of John is, the death of himself and brother in his father's lifetime,—not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property is, that his mother expressly declared, that, in the event which happened, he should not have it."

That is a very clear statement of what the law ordinarily is, and it has been followed ever since, albeit, with a good deal of reluctance. It will not, however, be followed if, on the true reading of the will, the gift over was intended only to operate in favour of some person who could take under it; and, indeed, the cases in line with *Lassence v. Tierney* (6) and *Hancock v. Watson* (7) have long told us that where there is a vested gift, it will not be divested in the ordinary way except in favour of persons existing to take under the gift over. So I should have thought that in the ordinary way, where there was a gift to A with a proviso that if he die before a life tenant it should go over to some class of remaindermen, the intention was to take A's gift away only if there were remaindermen to take. However, that is the law only in exceptional cases.

In *Robinson v. Wood* (8) SIR RICHARD KINDERSLEY, V.-C., rather reluctantly held himself bound by *Doe d. Blomfield v. Eyre* (5). In a more modern case, *Re Bold* (9), LAWRENCE, J., held that he must apply *Doe d. Blomfield v. Eyre* (5). In that case, a moiety of the trust fund was given to the testatrix's brother

"provided always that if my said brother Ernest Hartland shall die without leaving any issue living at his death the last mentioned moiety of the said trust funds shall be held in trust for the said John D'Urban Scott if he shall attain the age of twenty-one years or marry under that age."

J. D. Scott did not attain twenty-one or marry under that age; it was held that, nevertheless, the gift went over on the death without issue of Ernest. LAWRENCE, J., after discussing *Doe d. Blomfield v. Eyre* (5), says (95 L.J.Ch. 203):

A "The sole contingency upon which the interest of Ernest Hartland is to be divested is the event of his dying without leaving issue living at his death. In that event his interest, in my judgment, on the construction of this will, is divested; and, inasmuch as the gift over has failed, there will be an intestacy as to the second moiety as well as to the first moiety."

The rule which is said to be applicable in this case is stated in THEOBALD ON WILLS, 10th ed., p. 454, in these perfectly general terms:

"A vested interest, which is given over in certain events, is divested if those events happen, though the gift over may be void . . ."

B There is an admitted exception in cases of perpetuity discussed by COHEN, J., in *Re Pratt's Settlement Trusts* (10) to which I need not further refer. In JARMAN ON WILLS, 8th ed., p. 1445—and in this it is not inconsistent with the older editions—I find this passage:

C "We have already discussed the rule that, where an estate is devised on a contingency in partial derogation of a preceding estate in fee, the original devise is only affected to the extent necessary for the introduction of the contingent estate."

That would suit this case and would suit the interests of Gertrude Edith Rooke. The learned editor goes on in these words (p. 1446):

D "But it would appear to be clearly settled that the principle of *Doe d. Blomfield v. Eyre* (5) applies to personalty as well as realty, so that where there is an absolute gift, followed by a gift over on the happening of a certain event, the prior gift is defeated on the happening of the event, although the gift over fails."

Then he refers to *O'Mahoney v. Burdett* (11) and continues:

E "But the principle does not apply in those cases 'in which it is plain that the original gift was not intended to be defeated unless there [are] objects to take under the gift over, as for instance in cases of substitutionary gifts to children.'"

F That last citation is taken from the judgment of SIR GEORGE JESSEL, M.R., in *Hurst v. Hurst* (12), which bore on subject-matter very foreign to this, except that it was necessary to construe the will in order to see whether there was forfeiture in that case. After using the words just quoted, SIR GEORGE JESSEL, M.R., continued (21 Ch.D. 293):

G "... but here we have an intention separately declared that the gift is to be forfeited . . . If the forfeiture is expressly limited to take effect on the event mentioned in the first branch of the clause effect must be given to it, though there be nothing to be accelerated under the second branch . . ."

H Then he considered *Doe d. Blomfield v. Eyre* (5), *Robinson v. Wood* (8) and *O'Mahoney v. Burdett* (11), and came to the conclusion that there was in that case a forfeiture. But what about the exception? Is he not suggesting that, where the only gift over is a gift over in favour of the children or issue, that is a sufficient indication to the court that the gift is intended to be defeated only in favour of issue, and, if there are no children or issue, then the gift is not defeated. It is not quite like *Salisbury v. Petty* (13), cited to me by counsel, where the gift was merely to A or B, because there it is clear that the testator intended that either A or B should take and B only if A were not alive. In that case there was a complicated will, whereby charges were levied on the estate in favour of remaindermen according to who took the

fee simple. SIR JAMES WIGRAM, V.-C., had no difficulty in coming to the conclusion that the charges were meant to arise whether the original taker or his issue existed to take the fee simple, and, therefore, if there were no issue, then the original taker would take. There are other cases in which gifts to issue have been treated as purely substitutionary. *Smither v. Willock* (14) is a clear decision. The substitution there was to the children of the first taker (9 Ves. 233):

"The Master of the Rolls declared the share of the deceased brother to be vested, subject to be divested [sic] only in the event of his death in the life of the testator's widow, leaving children; and consequently, that event not having happened, his representative was entitled."

That case is stated to be the law in JARMAN ON WILLS, 8th ed., p. 1446.

What, then, am I to conclude? I find no case where, there being a substitutionary gift in favour of children (which is the case here as this is a mere substitutionary gift introduced by the words of contingency "in case"), the divesting has been held to be anything but a partial divesting operative to the extent necessary to let in the remaindermen. It seems to me that the natural way to construe this will is to say that the testator intended his brothers and sisters to be defeated only if they died in his widow's lifetime leaving children, or, at any rate, having had children. It is said that the authority of *Doe d. Blomfield v. Eyre* (5) defeats that view, but, in my judgment, I am at liberty in cases where substitution is in favour of children, to follow the words of SIR GEORGE JESSEL, M.R., in *Hurst v. Hurst* (12) (21 Ch.D. 293) where he said that the principle did not apply in cases where it was plain that the substitution was meant to operate only in favour of a certain class, as in substitutionary gifts to children or issue. This is such a substitutionary gift. In my judgment, the gift over was intended to operate only if there was some person to take under it. There being no such person, the right given to the testator's sister which vested in her at his death has not been divested because she had no child. I shall, therefore, declare that it devolves on the personal representative of Gertrude Edith Rooke.

Declarations accordingly.

Solicitors: *Hunters*, agents for *Louch, Belcher & Co.*, Newbury (for the plaintiff and the first and sixth defendants); *Lane & Cottier*, agents for *Charles Lucas & Marshall*, Newbury (for the second, third, fourth and fifth defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

GATEHOUSE v. JOHN SUMMERS & SONS, LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.J.J.), May 4, 5, 1953.]

Factory—Lifting machine—“Parts and working gear”—Good construction—Travelling crane with magnet—Defective cable conveying current to magnet—Factories Act, 1937 (c. 67), s. 24 (1).

A *Negligence—Breach of statutory duty—Electricity—Electrical joint—“Proper construction as regards . . . mechanical strength”—Cable supplying electricity to magnet of crane—Duty to make safe for electrician pulling on cable—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907 (S.R. & O., 1908, No. 1312), reg. 6.*

B An electrical cable conveyed current to a travelling crane at the defendants' works to electrify its magnet. While an electrician employed by the defendants was pulling at the cable in order to free it after it had jammed a defective joint in it broke and the electrician fell and was killed.

HELD: (i) the cable was not one of the “parts and working gear . . . of . . . [a] lifting machine” within the meaning of s. 24 (1) of the
C *Factories Act, 1937*, but was a mere electrical lead, and the defendants were, therefore, not in breach of a duty to ensure that it was “of good construction” under that sub-section.

(ii) the provision in the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, reg. 6, that an electrical joint should
D be “of proper construction as regards . . . mechanical strength” covered strength necessary to resist such pull as the electrician would be likely to exert to free the cable if the need arose, as distinct from the strength necessary safely to carry electrical current, and the defendants were, therefore, liable for breach of the regulation.

Gorris v. Scott (1874) (L.R. 9 Exch. 125) and *Carroll v. Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 386), distinguished.
E

FOR THE FACTORIES ACT, 1937, s. 24 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1016; and FOR THE REGULATIONS FOR THE GENERATION, TRANSFORMATION, DISTRIBUTION AND USE OF ELECTRICAL ENERGY IN PREMISES UNDER THE FACTORY AND WORKSHOP ACTS, 1901 and 1907, reg. 6, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 89.

F Cases referred to:

(1) *Gorris v. Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 2 Digest 277, 526.

(2) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 2nd Digest Supp.

G (3) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; Digest Supp.

(4) *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; Digest Supp.

H APPEAL by the defendants and CROSS-APPEAL by the plaintiff from an order of PEARSON, J., dated Dec. 5, 1952, and made at Chester Assizes, awarding damages to the plaintiff in an action for damages for negligence and breach of statutory duty.

The plaintiff was the administratrix of the estate of her deceased husband, an electrician employed by the defendants, who was killed as a result of an accident due to a defective joint in a cable conveying electric current to the magnet of a travelling crane at the defendants' works. She claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, (i) for negligence at common law in that the

defendants failed to provide proper or suitable plant for the deceased or to provide a proper and safe system of working, and (ii) for breach of statutory duty on the ground that the cable was one of the parts and working gear of a lifting machine within the meaning of the Factories Act, 1937, s. 24 (1), and was not of good construction as required by that enactment, and that the electrical joint of the cable was not of proper construction as regards mechanical strength as required by the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907 (S.R. & O., 1908, No. 1312), reg. 6. The defendants denied negligence and contended that the cable was not one of the parts and working gear of a lifting machine within the meaning of s. 24 (1) and that the accident was not a danger against which it was one of the purposes of reg. 6 to provide. PEARSON, J., held the defendants not liable at common law, but liable for breach of their duty under both the Act of 1937 and the regulation.

*H. Edmund Davies, Q.C., and Mars-Jones for the defendants.
Beney, Q.C., and F. Elwyn Jones, Q.C., for the plaintiff.*

LORD GODDARD, C.J.: This is an appeal from an order of PEARSON, J., who awarded damages to the plaintiff as the administratrix of her husband who was killed while carrying out an operation at the works of the defendants. The learned judge assessed the damages at more than £4,000, but deducted twenty-five per cent. because he held that the deceased had to some extent brought about the accident by his own negligence.

The deceased was an electrician who had been employed by the defendants for some time. At their works the defendants have a moveable crane which travels up and down on a gantry on rails, and lifts scrap steel by means of a powerful magnet weighing many tons. The magnet has to be kept electrified, and, accordingly, independently of the machinery which hauls up the magnet once it has attracted the metal, it has an electric cable, wound on a separate drum, bringing it electric current. The gantry, being near the sea, is at times exposed to considerable wind pressure, and in a high wind from time to time the cable gets blown off the drum, generally to the side nearest to the cat-walk or gangway along which electricians or other workmen can walk, but also, more rarely, on the opposite side. On the occasion in question the cable had been blown off on the far side from the gangway. The cable jammed, and, as the crane man could not by manipulation release the jamming and make the drum work again, the deceased was called up the ladder. He ascended and stood with one foot on the rail on which the crane ran and the other on the pedestal part of the crane. That was a dangerous position, because he was directly over a space. He pulled with both hands on the electrical cable, hoping to release it and get it back on to the drum. Unfortunately, the cable had a defective joint which broke, and he fell some twenty-six feet on to the scrap metal below and was killed. This cable was of substantial construction, and, according to the evidence, it ought to have borne the strain of eight men. It broke because it had not been jointed properly. The evidence of the expert witnesses of both the plaintiff and the defendants was that, properly jointed, it would have been as strong as a new cable.

The action was framed on two grounds. First, it was said that the defendants were negligent at common law in not providing the deceased man with proper plant, which it was their duty to provide for the safe working of their men. Secondly, it was said that the defendants had committed breaches of the Factories Act, 1937, s. 24 (1), and also of the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, reg. 6.

The deceased was entitled to assume that, if he pulled on this thick cable, whether with one hand or two, it would withstand his weight. This court has

come to the conclusion that there was a defect in the plant which ought not to have existed, and, it being the duty of the defendants to supply their men with proper plant, that the learned judge ought to have found that there was a breach of their common law duty. The judge did not find that the method of righting the cable employed by the deceased was a wholly improper method, but this court does not see any ground on which to differ from his finding that the deceased contributed to his own misfortune to the extent of twenty-five per cent.

That is enough to dispose of the case, but I think there was also a breach of statutory duty, though not a breach of s. 24 (1) of the Factories Act, 1937, which deals with lifting machinery, because the cable that broke was no part of the lifting machinery. It was a mere electrical lead. It had nothing to do with the winding up or raising of the magnet. It simply electrified the magnet.

I think it would be wrong, therefore, to say—and I respectfully differ from the learned judge on this point—that it was part of the lifting working gear of the crane.

The electricity regulations made under the Factories Acts, however, show their object by the preamble:

“Whereas the generation, transformation, distribution and use of electrical energy in any factory or workshop or any place to which the provisions of s. 79 of the Factory and Workshop Act, 1901, are applied by that Act have been certified in pursuance of the said section to be dangerous”,

the following regulations are made. “Danger” is defined in these regulations as meaning

“... danger to health or danger to life or limb from shock, burn, or other injury to persons employed, or from fire attendant upon the generation, transformation, distribution, or use of electrical energy.”

I think, therefore, that counsel for the defendants is justified in saying that the main object of these regulations is to protect the workmen from what may be called electrical injury. By contrast with several of the regulations the word “danger” does not appear in reg. 6, which provides:

“Every electrical joint and connection shall be of proper construction as regards conductivity, insulation, mechanical strength and protection.”

It is clear that an electrical installation including dynamos, converters, engines and so forth, will include cables and, perhaps, pylons and other things used for the transmission of electricity. The wording of the regulation is clear and is not limited in any way. Therefore, although electric current may not at the moment be passing through the cables, as it would not be if workmen were working on them, an electrician will, nevertheless, be entitled to assume that those electric cables are safe and that the joints are of proper construction and sound as regards mechanical strength and protection. If he feels it necessary to haul on the cable or put weight on it, whether to draw it through a conduit or for any other purpose, he is entitled to assume that the regulations have been carried out, and that the electrical joint has been so constructed as to provide adequate mechanical strength and protection. This one was not, and it does not seem to me to matter whether the injury which the deceased man received was an electric burn or shock or some other form of injury, provided it resulted from the defect in the electrical joint and was, therefore, caused by a breach of reg. 6.

We were pressed with the decision in *Gorris v. Scott* (1), in which it was held that where regulations or statutory provisions are made for one object and the damage complained of is divorced from the purpose for which those regulations were made, there is no cause of action. The regulations there were made under the Contagious Diseases (Animals) Act, 1869, s. 75, and provided that

in ships the animals should be separately and properly penned. The animals in question were not properly or securely penned in the ship, and they were lost, not by reason of any contagious disease, but by the perils of the sea, being washed overboard. It was claimed that the statutory provisions for the prevention of contagious diseases had been broken—and that any damage which resulted from that default could form a cause of action. The court held that the regulations had nothing to do with the perils of the sea or with precautions against the animals being washed overboard. They were simply provisions against contagious diseases. In *Carroll v. Barclay (Andrew) & Sons, Ltd.* (2) the House of Lords held that failure to comply with an enactment requiring machinery to be fenced in order to prevent workmen putting their hands into the machines did not give rise to a cause of action where, in the absence of a fence, a piece of machinery flew out and killed a man standing near. That was because the object of the Act was, not to prevent a piece of machinery flying out, but to prevent the workmen from coming into contact with the moving machine.

I do not think that that applies here. The statutory requirement is that the electrical joints shall be perfect, or as near perfect as they can be made by ordinary care and skill. They are to be of proper construction as regards mechanical strength. This one was not of proper construction as regards mechanical strength, and an electrician who was working on it, and was, therefore, one of the persons whom these regulations are designed to protect, was injured thereby. Whether he was injured in one form or another seems to me to be immaterial. He was injured by reason of the defect in the mechanical construction of this electrical joint, and, therefore, I think the defendants are liable. While we differ from the learned judge in thinking that there was here a breach of common law duty as well as the breach of statutory duty, we uphold his judgment for the plaintiff and we see no reason to differ from him in the assessment of the relative responsibilities of the parties.

BIRKETT, L.J.: I agree. In the case as originally pleaded by counsel for the plaintiff he relied on three main matters. There was first a claim at common law for negligence against the defendants in that they failed to provide proper or suitable plant for the deceased workman. Four matters were set out in the pleadings to support that contention, the third being:

“The said cable was not of adequate or normal mechanical strength being weakened at the point at which it was jointed at which it broke as aforesaid.”

There was a clear allegation of the non-provision of proper and suitable plant in that particular respect. Secondly, it was said that the defendants “failed to provide a proper and/or safe system of working”, which is almost a commonplace in every case of this kind in the courts. The other two matters relied on were breaches of statutory duty, one being under s. 24 (1) of the Factories Act, 1937, and the other under reg. 6 of the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907. The learned judge, after giving careful attention to the facts of the case and to the arguments addressed to him, said:

“There was, therefore, a breach of statutory duty under s. 24 (1) and also under reg. 6 . . . Other points were covered by the pleading and the argument on behalf of the plaintiff, but I was not satisfied that the plaintiff's case was made out on any ground other than the breaches of statutory duty which I have mentioned.”

That paragraph occasioned me considerable surprise, and I can only think that, as the allegation with regard to the plant had at least four branches, the third one was in some degree overlooked, because the mere finding of a breach of

reg. 6 on the grounds on which it was found seems to me to cover entirely the point counsel for the plaintiff pleaded in para. 8 (a) (iii). PEARSON, J., found that the "main cause" of this accident was the breaking of the cable at the faulty electrical joint. It was attempted to make s. 24 (1) of the Act relevant to this case under the provision that

"All parts and working gear . . . of every lifting machine shall be of good construction . . .",

on the ground that the cable was a part and also working gear, and the learned judge so found. I agree with what my Lord has already said, and I differ from the finding of the learned judge, about that. I think that on the facts s. 24 (1) has no application here.

As regards reg. 6, the defendants said that, if their whole purport is looked at, these regulations deal with the danger arising from the use of electricity, and on the facts of this case this accident was not in any sense concerned with electricity. Much reliance was placed on the definition of danger contained in the regulations. The material words in reg. 6,

"Every electrical joint . . . shall be of proper construction as regards . . . mechanical strength . . .",

have no reference to any danger immediate or to be apprehended. They cast a duty on the employers with which they must comply. If that is the proper construction to be put on them, there is nothing more to be said, for the learned judge found that the main cause of the accident was that the electrical joint was not of the construction and mechanical strength laid down by the regulation. I think, therefore, that reg. 6 is applicable in this case, though s. 24 (1) of the Act of 1937 is not.

I also entirely agree with what my Lord said about the liability at common law. In my view, the finding of the learned judge on that matter is conclusive. The question of the deceased's own liability, which the judge assessed at twenty-five per cent. is not an easy one. It can be said that he was entitled to act in almost any way he pleased, relying on the fact that the cable would be of sound construction and would not break, but I think the better view is that regard must be had to the evidence. Mr. Gardner, who was called for the plaintiff, answered the first question put to him in cross-examination in this way:

"Mr. Gardner, there is no doubt about it that Mr. Gatehouse unfortunately chose, from the safety point of view, the worst possible method, did he not? (A) Yes."

In all the circumstances I think the learned judge came to a right conclusion on that matter.

HODSON, L.J.: I agree. The learned judge found that the defendants were in breach of reg. 6 of the electricity regulations made under the Factories Acts, but not in breach of their common law liability. The plaintiff having relied in her pleading on the inadequate strength of the cable as part of the working gear with which the deceased man was provided, it seems to me that the finding of inadequate strength with the finding that this was the primary cause of the accident carries with it necessarily the common law liability of the defendants. The learned judge approached the case, I think, on the basis that the common law attack was really made on the lines that there was no proper system of work, in that no satisfactory platform was provided for the deceased man, and, having found against the plaintiff on that, he dismissed that part of the claim and concentrated on the breach of the statutory regulations, and under that head he dealt with the question of liability. For the reasons which my Lords have given, I agree that the two matters overlap.

Not only are the defendants liable at common law, but they are also liable under reg. 6, which provides:

“Every electrical joint and connection shall be of proper construction as regards conductivity, insulation, mechanical strength and protection.”

Having regard to the use of the word “conductivity”, it is difficult to give any useful meaning to the words “mechanical strength” unless one treats them as covering strength apart from the strength necessary to carry electric current, in other words, the strength necessary to resist such pull as a workman may be likely to want to exert in carrying out such a task as freeing a jammed cable. I agree also that, although the regulations apply, s. 24 (1) of the Act dealing with cranes and lifting machines does not apply, because I cannot hold that this cable, which was nothing more than a lead bringing electricity to the magnet and had nothing to do with the crane as a lifting machine, comes within the language of s. 24 (1):

“All parts and working gear . . . shall be of good construction, sound material . . . adequate strength . . .”

This was not part of the lifting machinery at all, and I agree that s. 24 (1) does not apply.

With regard to the appeal on contributory negligence, I notice that the learned judge directed himself by *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3), where LORD WRIGHT ([1939] 3 All E.R. 736) drew attention to some earlier words of LAWRENCE, J., in *Flower v. Ebbw Vale Steel Iron & Coal Co.* (4), pointing out that, where a workman is concentrating on his job in the circumstances of factory life, the courts will not be ready lightly to find him guilty of contributory negligence so as to prevent his recovering from his employers. Having directed himself in that way, the learned judge felt bound, I think rightly, to find that a proportion of the blame must be attributed to this man. The main ground on which he based his decision was that, instead of holding on with one hand and pulling with the other, while standing in this precarious position more than twenty feet above the ground, he let go with both hands, and applied both hands to the cable to free the jam. It is obvious that, as the expert said, it was an exceedingly dangerous operation. Whether the cable broke or whether the jam freed itself suddenly, the risk that the man was running was a very great one. I agree, therefore, with the finding of the learned judge on that aspect of the case.

Appeal dismissed: cross appeal allowed.

Solicitors: *Carpenters*, agents for *Laces & Co.*, Liverpool (for the defendants); *Rowley Ashworth & Co.* (for the plaintiff).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. NICHOLSON AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), April 30, May 1, 1953.]

Income Tax—Settlement—Income of settlor—Settlement revocable after seven years—Cesser of liability to make annual payments—Further deed postponing operation of power of revocation for further three years—Finance Act, 1938 (c. 46), s. 38 (1).

A

By a deed dated Mar. 27, 1943, a settlor constituted a trust for objects which were exclusively charitable and covenanted with the trustees that so long as she lived she would pay to the trustees the monthly sum of £350 without any deduction except for income tax, such sum to accrue as from Apr. 6, 1942, and to be paid on the last day of every month. The deed further provided that "the settlor shall have power exercisable by deed at any time or times after the expiration of seven years from the date hereof to revoke wholly or partially the foregoing covenant". On Feb. 28, 1950, the settlor executed a deed supplemental to the deed of 1943 by which she provided that, notwithstanding anything in the deed of 1943 to the contrary, the power of revocation thereof should not be exercisable by her until after Mar. 27, 1953, and, so far only as was necessary to give full effect to that provision, she released her said power of revocation. Up to and including the payment made on Feb. 28, 1950, the trustees recovered the tax paid by the settlor under the Income Tax Act, 1918, s. 37. An application by the trustees for repayment of tax paid in respect of payments made under the deed of covenant on and after Mar. 31, 1950, was rejected.

B

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D

E

HELD: if for the purposes of the Finance Act, 1938, s. 38 (1), the "settlement" comprised only the deed of 1943, the power to revoke was not suspended on and after Mar. 28, 1950; and if the "settlement" were the deed of 1943 coupled with the deed of 1950, the first payment thereunder fell due on Mar. 31, 1950, and the power of revocation would be exercisable in 1953, within six years of the first payment due under the compound settlement; and, therefore, the proviso to s. 38 (1) was not satisfied and the monthly sums were "income of the settlor" within that sub-section and not of the trustees of the charity, and no tax was repayable.

Dictum of COHEN, L.J., in *Taylor v. Inland Revenue Comrs.* (1946) (27 Tax Cas. 101), applied.

F

EDITORIAL NOTE. The Finance Act, 1938, s. 38, is now replaced by the Income Tax Act, 1952, s. 404.

FOR THE FINANCE ACT, 1938, s. 38, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 410.

Case referred to:

G

(1) *Taylor v. Inland Revenue Comrs.*, [1945] 1 All E.R. 698; *affd.* C.A., [1946] 1 All E.R. 488, n.; 27 Tax Cas. 93; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

H

The trustees of a charity known as the Frank Butler Memorial Fund applied under the Finance Act, 1925, s. 19 (2), to have a claim for exemption from income tax under the Income Tax Act, 1918, s. 37, heard and determined by the Special Commissioners, the claim having been refused by the Inland Revenue Commissioners. By a deed dated Mar. 27, 1943, a settlor executed a declaration of trust in favour of herself and another as trustees with the intention of setting up a charitable trust, the Frank Butler Memorial Fund. By the said deed, the settlor covenanted to pay so long as she lived monthly sums to the trustees after deduction of tax therefrom to be held on the trusts thereof, and provided that

"the settlor shall have power exercisable by deed at any time or times

after the expiration of seven years from the date hereof to revoke wholly or partially the foregoing covenant."

By a further deed dated Feb. 28, 1950, the settlor, in effect, postponed the operation of the power of revocation for a further three years. The Inland Revenue Commissioners refused the claim of the trustees that the payments made to them on and after Mar. 31, 1950, under the deed of covenant were, as the income of a charity, exempt from tax, and that the tax paid by the settlor was, therefore, repayable to them. The Special Commissioners allowed the appeal of the trustees. The Crown appealed against their decision.

Heyworth Talbot, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.
Grant, Q.C., and Tribe for the taxpayers.

UPJOHN, J.: This appeal by the Inland Revenue Commissioners against a decision of the Special Commissioners raises a point on the Finance Act, 1938, s. 38, which section has given rise to the execution by many persons of documents frequently referred to among lawyers as "seven-year covenants".

Section 38 (1) provides:

"If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement; . . . any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person. Provided that, where any such power as is referred to in para. (a) of this sub-section cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments are payable in each year throughout that period, the said para. (a) shall not apply so long as the said power cannot be exercised."

Section 41 (4) (b) of the same Act defines the word "settlement":

"The expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and the expression 'settlor' in relation to a settlement means any person by whom the settlement was made."

In this case, by a deed dated Mar. 27, 1943, Patience Nicholson, who is defined as the settlor, executed a declaration of trust in favour of herself and one Bartlett as trustees (they being the respondents) with the intention of setting up a charitable trust to be known as the "Frank Butler Memorial Fund". That memorial fund is, undoubtedly, a fund formed for exclusively charitable objects. That is not in dispute. By cl. 3 of the deed the settlor covenanted in these terms:

"The settlor hereby covenants with the trustees that so long as the settlor lives she the settlor will pay to the trustees the monthly sum of £350 without any deduction except for income tax such sum to accrue as from Apr. 6, 1942, and to be paid as to the amount thereof accrued down to the date hereof on the execution of these presents and as to the sums hereafter to accrue on the last day of every month . . . Provided always that the settlor shall have power exercisable by deed at any time or times after the expiration of seven years from the date hereof to revoke wholly or partially the foregoing covenant."

No difficulty arises down to and including the last payment before the power of revocation became exercisable, i.e., the payment due on Feb. 28, 1950. Down to that date inclusive the settlor deducted tax from the payments, and the respondents, as charitable trustees, were able to recover payments of that tax under the Income Tax Act, 1918, s. 37. However, shortly before the power of revocation became exercisable on Mar. 28, 1950, i.e., on Feb. 28, 1950, the settlor executed a supplemental deed to the declaration of trust of Mar. 27, 1943, which made provision in these terms:

"Notwithstanding anything in the said declaration of trust to the contrary the power of revocation given to the settlor by the said declaration of trust shall not be exercisable by her until after the expiration of Mar. 27, 1953, and (so far only as may be necessary to give full effect to the terms of this declaration hereinbefore contained) the settlor hereby in exercise of every statutory or other power enabling her in this behalf releases this said power of revocation to this intent that the same shall not be exercisable except as aforesaid."

In other words, the operation of the power of revocation was postponed for a further three years.

The question arises whether, in respect of payments falling due on and after Mar. 31, 1950, the income, having regard to s. 38 (1), is to be deemed to be the income of the settlor, or whether it is to remain the income of the charity trustees. The Special Commissioners took the latter view.

The construction of this section is not without authority. It was considered in *Taylor v. Inland Revenue Comrs.* (1). The facts there were a little complicated, but in effect what happened was this. By a deed dated Dec. 30, 1939, the settlor covenanted to pay certain sums additional to those which he was already under covenant to pay by virtue of two earlier deeds. The covenant contained in that deed was revocable at any time after 1942. Therefore, there was the distinction between *Taylor's* case (1) and the present case that the deed of 1939 never satisfied the provisions of s. 38 (1), whereas, undoubtedly, the original deed before me did so. Then, in 1940, the period of irrevocability, if I may so call it, was extended by a deed dated Apr. 1, 1940, to a period which failed, owing obviously to a slip, to exceed six years from Apr. 1, 1940, by some three weeks. There is no doubt that the commissioners, and, I think, MACNAGHTEN, J., proceeded on the footing that the relevant settlement was the deed of Dec. 30, 1939, and that settlement did not include the subsequent deed of Apr. 1, 1940.

A different view, however, was taken in the Court of Appeal, where COHEN, L.J., delivered the leading judgment, a judgment with which LORD GREENE, M.R., and SOMERVELL, L.J., concurred. The argument before them proceeded on the footing that the deeds of December, 1939, and of Apr. 1, 1940, constituted one settlement, and, as the power of revocation in that settlement was exercisable within six years of the date of the first payment under that compound settlement, the proviso to s. 38 (1) was not satisfied. COHEN, L.J., in the course of his judgment, said (27 Tax Cas. 101):

"Having regard to the references in the proviso back to the earlier part of the sub-section, and to the use of the present tense, the proviso must, in my opinion, be construed to read as follows: 'Provided that, where any power to revoke or otherwise determine the settlement contained in such settlement cannot under any provision of such settlement be exercised within the period of six years from the time when the first of the annual payments due under such settlement becomes payable, the said para. (a) shall not apply so long as the said power cannot be exercised'. It is plain that the power to revoke and the obligation to pay must be contained in the same settlement, and the use of the present tense, in my opinion, involves that the restriction on the exercise of the power to revoke

should also be present in the same settlement. Having regard to the definition of 'settlement' in s. 41, the settlement may be a single document or may be comprised in two or more documents, but it must be the same settlement throughout."

That is a very valuable guide to me on the principles to be applied in construing the section, and, in particular, the proviso. Indeed, it seems to me that that part of the judgment which I have just read is binding on me.

I say no more about the decision of the Special Commissioners in this case other than that they appear wholly to have misapprehended the effect of the judgment of the Court of Appeal in *Taylor's* case (1). In my judgment, what was said by COHEN, L.J., is quite plain. There must be found in the settlement, whether it be constituted in one document or in two or more documents so as to form a compound settlement, three things. There must be, first, an obligation to pay, secondly, a power to revoke, and, thirdly, a suspension of that power to revoke for six years from the first payment. It seems to me clear that the learned lord justice when he used the words "so long as the said power cannot be exercised" intended to refer to a minimum period of six years, and it is not sufficient merely to be able to point to a restriction during the relevant year of assessment. That seems to me clear from the next sentence in the passage I have read. If that be true, then it must be clear that the claim of the Crown here succeeds.

If the only settlement is the settlement of 1943, then for the relevant period the power to revoke is no longer suspended. If the relevant settlement be the settlement of 1943, coupled with the deed of 1950, then the first payment thereunder fell due on Mar. 31, 1950. Again, the proviso was not satisfied because the power of revocation comes into operation in 1953, within six years of the first payment due under the compound settlement.

Counsel for the taxpayers has reserved the right to challenge the passage I have read in the judgment of COHEN, L.J., because he submits that it is wrong and not in accordance with the true construction of the proviso to say that the suspension of the power to revoke must be in the same settlement as the power of revocation, but he admitted that he could not argue that before me. He submitted also that, even if the learned lord justice was right, it was sufficient to show that the original restriction was for six years and to point to an existing restriction during the relevant year of assessment. That is a matter that I have already dealt with in my judgment. Accordingly, the appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; R. C. Bartlett & Co.* (for the taxpayers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PACKER v. PACKER.

[COURT OF APPEAL (Denning and Morris, L.JJ.), March 9, May 11, 1953.]

Divorce—Custody—Child born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).

Infant—Maintenance—Infant born before marriage—Not legitimated per subsequens matrimonium—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).

A On Feb. 9, 1944, a child was born out of wedlock at a time when the father (the husband in the present proceedings) was married to another woman. In July, 1945, the father's marriage was dissolved, and on July 28, 1945, he married the mother of the child, the wife in the present proceedings. On Aug. 7, 1951, the wife filed a petition for dissolution of her marriage with the husband on the ground of his desertion. On Nov. 22, 1951, she obtained a decree nisi, which was made absolute on Jan. 9, 1952. On applications by the wife in the divorce proceedings under s. 26 (1) of the Matrimonial Causes Act, 1950, for provision with respect to the custody and maintenance of the child,

B HELD (per DENNING, L.J.): the test of jurisdiction under s. 26 (1) was the parenthood and not the legitimacy of the child, and, therefore, the court could make the provision sought by the wife.

C Per MORRIS, L.J.: the expression "the children the marriage of whose parents is the subject of the proceedings" in s. 26 (1) referred to the children of a "marriage" union, including a case where the "marriage" was declared to be null and void, but it did not include a child born out of wedlock in circumstances which, in view of the provisions of the Legitimacy Act, 1926, s. 1 (2), prevented his being legitimated by the subsequent marriage of his parents, and, accordingly, on the dissolution of the wife's marriage, no order for the custody or maintenance of the child could be made under s. 26 (1).

D *Harrison v. Harrison* ([1951] 2 All E.R. 346), considered.

E AS TO CUSTODY OF CHILDREN IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 752-757, paras. 1181-1194; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 500-503, Nos. 4432-4457.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 413.

Cases referred to:

- F (1) *Harrison v. Harrison*, [1951] 2 All E.R. 346; [1951] P. 476; 115 J.P. 428; 27 Digest, Replacement, 664, 6289.
- (2) *Langworthy v. Langworthy*, (1886), 11 P.D. 85; 55 L.J.P. 33; 54 L.T. 776; 27 Digest, Replacement, 689, 6597.
- (3) *C. v. C.*, [1947] 2 All E.R. 50; 177 L.T. 399; 111 J.P. 442; *sub nom. Colquitt v. Colquitt*, [1948] P. 19; [1948] L.J.R. 897; 27 Digest, Replacement, 709, 6765.
- G (4) *Woolwich Union v. Fulham Union*, [1906] 2 K.B. 240; 75 L.J.K.B. 675; 95 L.T. 337; *affd. H.L., sub nom. Fulham Parish v. Woolwich Union*, [1907] A.C. 255; 76 L.J.K.B. 739; 97 L.T. 117; 71 J.P. 361; 37 Digest 255, 503.

H INTERLOCUTORY APPEALS by the wife against two orders of His Honour JUDGE RICHARDSON, sitting as special commissioner in divorce, dated Dec. 12, 1952, whereby he dismissed the wife's applications for custody and maintenance of a child, Ian Kenneth.

On Feb. 9, 1944, the wife, then a single woman, gave birth to the child of which the husband, at that time married to another woman, was the father. In July, 1945, the husband's marriage was dissolved, and on July 28, 1945, he married the wife. On Aug. 7, 1951, the wife filed a petition for dissolution of the marriage on the ground of the husband's desertion and prayed for orders

for the custody and maintenance of the child. On Nov. 22, 1951, the wife was granted a decree nisi on her petition, and she then amended the petition by deleting the prayer for custody of the child. On Jan. 9, 1952, the decree nisi was made absolute. On Sept. 11, 1952, the registrar made an order for maintenance in favour of the wife at the rate of 7s. per week. On Oct. 28, 1952, the wife's application to the special commissioner in chambers for a variation of that order was dismissed. Later, the wife applied under the Matrimonial Causes Act, 1950, s. 26 (1), and r. 54 (1) of the Matrimonial Causes Rules, 1950, for orders for the custody and maintenance of the child. On Dec. 12, 1952, these applications were dismissed by the special commissioner in chambers, and the wife now appealed.

William Latey, Q.C., and *J. B. Gardner* for the wife.
N. R. Blaker for the husband.

Cur. adv. vult.

May 11. The following judgments were read.

DENNING, L.J.: In 1943 the husband, then a married man, had sexual intercourse with a woman who was not his wife, as a result of which a child was born to her on Feb. 9, 1944. In July, 1945, a decree absolute was made dissolving his marriage to his first wife, and on July 28, 1945, he married the woman who had borne his child. In October, 1947, he deserted his second wife, and on Aug. 7, 1951, she brought divorce proceedings against him on the ground of his desertion. On Jan. 9, 1952, a decree absolute was made dissolving that marriage. On Mar. 29, 1952, he married his third wife. In December, 1952, the second wife applied in her divorce proceedings for custody and maintenance of the child, but, on the authority of *Harrison v. Harrison* (1), the commissioner held that the court had no jurisdiction to entertain the application. The second wife now appeals to this court with the avowed intention of challenging the authority of *Harrison v. Harrison* (1). Both parties have been granted legal aid so as to enable an authoritative ruling to be obtained. On this account I will refrain from going further into the details of the case, but will consider simply the point of jurisdiction.

The matter depends on s. 26 (1) of the Matrimonial Causes Act, 1950, which repeats a series of sections in substantially the same form ever since s. 35 of the Matrimonial Causes Act, 1857:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

According to *Harrison v. Harrison* (1) the word "children" in that section does not apply to illegitimate children, but applies only to legitimate children, that is, to children of the petitioner and the respondent born in lawful wedlock or legitimated by subsequent marriage. The child in the present case was born illegitimate, and it was not legitimised by the subsequent marriage of its parents because the father was married to a third person when it was born: see the Legitimacy Act, 1926, s. 1 (2).

I see no reason for confining the section to legitimate children. On the contrary there are strong reasons why it must extend to illegitimate children as well as legitimate children. That is shown by the fact that the section applies not only to proceedings for divorce but also to proceedings for nullity. It applies, for instance, to nullity on the ground of affinity, bigamy or want of form, and the court can make provision for the children of incestuous or bigamous or invalid marriages, although those children are clearly illegitimate: see *Langworthy v. Langworthy* (2).

Once the word "children" in the section is interpreted so as to include illegitimate children (as it must be), then the jurisdiction of the Divorce Court to make provision under s. 26 (1) depends on three requisites being fulfilled: (i) the application must be made in "proceedings for divorce or nullity of marriage or judicial separation", and (ii) the application must relate to "children", legitimate or illegitimate, and (iii) "the marriage of the parents" of those children must be "the subject of the proceedings". When the section is analysed in that way it is clear that the test of jurisdiction is parenthood, not legitimacy. Counsel for the husband conceded that in proceedings for nullity the test was parenthood, but he argued that in proceedings for divorce or judicial separation the test was legitimacy. I cannot see the slightest justification for that dichotomy. There is nothing in the wording of the section to support it. If the matter was tested by an attempt to write out the section in full with that dichotomy inserted into it, you would soon give up the attempt and insist on dividing the section itself into distinct parts, one part dealing with proceedings for divorce or judicial separation, the other part dealing with proceedings for nullity. It is, moreover, worth noticing that in s. 26 (2), which deals with restitution of conjugal rights, the words used are not "children of the marriage" which is the accepted way of denoting legitimate children, but "children of the petitioner and respondent" which are apt to make parenthood the test in that case also. On the strict construction of the section, therefore, I am of opinion that the Divorce Court has jurisdiction to make provision for an illegitimate child of the parties, provided that they are its parents.

I am not inclined, however, to stand out for a strict construction of an Act of Parliament if reason and good sense point to a different construction. But in this case reason and good sense go hand in hand with the strict construction. Counsel for the husband concedes that the Chancery Division (or the county court or the court of summary jurisdiction) can make provision under the Guardianship of Infants Acts, 1886 and 1925, with regard to illegitimate children. All he says is that the Divorce Court cannot do it. Just see what this means. Take the familiar case where a single woman lives with a married man and has a child by him. He afterwards gets a divorce from his previous wife and marries the single woman and they have three more children. The Divorce Court has full jurisdiction in respect of the three children born after marriage, but none, it is said, over the child which was born to them before marriage. The parties have to go to the Chancery Division to deal with that child. What a waste of money this is. That one child could well have been provided for by the Divorce Court at the same time as the other three, and, indeed, better provided for, because the divorce judge will have seen the parties and will know all about them. Yet it is said that the parties must go to the expense of separate Chancery proceedings, and instruct a Chancery judge by fresh affidavits, and get his order about this one child while the divorce judge is dealing with the other three. Surely the sensible and the practical thing is for the judge who tries the divorce case to make provision at one and the same time for all the four children of the parties, as well for the illegitimate one as for the three legitimate ones. The wording of the Act of Parliament permits the divorce judge to do this, and I do not think that we should stand in the way of it.

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both. There is no decision of this court that an order cannot be made for custody of an illegitimate child, and, in the absence of direct decision preventing us, I think we should follow the course which is permitted by statute and prescribed by good sense. I realise that there is a dictum of the Divisional Court in 1948 in *C. v. C.* (3) and a rule

of court, first made in 1950, (r. 54 (1) of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940)) which assume that s. 26 is confined to legitimate children, but the present case is brought to test the validity of this assumption. If it is shown to be wrong, we should not hesitate to say so.

There was one point made by counsel for the husband, however, which deserves to be mentioned. It is best shown by an illustration. Suppose that a married woman gave birth to a child and afterwards admitted that it was the child, not of her husband, but of the co-respondent. Then suppose that she was divorced and married the co-respondent and they took the child to live with them. If she afterwards divorced the second husband and obtained in those proceedings an order for custody of the child, that would, it is said, amount to a finding that the child was the child, not of her first husband, but of the co-respondent, and this might operate to the prejudice of the child, because it would amount to a finding of illegitimacy. The answer to this point is, however, this. An order for custody is an order in personam as between the two parties to the proceedings. It does not operate in rem so as to affect the status of the child. The order of the court in the case mentioned is no more prejudicial to the child than the previous admission of the mother. Even if the mother had made no prior admission, but made it only on the application for custody, that would not prejudice the child any more than any other admission which she might make about the paternity of her child. It would be no more prejudicial than a like order made by the Chancery Division. The objection is, therefore, without foundation.

I have now dealt with all the points made by counsel for the husband. None of them touches the crucial matter, which is the true construction of s. 26. That section plainly gives jurisdiction to the Divorce Court, and we should, I think, uphold that jurisdiction especially when it is so just and convenient and saves so much expense. We should not send the parties to the Chancery Division. I would, therefore, allow this appeal.

MORRIS, L.J.: When the wife petitioned for the dissolution of her marriage on the ground of the desertion of her husband her petition erroneously stated that there was issue of the marriage a child born on Feb. 9, 1944, and by her prayer she asked that she might have the custody of her said child and that the husband should pay such sum by way of maintenance of the child as the court should deem fit. When the petition was heard on Nov. 22, 1951, counsel for the wife applied for and obtained leave to amend the petition. One amendment had the result that the petition records that there was no issue of the marriage. The prayer was amended so as to omit the claim for custody. Such amendment was made because of the decision of BARNARD, J., in *Harrison v. Harrison* (1) which was very properly cited to the court. Had it been intended to challenge that decision it seems probable that the course would have been adopted of allowing the prayer for custody to remain, but drawing the attention of the court to *Harrison v. Harrison* (1) and stating that it was hoped to debate its correctness in the Court of Appeal. The prayer for maintenance of the child remained, the words being amended so as to read:

"That the respondent do pay to the petitioner such sum by way of maintenance of her child Ian Kenneth as to the court may seem fit."

In reliance on *Harrison v. Harrison* (1) counsel asked the judge to adjourn the question of the amount of maintenance to the registrar. In making this application counsel usefully cited certain words from the judgment of BARNARD, J., as follows ([1951] 2 All E.R. 348):

"I am concerned solely with a claim for legal custody. The wife, already, has the de facto custody, and, so far as maintenance is concerned, the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a matter which the court would take into

consideration in awarding the woman maintenance after the dissolution of the marriage, assuming the child was still under age and needing support. For the reasons I have given, this summons must be dismissed."

A Counsel also asked the judge to make any comments he might feel desirable. The judge ordered that maintenance be adjourned to the registrar. He added: "I think in the heartless circumstances in which he broke up a happy marriage the wife may well look for some maintenance". Counsel then added in conclusion: "My Lord, as it is his child but born out of wedlock. I am obliged to your Lordship". That was on Nov. 22, 1951. Thereafter there was an application by the wife for maintenance. An order was made on Sept. 11, 1952. An appeal to the special commissioner in chambers was dismissed on Oct. 28, 1952. From that dismissal there is an appeal pending in this court and on behalf of the husband it is not disputed that in deciding the question of amount full effect can be given to the considerations referred to by BARNARD, J., in his judgment in *Harrison v. Harrison* (1). Unless this judgment is held to have been erroneous, the question in the pending appeal appears to be as to what sum the husband can pay and should be ordered to pay, regard being had to the fact that the wife has to support the child.

C The wife made further applications. She applied to the registrar for leave to refer an application for the custody and maintenance of the child to the judge in chambers. She apparently made this application under r. 54 (1) of the Matrimonial Causes Rules, 1950, which reads as follows:

D "The petitioner, or (if he has entered an appearance to the petition for this purpose) the respondent spouse or the guardian of any children of the marriage or any person who has obtained leave to intervene in the cause for the purpose of applying for the custody of, or who has under an order of the court the custody or control of, such children may at any time, either before or after final decree, apply to a judge for an order relating to the custody or education of the children of the marriage, or E for directions that proper proceedings be taken for placing such children under the protection of the Chancery Division."

The rule refers to the "children of the marriage". On Dec. 12, 1952, the special commissioner dismissed the wife's applications for custody and maintenance of the child. From these orders the present appeals are brought. As the wife has got de facto custody of the child, as she abandoned her original claim F for custody in her petition, as in assessing maintenance for the wife regard can be had to her responsibilities for the child, as the husband makes no claim to the child, and as the child, being in Scotland, is out of the jurisdiction, it does not seem probable that the issues raised in these appeals would have been debated had it not been that both parties were sustained by legal aid.

G The issues raised depend on the construction of s. 26 (1) of the Matrimonial Causes Act, 1950. That sub-section is the ultimate successor of s. 35 of the Matrimonial Causes Act, 1857. Such changes of wording as have taken place do not throw light on the present problem. Neither is assistance gained by examining the wording of sections in the statutes between 1857 and 1950, namely, s. 4 of the Matrimonial Causes Act, 1859, s. 6 of the Matrimonial Causes Act, 1884, and s. 193 (1) of the Supreme Court of Judicature (Consolidation) I Act, 1925. It is to be noted that, even in the case of children in regard to whom the jurisdiction is beyond question, the court is empowered to direct, if it thinks fit, that proper proceedings be taken for placing the children under the protection of the court. The consideration of main importance is that in s. 35 of the Act of 1857, as in s. 26 (1) of the Act of 1950, are the words "the custody, maintenance and education of the children the marriage of whose parents is the subject of" the proceedings. The question to be determined is whether in the context the word "children" includes those who at the time are illegitimate.

In *Woolwich Union v. Fulham Union* (4) VAUGHAN WILLIAMS, L.J., referred in his judgment to the technical rule of law that when the words "child" or "children" occur in a statute the prima facie meaning is legitimate child or legitimate children. He proceeded to say ([1906] 2 K.B. 246):

"It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

Then, having given his view as to the meaning to be ascribed in the enactment then in question, he continued (*ibid.*, 247):

"But, apart from that consideration, there is another reason why I should hesitate so to construe it. A long time has now elapsed since 1846 and during all that length of time numerous cases must have occurred in which the question whether the proviso to s. 1 of the [Poor Removal Act, 1846] was applicable to an illegitimate child might have been raised; but, apparently, there is no case in the books in which that point was raised . . ."

If the wording of s. 26 (1) is clear then, of course, full effect must be given to it, but it is not without some significance that in a situation which could so very often have arisen since 1857 there is no trace until comparatively recently of the point having been taken that on a dissolution of marriage there may be orders for maintenance and custody of illegitimate children if the parties assert and admit that the children are in fact theirs. If the provisions of the Legitimacy Act, 1926, apply, then the effect on an illegitimate person is to "render" him or her legitimate. In such a case the legitimated person can be covered by the word "children" in s. 26 (1) of the Matrimonial Causes Act, 1950: see *C. v. C.* (3). It may well be that it would on occasion be very convenient if on a decree of divorce the court could make orders as to the custody, maintenance and education of those acknowledged by the parties to be their illegitimate children. But considerations of convenience are for the legislature. The question for the court is one of the construction of the Act. It is to be noted that it was provided by s. 7 of the Guardianship of Infants Act, 1886, that in any case where a decree for judicial separation or a decree either nisi or absolute for divorce shall be pronounced the court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage. If by the then existing law the court had power to deal with the custody, maintenance and education of all children of the parties, whether legitimate or not, it is difficult to see why the power given by s. 7 should only have been given in reference to the children of the marriage.

In my judgment, the phrase in s. 26 (1) of the Act of 1950, "the children of the marriage of whose parents is the subject of the proceedings" has reference to the children of a "marriage", using inverted commas so as to include and comprehend cases where the "marriage" may be declared not to have been a marriage. It seems to me that the reason why the phrase "children of the marriage" was not employed was that the mention of proceedings for nullity of marriage rendered such a phrase inappropriate. In s. 23 (1) of the Act of 1950 is the phrase "infant children of the marriage"; in s. 24 (1) and (2) occurs the phrase "children of the marriage"; in s. 30 (3) is the phrase "the children, if any, of the marriage". If the court under s. 26 (1) has power to deal with the custody, maintenance and education of all children of the parties whether legitimate or not, it seems to me that some or all of the powers of the court under s. 23, s. 24 and s. 30 would not have been limited so as only to be referable to the children of the marriage.

The view that I have formed is, I think, supported by the language of COTTON, L.J., in *Langworthy v. Langworthy* (2). In that case the marriage in fact had and solemnised was declared to be null and void as not having been solemnised according to law. In reference to s. 35 of the Act of 1857 COTTON, L.J., said (11 P.D. 88):

“Now, does the enactment apply to this child although there was no valid marriage? I am of opinion that it does. The section refers to the children not ‘of the marriage’ but ‘the marriage of whose parents is the subject of such suit or other proceedings’. The section includes sentences of nullity of marriage, and must, therefore, in my judgment, be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for.”

In my judgment, s. 26 (1) of the Act of 1950 refers to the children of the “marriage” union even where such “marriage” is declared to be null and void. For the reasons which I have given I find myself in agreement with the judgment of BARNARD, J., in *Harrison v. Harrison* (1), and I would dismiss these appeals.

DENNING, L.J.: The court being equally divided in opinion the decision of the judge below will stand and the appeals will be dismissed.

Appeals dismissed.

Solicitors: *J. A. H. Powell, Law Society, Divorce Department*, agent for *J. M. Gregory-Jones, Law Society, Divorce Department*, Newcastle-upon-Tyne (for the wife); *Gibson, Pybus & Pybus*, Newcastle-upon-Tyne, agents for *Hodding, Jackson & Co.*, Salisbury (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. UNIVERSAL GRINDING WHEEL CO., LTD.

[CHANCERY DIVISION (Upjohn, J.), May 7, 1953.]

Profits Tax—Distribution—Exclusion of “sum applied in reducing share capital”—Company’s redemption of preference shares—Price equal to nominal amount of share plus a premium—Finance Act, 1947 (c. 35), s. 36 (1).

By s. 30 (1) and (2) of the Finance Act, 1947, as amended by the Finance (No. 2) Act, 1947, s. 7, profits tax was chargeable at 25 per cent. on the profits of a trade or business, with a reduction of 15 per cent. on the excess of profits chargeable in any chargeable accounting period over the net relevant distributions to proprietors in that period. By the proviso to s. 36 (1): “. . . no sum applied . . . in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.” In accordance with the terms of its articles, under powers conferred by s. 46 of the Companies Act, 1929, a company redeemed four hundred thousand preference shares at a price equal to the nominal amount of the share plus a premium of 7s. per share, the redemption being carried out in part by an issue of new capital and in part (in particular, as to the premium of 7s.) out of profits available for dividend.

HELD: as the company, in redeeming its preference shares, was bound by its articles to apply 27s. for every £1 nominal value thereof, the full 27s. per share was applied in reducing its share capital within the meaning of the proviso to s. 36 (1) of the Act of 1947, and no part of it represented a distribution under the Act chargeable to the tax.

FOR THE FINANCE ACT, 1947, s. 36 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 780.

Cases referred to:

- (1) *Trevor v. Whitworth*, (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 9 Digest 98, 411.
- (2) *British & American Trustee & Finance Corpn. v. Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 9 Digest 149, 840.
- (3) *Ex p. Westburn Sugar Refineries, Ltd.*, [1951] 1 All E.R. 881; [1951] A.C. 625; 2nd Digest Supp.
- (4) *Re Serpell & Co., Ltd.*, [1944] Ch. 233; 113 L.J.Ch. 165; 170 L.T. 335; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

The respondent company appealed against an assessment to profits tax made on the company for the twelve months to Sept. 30, 1948, showing tax payable in the amount of £56,250, viz., £112,500, less relief in respect of non-distribution £56,250.

In December, 1947, the company redeemed four hundred thousand £1 preference shares at a redemption price of 27s. per share, together with a sum equal to certain dividends (as to which no question arose) under a power contained in the articles of association of the company (in accordance with the Companies Act, 1929, s. 46), which provided that the redemption price should be the nominal amount of the shares plus a premium of 7s. per share and a sum equal to certain dividends. The available profits of the company not being sufficient to provide the funds necessary for the redemption, the company issued four hundred thousand new preference shares. It obtained subscriptions from brokers for the whole of these shares at a price of 20s. 6d. per share amounting after deduction of commission to £402,500 and set aside that sum to a sinking fund for redemption of the old shares and also set aside £148,384 out of its profits standing to general reserve. The company allotted to the holders of the old preference shares who elected to accept an invitation to convert them into the new shares, new shares at 20s. 6d. per share, made cash payments to them of 6s. 6d. per share, and allotted the balance of new shares to brokers, to whom it paid 20s. 6d. in respect of every share allotted to holders of old shares converted in recoupment of the price already paid by the brokers.

The company contended that the redemption of the four hundred thousand old preference shares was a reduction of its share capital at 27s. per share and that the whole amount paid was "applied . . . in reducing the share capital" of the company within the proviso to s. 36 (1) of the Finance Act, 1947, and that, in particular, the company, in redeeming the old preference shares at a cost of 27s. per share, was purchasing its own shares at a price of 27s. per share as permitted by the Companies Acts. The Crown contended that the amount applied in reducing the share capital of the company could not be greater than the amount by which its share capital had been reduced, which was from £1,000,000 to £600,000 or £400,000 only, within the meaning of s. 36 (1) of the Finance Act, 1947.

The commissioners held that the redemption of the four hundred thousand preference shares was simply a way of reducing the share capital of the company, for which the company had to apply 27s. in payment for each share. Accordingly, they held that the full amount representing 27s. per share was applied in reducing the share capital of the company within the meaning of the proviso to s. 36 (1) of the Act of 1947, and allowed the company's appeal. The Crown appealed.

G. Montgomery White, Q.C., *J. H. Stump* and *Sir Reginald Hills* for the Crown.
Grant, Q.C., and *G. W. H. Richardson* for the company.

UPJOHN, J.: This is an appeal from a decision of the Special Commissioners given on Jan. 15, 1952, and it relates to a difficult matter of profits tax. The respondent company, Universal Grinding Wheel Co., Ltd., was

incorporated on Mar. 8, 1935, with a nominal capital of £600,000 divided into four hundred thousand five per cent. cumulative participating preference shares of £1 each and four hundred thousand ordinary shares of 10s. each. By art. 8 of the articles of association provision was made in accordance with powers given by s. 46 of the Companies Act, 1929, for the redemption of the preference shares. Article 8 (i) provided for the redemption of those preference shares at a price equal to the nominal amount of each share plus a premium of 7s. per share, together with certain other sums relating to any deficiency of dividend which I need not mention. Briefly stated, these were redeemable preference shares, redeemable at a price of 27s. In 1947 the company redeemed those preference shares. That redemption was carried out in part by an issue of new capital and in part out of profits available for dividend. In particular, the premium of 7s. was paid out of such profits, that being required by s. 46 of the Companies Act, 1929, and by the company's articles of association.

I have to determine whether, for the purposes of s. 36 of the Finance Act, 1947, the company has applied, as the Crown say, 20s., or, as the company says, 27s., in reducing each £1 nominal share of its preference capital.

Profits tax was originally created under the name of national defence contribution by Part III of the Finance Act, 1937. It was substantially amended as the profits tax in Part IV of the Finance Act, 1947, s. 30 of which, as amended by the Finance (No. 2) Act, 1947, s. 7, provides:

"(1) Subject to the provisions of this Part of this Act—(a) the profits tax to be charged for any chargeable accounting period on the profits of a trade or business shall be of an amount equal to twenty-five per cent. of the profits . . . (2) Subject to the provisions of this Part of this Act, if, in the case of any trade or business, the net relevant distributions to proprietors (as defined in the subsequent provisions of this Part of this Act) for any chargeable accounting period are less than the profits thereof for that period chargeable to the profits tax, the amount chargeable by way of the profits tax in respect of that period shall be reduced by an amount equal to fifteen per cent. of the difference."

The effect of these rather complicated provisions was to charge a tax of 25 per cent. on what are called the "net relevant distributions", and ten per cent. on the profits retained in the business. Section 34 (2) defines "the net relevant distributions" to proprietors, as follows:

"The net relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body are so much of the gross relevant distributions to the proprietors for that period of that body corporate, society or other body (as defined by the next succeeding section) as bears to the whole of the said gross relevant distributions the same proportion that the profits for that period bear to the profits therefor computed without abatement and including franked investment income."

"Gross relevant distributions" is defined in s. 35 (1) as follows:

"Subject to the provisions of this and the two next succeeding sections, the gross relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body, are the total distributions to the members of the body corporate, society or other body, not being distributions allowable as deductions in computing the profits of the trade or business for any period for the purposes of the profits tax, and being . . . (c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this sub-section [relating to dividends] applies) as is not a distribution of capital, and, for the purposes of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not."

in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

"Distribution" is defined in s. 36 (1) as follows:

"Subject to the provisions of the next succeeding sub-section, wherever—
(a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or (b) assets are distributed in kind to any person; or (c) where the trade or business is carried on by a body corporate the directors whereof have a controlling interest therein, an amount is applied, whether by way of remuneration, loans or otherwise, for the benefit of any person, there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets."

Pausing there, it is admitted that *prima facie* the distribution of 27s. a share is a distribution for the purpose of the Act, but it is said that the next proviso takes it out of the definition:

"Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

The sum of 20s. per share was admittedly applied in reducing capital, and the question is whether, having regard to the proviso to s. 36 (1), the extra sum of 7s. is to be treated as being a distribution or not. The Crown says that the section refers to the amount applied, not in redeeming shares, but in reducing capital, and that a greater sum cannot be applied in reducing capital than the nominal amount by which the capital is reduced in the balance sheet. It is said that the true effect of what took place in 1947 was that 20s. per share was applied in reducing the capital and 7s. per share in paying a premium to the preference shareholders. The Crown points out that the premium is necessarily paid out of profits, having regard to s. 46 of the Companies Act, 1929, and the whole scheme of the Finance Act, 1947, is that the distribution of any profits forfeits any non-distribution relief. They point to the provisions of s. 35 (1), which precludes any distribution in a liquidation representing accumulated profits being treated as capital beyond the amount of the nominal capital, and submit that, analysing the matter accurately and looking at the company's balance sheet, 20s. goes to reduce £1 of preference capital and 7s. goes to reduce the profit and loss account.

On the other hand, the company says that the section must be strictly construed, and, in taxing the subject, it is not right to rely on any supposed general scheme or policy of the Act in distributing the profits of the company. I agree with that. Then the company says that 27s. has, in fact, been applied in reducing the capital and the question is posed how else has the 7s. been applied? The company submits, first, that the redemption of shares is a purchase of shares by the company, and, secondly, that the company which purchases its own shares thereby reduces the capital. It relies on certain well-known passages in *Trevor v. Whitworth* (1) and in *British & American Trustee & Finance Corpn. v. Couper* (2), in support of those propositions, which cannot be disputed. Therefore, the company says that it has had to apply 27s. in the purchase of its shares and has thereby reduced its capital. It points to the fact that the articles speak of a redemption price, and points out that there is nothing to preclude a company applying assets to a greater value than £1 in paying off a £1 share: *Ex p. Westburn Sugar Refineries, Ltd.* (3). There is no dispute (although it does not determine the matter) that the effect of a redemption of preference shares pursuant to s. 46 of the Companies Act, 1929, effects a reduction in the nominal amount as well as in the paid-up

capital of the company. That was determined by UTHWATT, J., in *Re Serpell & Co., Ltd.* (4).

The Special Commissioners decided in favour of the company. They said this in the Case Stated:

A "In our opinion, the redemption of the four hundred thousand preference shares was simply a way of reducing the share capital of the company. In order to reduce the share capital in that way the company had to apply, and did apply, 27s. in payment for each share. We held that the full amount representing 27s. per share was therefore applied in reducing the share capital of the company within the meaning of the proviso to s. 36 (1) of the Act."

B I have found this a most difficult case, and my mind has fluctuated several times during the course of the argument. I disregard any supposed scheme of taxation in the Act and ask myself the question: What sum has been applied in reducing the share capital of the company? Ought one, as the Crown says, to explore the application of this sum of 27s. per share into the company's balance sheet and find that 20s. goes to reduce the capital and 7s. to reduce the profit and loss account? Or ought one to treat this as one transaction and say that, in order to get rid of these shares and thereby reduce the capital by that amount, the company was compelled by its articles to apply the 27s. per share? A company may reduce its capital in many ways, and one way is by redeeming its preference shares if so authorised by its articles. To reduce the capital by that method, the company was bound by its articles to apply 27s. for the redemption of every £1 nominal of capital reduced. On the whole, not without some hesitation, I think the Special Commissioners were right, and I dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Linklaters & Paines* (for the company). [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. COMPTROLLER-GENERAL OF PATENTS.

Ex parte PARKE, DAVIS & CO.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), May 11, 12, 1953.]

F *Patent—Licence—Compulsory licence—Medicine—Application for compulsory licence within three years from grant—Effect of International Convention for Protection of Industrial Property, art. 5 (A) (4)—Patents Act, 1949 (c. 87), s. 41 (1) (b), s. 45 (3).*

G The applicants, a company registered in the United States of America, obtained a grant of three British letters patent concerning a process for the production of a non-toxic antibiotic. Within three years of the grant the respondents applied to the Comptroller-General of Patents for a compulsory licence under the Patents Act, 1949, s. 41 (1) (b). The applicants applied for an order prohibiting the Comptroller-General from entertaining the application on the ground that, having regard to the International Convention for the Protection of Industrial Property, art. 5 (A) (4), and s. 45 (3) of the Act of 1949, no compulsory licence could be granted before the expiration of three years from the date of the grant of the patent.

H HELD: on its true construction when read as a whole, art. 5 referred simply to measures, whether by way of grant of compulsory licence or revocation, to prevent abuses of monopoly rights, and it had no reference to the special provisions of the English legislation contained in s. 41 (1) of the Act of 1949, under which a compulsory licence could be granted in respect of substances capable of being used as food or medicine, and, therefore, in acceding to the respondents' application the Comptroller-

General would not be making an order "at variance with any . . . convention" within s. 45 (3) of the Act of 1949, and the order of prohibition would not issue.

Decision of the DIVISIONAL COURT ([1953] 1 All E.R. 862), affirmed.

FOR THE PATENTS ACT, 1949, s. 41, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 678.

APPEAL by the applicants from an order of the Divisional Court, dated Mar. 20, 1953, and reported [1953] 1 All E.R. 862.

An application was made by the patentees, Parke, Davis & Co. (a corporation organised under the law of the State of Michigan in the United States of America) for an order of prohibition prohibiting the Comptroller-General of Patents, Designs and Trade Marks from entertaining an application made under the Patents Act, 1949, s. 41, by the respondents, British Drug Houses, Ltd., for compulsory licences under the patents No. 652280, No. 660381 and No. 652273.

By art. 5 (A) (4) of the International Convention for the Protection of Industrial Property, ratified by the United Kingdom on June 30, 1938, it was provided that an application for the grant of a compulsory licence might not be made before the expiration of three years from the date of the grant of a patent, and it was contended by the applicants that that provision applied to applications for compulsory licences made under s. 41 (1). It was contended by the respondents that art. 5 applied only to compulsory licences to prevent an abuse of monopoly rights and not to compulsory licences to exercise patents relating to food or medicine (with which s. 41 (1) was concerned). The Divisional Court dismissed the motion.

Pritt, Q.C., Shelley, Q.C., and Aldous for the applicants, Parke, Davis & Co.

Sir Hartley Shawcross, Q.C., and Graham, Q.C., for the respondents, British Drug Houses, Ltd.

The Attorney-General (Sir Lionel Heald, Q.C.) and P. J. S. Bevan for the Comptroller-General of Patents.

SINGLETON, L.J.: The facts are conveniently set out in the statement of the applicants, which was filed pursuant to R.S.C., Ord. 59, r. 3 (2):

"1. The applicants are a corporation organised under the laws of the State of Michigan in the United States of America and are large manufacturers of pharmaceutical products. Parke, Davis & Company, Ltd., a corporation organised under the laws of the State of Colorado, U.S.A., and a wholly owned subsidiary of the applicants, have a factory in this country where they carry on a large business in the manufacture and sale of pharmaceutical products including in particular the synthesis of an antibiotic, 'chloramphenicol'. 2. The applicants are the grantees and registered proprietors of a number of letters patent relating to their said synthetic manufacture of chloramphenicol, and, in particular, letters patent No. 652280, No. 660381 and No. 652273. These patents were applied for in pursuance of the International Convention for the Protection of Industrial Property ratified by this country on June 30, 1938, and were based upon original applications made in the United States of America, and letters patent were granted in this country in respect thereof on [certain specified dates]. 3. The respondents, who are also manufacturers in this country of pharmaceutical products, have applied to the Comptroller-General of Patents and Designs for a compulsory licence to be granted to them under the said patents pursuant to the Patents Act, 1949, s. 41, to enable them also to manufacture the said substance. 4. By the Patents Act, 1949, s. 45 (3), it is provided that no order can be made in pursuance of an application under the said s. 41 which would be at variance with any convention

A applying to the United Kingdom and any convention country, a description which includes the United States of America. Article 5 (A) (4) of the International Convention above mentioned, which is a convention falling within the said s. 41, is as follows: 'In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent . . . ' 5. In the premises, as three years have not expired since the grant of any of the said letters patent, the Comptroller has no jurisdiction to entertain the said application. 6. By the Patents Rules, 1949, rr. 114, 115, 116, the Comptroller is under a duty not to permit the application to proceed unless he is satisfied that there is a prima facie case. Although the Comptroller has no jurisdiction to entertain the said application he has allowed the application to proceed pursuant to the said r. 115. 7. The applicants ask that an order of prohibition should be made to restrain the Comptroller-General of Patents and Designs from permitting the said application to proceed."

B The Divisional Court dismissed the motion after hearing counsel for Parke, Davis & Co., and counsel on behalf of British Drug Houses, Ltd. The Divisional Court also heard the Attorney-General, on behalf of the Comptroller-General of Patents, on the question whether or not prohibition would lie in a case of this nature where a right of appeal is specifically given. We have not thought it necessary to hear the Attorney-General on that matter in view of the conclusion at which this court has arrived on the merits of the appeal generally.

C The history of the law in relation to patents, which goes back to 1883, has been discussed in this court. The Patents and Designs Act, 1907, was amended by a number of Acts. Over a considerable period of years there have been international conventions held from time to time to bring about, so far as possible, agreement as to the rights of patentees in the countries which were parties to the conventions. As counsel for the respondents pointed out, after there had been a convention and the delegates had agreed on certain articles, those articles were put before the governments of the countries concerned, and in due course in this country there followed legislation and the formal ratification by the government. For some thirty years prior to 1949 legislation had dealt specifically with manufactured articles which might be for use as food or medicine. The amending Act (the Patents and Designs Act, 1919) introduced specific provisions for patents in relation to food and drugs, and matters of that kind have not been, so far as we are told, the subject-matter of agreement at any convention. But over a considerable period of years other patented articles were made subject to an international obligation embraced in the agreed article or articles resulting from a particular convention. In 1925, as a result of agreements at the Hague Convention, an article was ultimately ratified in this country that individual States could deal with abuses of monopoly by legislation provided, first, that compulsory licences could not be granted for three years after the date of the letters patent, and, secondly, that there should be revocation only if compulsory licensing was insufficient. That article was followed in the Patents and Designs (Convention) Act, 1928, s. 2 of which amended s. 27 of the Patents and Designs Act, 1907, so as to incorporate into s. 27 of the Act of 1907 the provision that there should be no grant of a compulsory licence for three years from the date of the grant of the letters patent.

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H That system has been followed ever since. The amendment made by the Act of 1928 followed the article of 1925, which was, in turn, ratified by the British government on May 1, 1928. Article 5 of the convention of 1925 contains these provisions:

"The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent. Nevertheless each of the contracting countries shall have the right to take the necessary legislative

measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses. In no case can the patent be made liable to such measures before the expiration of at least three years from the date of grant of the patent and then only if the patentee is unable to justify himself by legitimate reasons."

It is agreed that that provision was dealing with "abuses of monopoly". In such circumstances the contracting countries had the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work, but in no case could the patent be made liable to such measures before the expiration of at least three years from the date of the grant of the patent. At that time there had been for some years as part of the law of this country the specific provisions for licences in respect of food and drugs, and those provisions must have been known to the delegates who were present at the Hague when the 1925 agreement was reached. It has not been suggested that the 1925 article to which I have referred, or the Act of 1928, affected patents in relation to food and drugs in any degree.

In 1934 there was another convention, followed by the Patents, etc. (International Conventions) Act, 1938, which received the Royal Assent on May 26, 1938, and in accordance with the usual practice, the ratification by the government of the United Kingdom of the articles agreed on by the convention was signified on June 30 of the same year. The wording of art. 5 was slightly changed. The material parts of art. 5 of the 1934 convention are:

"A. (1) The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent. (2) Nevertheless each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. (3) These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses. (4) In any case, an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent, and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons. No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence."

To all intents and purposes, paras. (1), (2) and (3) are the same as the corresponding paragraphs of art. 5 of the 1925 convention; it is in art. 5 (A) (4) that a change in the 1934 article took place.

It was submitted on behalf of the applicants that as they have the patent rights in respect of certain substances connected with the manufacture of food or medicine, no licence in respect of those patents can be granted until the expiration of three years from the date of the issue of the patent. It is common ground that a period of three years has not yet run from the issue of the patent in any of the three cases, so that, although those manufactured articles may be used for food or medical purposes, their case is that for three years from the date of the grant of the patent no licence can be granted by the Comptroller. In other words, they claim that he has no jurisdiction to grant any such licence, and, if that claim be right, the result would be that whenever a patent had been issued for the manufacture of some valuable medicine, however small the quantity the patentees might be able to manufacture, no licence could be granted to anyone else until the three years' period has elapsed.

That submission is based on the wording of art. 5 (A) (4) and on a change

which was made in the law by the Patents Act, 1949, which consolidated certain enactments relating to patents. The material part of that Act is contained in s. 37 to s. 45 and is headed: "Compulsory licences". Section 37 deals with compulsory indorsements of licences, and s. 37 (1) provides:

A "At any time after the expiration of three years from the date of the sealing of a patent, any person interested may apply to the Comptroller upon any one or more of the grounds specified in the next following sub-section for a licence under the patent . . . with the words 'licences of right'."

B That section preserves the three years' period before which a licence cannot be obtained, and in so doing it is in accordance with art. 5 (A) (4) of the 1934 convention. Section 37 (2) reads:

C "The grounds upon which application may be made for an order under this section are as follows, that is to say:—(a) that the patented invention, being capable of being commercially worked in the United Kingdom, is not being commercially worked therein or is not being so worked to the fullest extent that is reasonably practicable; (b) that a demand for the patented article in the United Kingdom is not being met on reasonable terms, or is being met to a substantial extent by importation; (c) that the commercial working of the invention in the United Kingdom is being prevented or hindered by the importation of the patented article; (d) that by reason of the refusal of the patentee to grant a licence or licences on reasonable terms—(i) a market for the export of the patented article manufactured in the United Kingdom is not being supplied; or (ii) the working or efficient working in the United Kingdom of any other patented invention which makes a substantial contribution to the art is prevented or hindered; or (iii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced; (e) that by reason of conditions imposed by the patentee upon the grant of licences under the patent, or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced."

F Those grounds are, in my view, all in the nature of abuses of the monopoly. If one or other of those reasons arose at any time after the expiration of three years from the date of the sealing of a patent, any person interested could apply for a licence. Section 38 contains provisions as to licences under s. 37, and s. 39 deals with the exercise of powers on applications under s. 37. Section 40 deals with indorsement, etc., on application of the Crown. To none of those need I refer.

G Section 41 deals with inventions relating to food or medicine, etc., and s. 41 (1) provides:

H "Without prejudice to the foregoing provisions of this Act, where a patent is in force in respect of—(a) a substance capable of being used as food or medicine or in the production of food or medicine; or (b) a process for producing such a substance as aforesaid; or (c) any invention capable of being used as or as part of a surgical or curative device, the Comptroller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application."

I draw attention to the word "shall", which appears in that sub-section. In the provisions as to the grant of a compulsory licence in the case of other

goods the statutory provision seems to have been in each statute "may". Section 41 continues:

"(2) In settling the terms of licences under this section the Comptroller shall endeavour to secure that food, medicines, and surgical and curative devices shall be available to the public at the lowest prices consistent with the patentees' deriving a reasonable advantage from their patent rights. (3) A licence granted under this section shall entitle the licensee to make, use, exercise and vend the invention as a food or medicine, or for the purposes of the production of food or medicine or as part of a surgical or curative device, but for no other purposes."

Thus, if a person secured a licence under s. 41 of the Act of 1949 the Comptroller might impose terms and the person who obtained the licence could use the invention as food or medicine or for the purposes of the production of food or medicine, but for no other purpose. It seems to me that the scope of s. 41, which follows the principle of the earlier sections on inventions relating to food or medicine, is that the Comptroller should have the widest powers possible and should so carry out his duties as to secure that food, medicine, and the like can be available to the public at the lowest prices consistent with reasonable remuneration to the patentees.

That section, if it stood alone, would, doubtless, have preserved the position as it was before, because in s. 41 there is no three years' period as there is in s. 37. Section 42, which is headed: "Revocation of patent", provides in sub-s. (1):

"Where an order for the grant of a licence under a patent has been made in pursuance of an application under s. 37 of this Act, any person interested may, at any time after the expiration of two years from the date of that order, apply to the Comptroller for the revocation of the patent upon any of the grounds specified in sub-s. (2) of the said s. 37 . . ."

I am inclined to think it would have been very much better if s. 42 had preceded s. 41, because s. 42 is dealing with a matter under s. 37, whereas s. 41 deals with inventions relating to food or medicine, which had always been treated differently.

Section 45 (3) is in these terms:

"No order shall be made in pursuance of any application under s. 37 to s. 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country."

It is said on that sub-section that, if the Comptroller contemplates making an order for a compulsory licence, or licences such as the respondents, British Drug Houses, Ltd., seek, he is doing something which would be at variance with art. 5 (A) (4). I have found considerable difficulty in understanding why that provision in s. 45 (3), which appears at first sight to make an order dealing with inventions relating to food and medicines subject to any article of any convention, was put into the Act since patents in relation to foods and medicines had not been dealt with or considered by any convention so far as I have seen. Counsel for the respondents faces that difficulty and points out that it may well be that s. 41 was included advisedly in s. 45 (3) because of something in some other convention which had gone before or something which might follow. It may be that there is some reason for it, but I hope I am not unduly critical when I say I feel it is a provision which may have slipped in accidentally. That is not meant as criticism of the draftsman. The task of a draftsman is difficult indeed. It is even more difficult when one has to deal with the consolidation of a number of Acts relating to patents and attempt to align them with articles in various conventions over a great number of years. It has, however, to be faced that s. 45 (3) appears to bring inventions relating

to food and medicine which are dealt with in s. 41 within the scope of articles resulting from conventions.

The question for discussion on this appeal is: What is the true meaning of art. 5 (A) (4) of the International Convention for the Protection of Industrial Property, 1934? I have already read that article, and I have read the earlier one of 1925. There are two observations I would make. The first is that I do not think it is right to take the words in para. (4) by themselves and have no regard to the surrounding provisions. The second point is that the articles that we have before us are translations. The original is in French, and in the 1925 convention the one text is set against the other on opposite pages, whereas in the later ones the one text follows on the other. Article 5 (A) (4) in both the conventions of 1925 and 1934 begins: "En tout cas". One would think the English translation would be given the same way, but it is not. That is because of what follows; it has to be put into the proper framework. It is clear that art. 5 of 1925 does not cover inventions relating to food or medicines, but it is submitted that the special provisions of s. 45 (3), of the Act of 1949, namely:

"No order shall be made in pursuance of any application under s. 37 to s. 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country",

makes it necessary to examine this question carefully, and the more so in view of the change that was made in art. 5 (A) (4) in 1934. When the Comptroller has before him an application under s. 41 of the Act, it is his duty to bear in mind the provisions of s. 45 (3) so that he does not make an order which is at variance with anything in the article which he has to consider, in this case art. 5.

Counsel submitted on behalf of the applicants that the application of British Drug Houses was an application for the grant of a compulsory licence and that such an application cannot be made before the expiration of three years from the date of the issue of the patent, which time has not yet run. Therefore, it was said, the duty of the Comptroller was to refuse the application forthwith. On the other side it was submitted that it was for the Comptroller to consider the application made to him and to see whether or not, on an examination of art. 5, he was asked to do something which would infringe s. 45 (3). The argument on behalf of British Drug Houses was that, when art. 5 is fully examined, there is nothing which the Comptroller is asked to do which can be said to be at variance with anything contained in the article.

Article 5 (A) (1) provides:

"The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent."

Importation by the patentee into the country where the patent has been granted of articles manufactured elsewhere is something that the country which has granted the patent might regard as undesirable, and that is in the nature of an abuse of the monopoly. Article 5 (A) (2) provides:

"Nevertheless each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

The body of that sub-article is preserving to the individual State the right to take the necessary legislative measures to prevent abuses of the monopoly. Then art. 5 (A) (3) provides:

"These measures shall not provide for the revocation of the patent unless the grant of compulsory licences is insufficient to prevent such abuses."

So far, just as in the 1925 articles, one is dealing with abuses of the kind which are embraced in s. 37 (2) of the 1949 Act and with nothing else. Now I come to art. 5 (A) (4). The argument of counsel for the applicants is that "en tout cas" means in any and in every case, so the sub-article would read:

"In any case and in every case an application for the grant of a compulsory licence may not be made before the expiration of three years from the date of the issue of the patent, and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons."

What meaning can be attached to those words,

"and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons" ?

That consideration does not apply to the grant of a licence in regard to inventions relating to food or medicine. The guiding thought in s. 41 (1) appears to me to be that a person interested in that matter may apply to the Comptroller for a licence, and thereupon

"the Comptroller shall . . . order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application."

In view of the terms of s. 41 (1), I do not see any bearing of the words in art. 5 (A) (4),

"and this licence may only be granted if the patentee is unable to justify himself by legitimate reasons."

There is nothing in respect of which the patentee has to justify himself. That consideration forces me to the conclusion that art. 5 (A) (4) is dealing with the same subject-matter as art. 5 (A) (1), (2) and (3), that is to say, abuses of the kind now embraced by s. 37 (2) of the Act of 1949. Article 5 (A) (4) goes further:

"No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence."

I thought at one time that meant that a compulsory licence could not be granted for three years and there could be no proceedings for the revocation of the patent before the expiration of two years from the date of the granting of the first compulsory licence, but counsel for the applicants pointed out that there is no provision anywhere in any of the Acts for the revocation of a patent in regard to substances relating to food or medicine, and I accept that at once. That seems to me to support the view which I have formed, that art. 5 (A) (4) is throughout dealing with the same subject as art. 5 (A) (1), (2) and (3). Although I recognise that the question which this court has to consider is one of construction alone, it seems to me it would be an amazing thing if there had been a departure from the recognised practice of this country, which has been not to recognise or to make any international arrangement as to inventions relating to food or medicine. It would be surprising if in the result the legislature had by s. 45 (3) and art. 5 (A) (4), prevented this country from granting a licence for the manufacture of articles of food or of much needed medicines for a number of years. It would certainly be contrary to the practice which had been followed up to the passing of the Act of 1949, and I am relieved that on my view of the construction I have not to come to any such conclusion.

When this case was before the Divisional Court LLOYD-JACOB, J., said ([1953] 1 All E.R. 865):

"As I read this article [art. 5 (A)], it is concerned to express the restrictions which the contracting parties agree to accept on their right to take legislative measures to prevent abuses resulting from the exercise of the

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exclusive rights conferred by patents. Where it refers to compulsory licences, the reference is to such as are concerned with the prevention of such abuses. The Patents Act, 1949, s. 37 to s. 40, set out the grounds on which such compulsory licences may be granted, and it is to be noted that these sections conform to the provisions of the article. Section 41, on the other hand, is concerned neither with the exercise by the patentee of the rights conferred by the patent nor with any abuse that may result therefrom. The sufficiency or otherwise of compulsory licences to prevent abuses cannot, therefore, arise, and the possibility of revocation on the ground of abuse does not exist. The section specifies that certain patents, viz., those relating to food, or medicine or surgical or curative devices, shall be susceptible of exercise by persons licensed by the Comptroller-General, and this irrespective of the exercise or non-exercise by the patentee. There is, therefore, no default for which the patentee could be required to justify himself by legitimate, or, indeed, any, reasons, and this provides an additional differentiation from art. 5 (A) (4)."

I agree with that reasoning, and, in my opinion, this appeal must be dismissed.

C
JENKINS, L.J.: I agree. Article 2 (1) of the International Convention signed in London in 1934 provided:

D
"Persons within the jurisdiction of each of the countries of the Union shall, as regards the protection of industrial property enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to their nationals without prejudice to the rights specially provided by the present convention. Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the conditions and formalities imposed on nationals."

E
"Industrial property" for the purposes of the present case means patents. At the date when that convention was signed the patent law of this country, which, *prima facie*, was the patent law which nationals of other countries of the Union would be entitled to enjoy in this country (subject to anything to the contrary contained in the convention), included s. 38A of the Patents and Designs Act, 1907, introduced into the principal Act by the Patents and Designs Act, 1919, and providing by sub-s. (2) as follows:

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"In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Comptroller shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable, the Comptroller shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention."

H
It is admitted that this provision did not conflict with any provision of the convention which was in force down to the signing of the convention of 1934. The previous convention was that signed at The Hague in 1925 and the only provision in it that bears on the question raised in this case was art. 5. [His LORDSHIP read art. 5 of the 1925 convention and continued:] It was agreed before us that the provision of art. 5 was directed, and directed only, to the grant of compulsory licences in respect of patents, or the revocation of patents, on the ground of abuse, and that it had nothing to do with a licence compulsorily granted in respect of an invention intended for or capable of being used for

the preparation or production of food or medicine under s. 38A (2) of the Act of 1907.

The question in this case, therefore, is whether the revised form of art. 5 adopted by the convention signed in 1934 had the effect of converting s. 38A (2) from a perfectly legitimate provision, from the international point of view, into a provision which was at variance with the new art. 5. I think one can fairly say that, if the intention of art. 5 of the 1934 convention was to produce that not unimportant result, one would have expected such intention to be expressed in clear terms. As to the construction of the 1934 art. 5, on which this case turns, it is agreed that the corresponding provisions of the 1925 art. 5 dealt only with abuses. That it was so limited in its effect is made clear by the words:

"In no case can the patent be made liable to such measures before the expiration of at least three years."

That refers back to the reference to the

"necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights",

and so on, and limits both the grant of a compulsory licence and the revocation of the patent to cases of abuse, as both those steps are included in the expression "such measures". It is said that in the new art. 5 of 1934 there is a most significant change of language, a change sufficiently marked to make it embrace the case of licences under patents in respect of food and medicine. Article 5 (A) (1) concerns importation, and is in the same terms as the old art. 5, and art. 5 (A) (2) and (3) are also substantially in the same form as the old article. In art. 5 (A) (4) is the departure that is relied on by the applicants as bringing in compulsory licences in respect of patents relating to food and medicine. As to that I would say that, while there is certainly a change of language, it is not the change one would expect if the intention had been to produce the particular result contended for. One would have expected, in my view, a reference to the varieties of compulsory licences, other than those which might be granted as a remedy for abuses, to which the article was directed. If compulsory licences of patents in respect of food and medicine, as to which there has been no abuse, were intended to be brought into the article, that has been done in a most obscure and devious fashion, and it must be remembered that some change of language was in any case required for the purpose of introducing the new two years' period of grace between the granting of the first compulsory licence and the institution of any proceedings for revocation.

Looking at the article as it stands in the 1934 form, the applicants rely on these matters. First, as to the view that the whole of the article relates to abuses, it is said that the word "abuses" and the phrase "abuse of monopoly rights" are vague and ambiguous expressions to which no precise meaning can be attached, and it is impossible, therefore, to relate art. 5 to matters of that kind, for that gives the article too uncertain and indefinite a field. With respect, I cannot accept that argument. The expression "abuse of monopoly rights"—and it is to abuses of that kind that the French equivalent word "abus" is obviously directed in this article—is an expression long used and well understood in patent matters. It means, in effect, conduct of the kind referred to in s. 37 of the Act of 1949. I see no reason why art. 5 should not be limited to matters of that kind. Article 5 (A) (2) shows with reasonable clarity what is meant by "abuses" by referring to

"abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."

Secondly, great reliance is placed on the words "in any case". It is said that those words mean "in any case whatsoever", and that they, as it were, segregate para. (4) of the article from its other provisions and introduce a

provision dealing with the grant of compulsory licences and the revocation of patents in any circumstances whatsoever, and in no way confined to cases of abuse of monopoly rights. I cannot accept that argument. In my view, the widest meaning one can give to "in any case" is "in any case of the kind dealt with by this article". That construction seems to me to be necessary in order to give the article any coherent effect. Thirdly, it is said that what is to be granted under art. 5 (A) (4) is "*a* compulsory licence", not "*the* compulsory licence", which one would expect if there were a reference back to compulsory licences of the kind mentioned in art. 5 (A) (3). In my view, there is nothing in that point and it is reasonably plain that the reference in art. 5 (A) (4) to "the grant of a compulsory licence" is a reference back to a compulsory licence granted with a view to preventing abuse of monopoly rights. Then it is sought to get over the significant phrase in art. 5 (A) (4), "if the patentee is unable to justify himself by legitimate reasons", by saying that the words "justify himself by legitimate reasons" do not suggest exculpation or the provision of some adequate excuse or, in the ordinary sense of the word, "justification" of some act or omission which might otherwise be considered worthy of blame. It is said that it can equally well refer to a patentee who has not done anything he ought not to have done, or omitted anything he ought to have done, but has simply obtained a patent relating to food or medicine. I cannot accept that argument. I think the words "if the patentee is unable to justify himself by legitimate reasons" strongly support the view that the whole of this article relates to measures to be taken to prevent an abuse of monopoly rights. I think the last sentence of art. 5 (A) (4) points to the same conclusion:

"No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory licence."

I think the revocation there intended to be referred to is clearly revocation on the ground of abuse, and that bears out the view that the reference to the first compulsory licence is a reference to a compulsory licence granted with a view to preventing abuse. Unless revocation is so limited there as opposed to being considered as a revocation of any kind on any ground and in any circumstances, it is difficult to see what effect should be given to it, for it cannot well be given a wholly unlimited meaning. If it were, one might find imported into art. 5 a reference even to revocation of the kind provided for in s. 32 of the Act of 1949, that is to say, revocation on the ground of invalidity, fraud, and so forth.

The point is one which is incapable of great elaboration, but, reading art. 5 of the 1934 convention as a whole, and giving the best consideration I can to the various indications as to its meaning to be extracted from the language used, it seems to me that it is reasonably plain that this article is referring simply to measures, whether by way of grant of compulsory licence or revocation, to prevent abuses of monopoly rights, and has no reference at all to the special provisions of the English legislation under which a compulsory licence may be granted in respect of substances capable of being used as food or medicine. As I have said, those provisions were formerly contained in s. 38A (2) of the 1907 Act and they are now to be found in s. 41 of the 1949 Act.

Since the case turns, as in my view it does, on the true construction of the convention, little assistance on that question of construction can be derived from the Patents Act, 1949. It is, however, to be observed that s. 37 of that Act, which is the section under which compulsory licences can be granted by reason of what I will still refer to as abuses of monopoly rights, says that no application for a compulsory licence can be made until after the expiration of three years from the date of the sealing of a patent. That clearly reflects the provisions of art. 5 of the convention. So, too, s. 40, which deals with endorsements, etc., on the application of the Crown, provides that applications may

be made at any time after the expiration of three years from the date of the sealing of the patent. Section 42, which enables patents to be revoked on the grounds specified in s. 37, that is to say, for abuses of monopoly rights, provides that the application may be made at any time after the expiration of two years from the date of an order granting a compulsory licence under s. 37. That, again, reflects the provisions of art. 5 of the convention. Section 41, which, as I have said, is the present section relating to compulsory licences in respect of patents for substances capable of being used as food or medicine, contains no time limit. The inference, for what it is worth, seems to be that this Act was prepared on the footing that the convention imposed no provision as to time which was relevant to the granting of compulsory licences under s. 41. That circumstance fortifies me in the conclusion to which I have come.

It is, of course, true that s. 45 (3) says:

“No order shall be made in pursuance of any application under ss. 37 to 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country”,

and the inclusion of s. 41 in that provision is the foundation of the applicants' case, but they have also placed some reliance on this sub-section as an aid to the construction of art. 5 of the 1934 convention, for it is said that, by the very inclusion in its terms of s. 41, it suggests that the grant of a licence under s. 41 might be at variance with the convention, and that, if the reference to “any treaty, convention, arrangement or engagement” is to be treated as referring primarily to the existing convention of 1934, it suggests in effect that s. 41 is to be regarded as a section providing for the grant of compulsory licences within the meaning of art. 5 of the convention. As to that argument I would say that the expression in the Act (if there be such an expression) of an opinion to the effect that compulsory licences granted under s. 41 would, or might, come within the terms of art. 5 of the convention, cannot, in my view, affect the construction of art. 5. Further, I think there was some force in the respondents' argument to the effect that s. 45 (3) is satisfied if it is considered as referring, not merely to any existing convention, but to all such treaties, arrangements or engagements as may be made at any future time. I think the argument for the applicants based on s. 45 (3) is weakened by the circumstance that sub-s. (3) includes the whole fasciculus of ss. 37 to 42 and that ss. 37, 40 and 42 are all framed so as to conform, so far as can be seen, with the requirements of art. 5 of the convention, and yet the draftsman thought it necessary to include references to them in the provisions of s. 45 (3). That suggests that s. 45 (3) was inserted *ex superabundanti cautela* and not on account of any definite view taken as to the bearing of art. 5 of the convention on those sections. Therefore, for the reasons my Lord has given and such reasons as I have been able to add myself, I am of opinion that the Divisional Court came to a right conclusion in this case and that the appeal fails.

MORRIS, L.J.: I agree. It seems to me that the determination of this appeal must depend on the interpretation and construction of art. 5 of the convention of 1934. The result of s. 45 (3) of the Act of 1949 must be that the Comptroller cannot make an order in pursuance of an application under s. 41 which would be at variance with any convention applying to the United Kingdom. The only convention to which reference is made by the applicants is the convention of 1934. It, therefore, becomes a question whether on the construction of the convention of 1934 the application pending before the Comptroller should not be heard for the reason that it is an application that cannot be entertained.

The applicants do not contend that after the convention of 1925 there was any time limit imposed as to compulsory licences referable to food and medicine.

When Parliament legislated in 1928 it is not suggested that they did not legislate on appropriate lines, but the argument for the applicants is that in the convention in 1934 a fundamental change was made by art. 5 (A) (4). It is said that the new language is clear and that it is too strong to permit of any limitation. If that is so, it must be observed that the clarity and the strength of the language entirely eluded the legislature and those who drafted a Bill to submit to the legislature, for when an Act was passed in 1938 to give effect to the convention of 1934 there was no time limit introduced referable to compulsory licences for food and medicine. On the applicants' submissions, therefore, it remained that from 1938 until 1949 the legislature, having set out to embody in English law the matters agreed by the convention, entirely failed to understand the language of the convention. If at a later date the full effect of the words had become apparent, I should have thought that in further legislation, and, particularly, in s. 41 of the Act of 1949, there would have been some express reference to the time limitation. But these points cannot in any way affect the court in construing the article.

The change that was introduced in 1934 was that the period of two years in reference to revocation was introduced. I read art. 5 (A) (1), (2), (3) and (4) exactly as SINGLETON, L.J., has read them, and I agree fully with the way in which he has interpreted them. [HIS LORDSHIP read art. 5 (A) (3) and continued:] There is, therefore, a reference to compulsory licences and also to revocation, which are "measures". Those measures, it seems to me, are clearly measures to prevent abuses. When, therefore, art. 5 (A) (4) begins:

"In any case, an application for the grant of a compulsory licence may not be made . . .",

I consider that the reference is to a compulsory licence of the same kind as the compulsory licence referred to in art. 5 (A) (3), that is to say, a compulsory licence which is a measure to prevent an abuse if the patentee is unable to justify himself. I am of the opinion that the opening words (which are only a translation of the French) in their context mean: "In any case of the kind contemplated by paras. (1), (2) and (3)", or that they might alternatively mean: "However that may be". I fully agree with the way in which this matter has been dealt with by my Lords, and I express my concurrence with the judgments delivered.

Appeal dismissed.

Solicitors: *Tackley, Fall & Read* (for the applicants); *Bristows, Cooke & Carpmael* (for the respondents); *Solicitor, Board of Trade* (for the Comptroller-General of Patents).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

ELLIS v. HOME OFFICE.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), May 8, 13, 14, 1953.]

Negligence—Prison authorities—Duty to prisoner—Protection against injury—Attack on prisoner by fellow prisoner.

Discovery—Production of documents—Privilege—"Disclosure . . . injurious to the public interest"—Crown Proceedings Act, 1947 (c. 44), s. 28 (1).

In July, 1949, while detained on remand in Winchester Prison, the plaintiff was put in the hospital wing of the prison as it was suspected that he was ill. At the same time H., a convicted prisoner who was thought to be mentally defective, was also in the hospital wing for observation. On the morning of July 22, owing to shortage of staff, there was only one prison officer on duty in the hospital wing instead of two. After opening the doors of some of the cells to allow the prisoners to empty their slops, he left the wing for a period. In his absence, H. went into the plaintiff's cell and hit him violently on the head. In an action against the Home

Office for damages for the injuries he suffered thereby, the plaintiff based his claim on, *inter alia*, the negligence of the prison staff. For the prosecution of his case he asked for the production by the Home Office of certain documents, viz. (*inter alia*), medical reports on H., police reports at the time of the assault, and a deposition made at that time by another prisoner, but the Home Office refused to produce these documents on the ground that it would be injurious to the public interest to do so.

HELD: the common law duty owed by the prison authorities to the plaintiff was to take reasonable care for his safety, and, as there was no reason to think that H., though a mental defective, was more violent or dangerous than an ordinary prisoner, the conduct of the prison officer in leaving the hospital block, and in leaving the doors of the cells open so that H. had access to the plaintiff, could not have been reasonably expected to result in an attack being made by H. on the plaintiff, and, therefore, the Home Office were not liable to the plaintiff for negligence.

Per curiam: although it was essential that government departments should be entitled to claim privilege for documents the disclosure of which would be against the public interest, in the interests of justice the ambit of privilege should be carefully scrutinised, and in a case such as this each individual document should be examined before a claim of privilege was made and there should be disclosure and production of any documents which could not harm the public interest.

Per JENKINS, L.J.: "... where there is a large number of relevant documents within the ambit of privilege which may or may not become of real materiality to the case as it develops, there should be someone on the spot readily available—whether counsel or solicitor on the government side or an official from the department concerned—invested with authority to consider questions of privilege which may arise in the course of the case, and in his discretion to waive the claim of privilege. That, of course, would not apply to documents which from the outset appear to be such that they should on no account be disclosed for reasons of public interest."

Per MORRIS, L.J.: "... when considering the public interest and what might be 'injurious to the public interest', within the proviso to s. 28 (1) of the Crown Proceedings Act, 1947, it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done."

AS TO PRODUCTION OF DOCUMENTS WHERE DISCLOSURE IS CONTRARY TO PUBLIC INTEREST, see HALSBURY, Hailsham Edn., Vol. 10, p. 397, para. 479, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 18, pp. 166-169, Nos. 1202-1223, and Digest Supps.

FOR THE CROWN PROCEEDINGS ACT, 1947, s. 28 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 6, p. 66.

Cases referred to:

- (1) *Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587; [1942] A.C. 624; 111 L.J.K.B. 406; 166 L.T. 366; 2nd Digest Supp.
- (2) *Admiralty Comrs. v. Aberdeen Steam Trawling & Fishing Co.*, 1908 S.C. 335; 18 Digest 168, o.

APPEAL by the plaintiff from an order of DEVLIN, J., made at Winchester Assizes, and dated Dec. 5, 1952.

On July 22, 1949, the plaintiff, while detained as a remand prisoner in Winchester Prison, was attacked in his cell and seriously injured by another prisoner, one Hammill, who had gained access to the cell while the prison officer was away for a short period. Hammill was a convicted prisoner who was thought to be mentally defective, and both he and the plaintiff were in the hospital block of the prison at the time of the assault. In an action against the Home

Office the plaintiff claimed damages for the injuries suffered by him through, as he alleged, the negligence of persons employed by the Home Office, and, alternatively, he claimed damages for breach of the statutory duty which the Home Office owed to him under the Prison Rules, 1949, r. 92, r. 105, and r. 142. The claim at common law was based on the fact that Hammill was a mental defective, and it was contended on behalf of the plaintiff that, by reason of that fact, a particular duty of care was laid on the prison authorities.

A DEVLIN, J., found that there was lack of proper supervision at the material time, but that there was no reason to anticipate any act of violence on the part of Hammill, and he held that the plaintiff had failed to establish negligence at common law. He further held that the injury did not result from a breach of the Prison Rules. As the material before him was incomplete owing to the fact that the defendants had refused to produce a number of documents on B the ground that it would be injurious to the public interest to do so, the learned judge expressed the view that, whether or not justice had been done, it certainly would not appear to have been done.

Scott Henderson, Q.C., and I. S. Hill for the plaintiff.

Diplock, Q.C., and Fay for the defendants.

C SINGLETON, L.J.: The plaintiff, who had been committed for trial, was in gaol in Her Majesty's prison at Winchester on July 22, 1949. As it was suspected that he had some illness, he was sent to No. C.2 wing, the hospital wing, of the prison, which has some thirty-eight cells. Two of them are used as places at which prisoners can empty their slops, and in the ordinary course they are allowed out of their cells at about 7 a.m. to do that. According to D the established practice, the officer in charge unlocks the doors of roughly one-quarter of the cells at a time, the doors of the other three-quarters remaining locked until those from the first quarter have emptied their slops. The cells were not all occupied on the morning of July 22, 1949. There were usually two prison officers on duty at this time of the morning, and one went down to the kitchen to get breakfast for the prisoners. On July 22, owing to shortage E of staff and to the fact that two officers were on leave, there was only one prison officer, one McHugh, in attendance. McHugh opened the doors of about half of the cells, and then left the wing for a period. While he was away, a prisoner named Hammill, who was the occupant of No. 25 cell, went into the plaintiff's cell, which was No. 6, and hit the plaintiff on the head at least two blows, apparently with some implement, but it was never found or identified. F If the ordinary practice had been followed, the door of No. 25 cell would not have been open at the same time as the door of No. 6, so that Hammill would not have been able to get into the plaintiff's cell. Hammill later pleaded Guilty to the offence of unlawfully wounding the plaintiff and was dealt with for that offence.

G Hammill had been in Canada for some years, and it is clear from the documents which are before the court that different courts in Canada had regarded him as being a mental case. When he returned to England, he committed an offence and was sent for trial. He was received into prison at Winchester in February, 1949, and appeared at the quarter sessions at Southampton in April. At the trial a police officer produced a report before the learned recorder which showed that Hammill might well be regarded as mentally defective.

H Dr. Fenton, the prison medical officer at Winchester, does not seem to have been aware of that fact, but when his attention was drawn to it at Southampton he agreed to consider the matter, and Hammill was put back for sentence at a later sessions. In view of what had been found, Dr. Fenton put Hammill into the C.2 wing, where he remained under observation from Apr. 19 until July 22. For some part of the period Dr. Fenton was away and another doctor had charge of the hospital patients, including Hammill. On July 22, 1949, the plaintiff should have appeared at the Assize Court at Winchester on the charge

on which he had been committed for trial, but the injuries which he received that morning prevented his attendance there until December.

The plaintiff's claim against the Home Office was put on two grounds. In para. 4 of the statement of claim it is pleaded:

"The said injury was caused and brought about by the negligence of the defendants their servants or agents. Particulars of negligence. (i) The defendants, their servants or agents failed to exercise any or any adequate observation or supervision over the said convicted prisoner Hammill. (ii) They failed to segregate the said prisoner Hammill. (iii) They failed to keep the said prisoner Hammill, being a convicted prisoner, apart from the plaintiff, being an untried prisoner. (iv) They failed to take any or any adequate precautions to safeguard the plaintiff against the said prisoner, being a mental defective. (v) They failed to keep the said prisoner confined or detained in a place apart while he remained in the said prison. (vi) They failed to ensure that the said prisoner did not have access to implements for the purpose of striking the plaintiff."

It will be observed that the whole basis of the claim in regard to lack of supervision is lack of supervision of Hammill. I shall return to that later.

The further claim of the plaintiff is pleaded in para. 5 in this way:

"Further or alternatively by reason of the matters aforesaid the defendants their servants or agents were in breach of their statutory duty under r. 92, r. 105 and r. 142 of the Prison Rules, 1949, and the plaintiff will rely upon the particulars set out in para. 4 above."

The claim under para. 5, in so far as it was mentioned in this court, was based on the Prison Rules, 1949, r. 105, which falls under Part III, the heading to which is:

"Special rules for particular classes of prisoners other than those sentenced to corrective training or preventive detention. Untried prisoners."

Under the heading "General" in that Part is r. 105 which provides:

"Untried prisoners shall so far as possible be kept apart from convicted prisoners."

The reason for that rule is clear. It is, and for long it has been, the policy of those who are responsible for prison administration in this country to keep apart, as far as possible, convicted and unconvicted prisoners. It is recognised that, if a person has not been convicted, it is better that he should not be placed in danger of contamination from those who have been convicted. It is said on behalf of the plaintiff that it was a breach of that rule which led to, or was a cause of, the injury which befell the plaintiff. I do not think that that is so. The fact was that on the morning of July 22, 1949, it was possible for Hammill to get into the plaintiff's cell, but the injury which was caused to the plaintiff did not result from the breach of the rule, and that claim fails.

In regard to the plaintiff's claim under para. 4 of the statement of claim, the case was pleaded on the supposition that a particular duty was laid on the prison authorities because of the fact that Hammill was a person who was mentally deficient, and, when the case was before *DEVLIN, J.*, that was the way it was put before him. Witnesses were examined and cross-examined to show that Hammill was not up to the ordinary standard. It was said that his intelligence was not above that of a boy of seven or eight years of age, and it was, therefore, suggested that there was a higher duty on the prison authorities than there was in the case of someone who was not so afflicted. There was no evidence to show that Hammill had exhibited any sign of violence before July 22, 1949. There was evidence, which the learned judge accepted, that a person who is a mental defective is no more likely to use violence than

one who is not. There was, indeed, no evidence to the contrary. DEVLIN, J., said:

A “ Mr. McKenna [who was then appearing as counsel for the defendants] contends that mere lack of supervision shows no breach of any duty towards the plaintiff. Mr. McHugh’s duty was to carry out the proper routine, i.e., his duty towards his superiors, his employers. But I am not concerned with that. What I am concerned with is his superiors’ or employers’ duty towards the plaintiff, and they do not owe any duty to the plaintiff to see that the warders carry out all their instructions properly. The duty that the prison authorities owe to the plaintiff is to take reasonable care for his safety, and it is only if Mr. McHugh neglected to do that that his employers, the prison authorities, may be made liable. The test of that is whether Mr. McHugh, when he left the landing . . . ought to have appreciated, as a foreseeable consequence to what he did, that an injury might be done to the plaintiff. I do not think that he ought, unless he knew, or his superiors knew—for that would be sufficient for the purpose—that Hammill was the sort of person who was likely, if he was allowed out of confinement, to commit an act of violence, and, therefore, had to be watched, not merely in his own interest and not merely as a matter of prison discipline, but in order that others might be protected from the foreseeable consequence of what he might do if left at large. Thus, the matter appears to me to turn on whether the prison authorities knew, or ought to have known, that Hammill was a prisoner who was likely, if not kept under control, to commit an act of violence. On that, the only evidence that I have is the evidence of the prison authorities themselves and of the prison doctor, Dr. Fenton, who said . . . that when he examined [Hammill] he did not think, he had no reason for thinking, that [Hammill] was likely to commit an act of violence. There is nothing in Hammill’s previous record which shows that he was likely to commit an act of violence. There is nothing—I accept the defendants’ evidence on this point—that makes a mental defective any more likely to commit an act of violence than a person who is in full possession of his powers of mind; that is, nothing in the bare fact of mental defectiveness. Of course, mental defectiveness may take that form, but if you take an average of the prison population, you will not find that mental defectives are any more violent than the average person in prison. Accordingly, on that evidence there would be no reason to anticipate any act of violence by Hammill, and no reason to keep any special observation, or take any special precautions with regard to him for that purpose . . . I have either to believe or disbelieve, on the material I have, Dr. Fenton’s evidence. I believe it, and in those circumstances the plaintiff, in my judgment, failed to make out any breach of common law duty.”

G It is the duty of this court to accept those findings of the learned judge. I go further and say that on the evidence, and on the case as pleaded, those findings are right and are sufficient to dispose of this appeal. It was submitted to this court by counsel for the plaintiff that the learned judge had taken too narrow a view of the position, and that he had to consider not only the case made in regard to Hammill, but the whole of the circumstances. Counsel said that the learned judge, on his findings, should have come to the conclusion that the defendants had failed in the duty which they owed to prisoners generally, of whom the plaintiff was one, and that the very thing happened which might be expected to happen if there was a lack of supervision. It was submitted that on those grounds the judgment of the learned judge should be reversed. I do not disguise from myself that a case of considerable weight was made on that line of reasoning. It was not the case pleaded, and it was not the case

put to the learned judge. In his judgment, DEVLIN, J., speaking of the incident on the morning of July 22, said:

"In this case, therefore, I am not satisfied that Officer McHugh has given me a complete and true account of how this assault was committed. I am satisfied that he had his back turned for very much longer than he is willing to concede. What he was doing, I do not think very much matters on the facts so far as I am considering them at the moment. It is sufficient for me to find that there was a lack of the supervision which there ought to have been, and it was during that lack of supervision that the assault was committed. But I am bound to say that I cannot, in the circumstances, having rejected McHugh's evidence, accept a good deal of the plaintiff's evidence. I think the probability is that McHugh, being shorthanded and having a great deal of work to get through, had not followed the usual routine as it ought to have been followed, and had been tempted to hurry matters along by opening one or more of these sections at once so that, as the plaintiff says, Hammill and [the plaintiff] were both freed to use the recess and, to that extent, to move about the corridor at the same time. I am satisfied that the observation which ought to have been kept on the corridor to prevent that happening was not, at the material time, being kept. There was, therefore, I think—I do not at this stage say a breach of the rules, because that is a matter that I will have to consider later—a breach of duty by McHugh in relation to the tasks which he ought to have been carrying out."

[HIS LORDSHIP reviewed the evidence and continued:] There was ample material on which the learned judge could find that there was lack of supervision. The need for supervision is recognised. The unknown quantity is to be borne in mind, particularly when a number of persons are together under restraint and deprived of their liberty. The danger of someone having an instrument is appreciated. The danger may be danger to a prison officer, but if a man has access to an instrument, he may hit someone other than a prison officer, as happened in this case. The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will, of whom the plaintiff was one. If it is proved that supervision is lacking, and that accused persons have access to instruments, and that an incident occurs of a kind such as might be anticipated, I think it might well be said that those who are responsible for the good government of the prison have failed to take reasonable care for the safety of those under their care.

DEVLIN, J., felt grave concern about this case from another point of view. In his judgment he said:

The plaintiff is in the unfortunate position that he has been quite unable to test that evidence [in regard to Hammill] in any way at all. The facts relating to Hammill's behaviour in prison are known only to the prison authorities. Documents, of course, are brought into existence in relation to that. The hospital officers prepare a daily report in which, of course, it would be their business to note down anything with regard to Hammill which was significant, because he was put in the C.2 wing in mental hospital that he might be kept under observation. Those reports, if they were shown, might or might not show something which would lead a medical man to suppose that Hammill's conduct ought to have given rise to a finding of his intelligent violence. Those reports are not before the court because the prison authorities, and it was, therefore, also the Crown—have claimed Crown privilege. There was no evidence to the contrary, and that claim has not been challenged. Having regard to the fact that there was no evidence to the contrary, I suppose it could not be said before July 22, 1949. I, therefore, have to look at the case on the material that a person who is in a position to have to regard this case in precisely the same position

as if the documents which would have enabled the plaintiff to test the evidence of the defendants' witnesses had been destroyed. That would be a misfortune which he would have to put up with as best he could, but it is, of course, a worse misfortune than that, because, not merely are the documents to be regarded as having been destroyed, but no secondary evidence can be given of their contents, so that they must be treated, therefore, as being obliterated from everyone's memory. But that is what the law requires, and in those circumstances I can only act on the evidence which I have got. I must not assume that anything that is contained in the documents would have caused Dr. Fenton under cross-examination to alter his opinion or would have enabled the plaintiff to throw another light on the matter."

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B Having stated his conclusion, the learned judge said this:

"But before I leave this case I must express, as I have expressed during the hearing of the case, my uneasy feeling that justice may not have been done because the material before me was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done."

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That is a serious thing for a judge to have to say as to the administration of justice in his court. DEVLIN, J., continued:

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"This case . . . turns entirely on the cardinal fact whether the prison doctor had any reason to believe that Hammill, a mental defective, was likely to commit violence. There is no doubt that daily reports would have been prepared by the hospital orderlies, while Hammill was confined for some considerable time in the hospital wing, recording anything that was material about him. Dr. Fenton has, no doubt, examined those records, and, well, we do not know what they are. I have no reason at all to suppose, and it has not been suggested, that he has expressed an opinion—that is, has knowingly expressed an opinion—which is inconsistent with those records, but it does mean that his opinion cannot be tested in cross-examination in the way in which it ordinarily is tested. There may, for example, be incidents recorded which Dr. Fenton has regarded as of no significance, and which another doctor might have considered of significance, and, had there been a conflict of medical evidence on the point, it might be that I would have preferred that other doctor's evidence to that of Dr. Fenton . . . It is a rule, of course, which is particularly unfortunate when the person, who is responsible for deciding whether they should be disclosed or not, happens also to be the defendant in the action in which he is being sued. It means that every litigant against a government department—and such litigation is becoming more and more frequent as the sphere of government activities is extended—is denied, as a matter of course, the elementary right of checking the evidence of government witnesses against the contemporary documents. Dr. Fenton, for example, made an examination of the prisoner, Hammill, in June, and he prepared, I am told . . . case notes, which, of course, in the ordinary case the plaintiff would want to look at so as to check his evidence. They come among the documents that are privileged from disclosure, as has all the material to which I have already referred, the reports which were made by the hospital officers in the C.2 wing."

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Thus, we have the trial judge left with a feeling of dissatisfaction, and that is not as it should be. Over and above the reports on Hammill for which privilege was claimed, a further claim of privilege was made in respect of a report submitted on June 22, 1950, to the Chief Constable of Hampshire: "Statements of witnesses and photographs taken by the Hampshire Constabulary, July 22 to Aug. 5, 1949". The Secretary of State had sworn an affidavit in which he

deposed to the fact that the standing orders for the government of prisons, included in the third part of the first schedule of documents, were documents in respect of which he claimed privilege, he having formed the view on the grounds of public interest that those standing orders ought not to be produced. No one, I am sure, will say a word against that claim. It is of great importance that privilege should be maintained when the public interest is at stake. Some time after that affidavit had been put on the file, the Treasury Solicitor wrote to the solicitor for the plaintiff asking if an affidavit was required in respect of other documents for which privilege was claimed, and there were many of them. I have referred to two classes: (i) the reports on Hammill, and (ii) police reports. The solicitor for the plaintiff did not require another affidavit. I am inclined to think that, if a further affidavit had been required, more thought would have been given to this matter than appears to have been given at one stage. Everyone agrees that a government department, particularly the Home Office, is charged with a multiplicity of duties, and its officers must have possession of numbers of documents production of which would be against the public interest.

But let me consider the police documents in this case for a moment. It was 3.50 p.m. on July 22, 1949, when the police were called in. I have no doubt that they took a number of statements from people who might be witnesses. I have no doubt that they searched. I have no means of knowing what they found. I should assume that they found nothing, but the judge at the trial might have been helped if he had had before him the result of the police inquiries when they were called in in this matter. Counsel for the plaintiff did not go fully into the question of police documents. Apparently, it was thought that they were covered by the claim of privilege. But there happened a peculiar incident on the first day of the trial, when a witness named Hutton, another prisoner in C.2 wing, gave evidence. He gave his account of what happened three and a half years earlier. In cross-examination by counsel for the defendants, he was asked about the deposition which he had made at the time that Hammill was committed for trial. Part of his deposition was read to him. He was asked by counsel for the defendants:

"Q.—That is very different, is it not, from the evidence that you have given today? A.—In regards to that it is a long time really, to go back in regards to this part here, because this evidence I gave happened to be on the spot of a matter of twelve hours, when that evidence was given. The evidence I have given now is three and a half years. It is a long time to look into the case as regards evidence in between now.

Q.—You think that you may have forgotten really what happened? A.—That is really what I am trying to explain with regard to that. That is twelve hours old. Not twelve hours, because I was testified by the police there that same day, that same evening between the hours of six o'clock and eight o'clock at night, whereas this evidence is three and a half years old. It is a long time to go back."

Counsel for the defendants then proceeded to ask Hutton about a statement which he had made to some solicitors for the purpose of this case. He read the statement to him and Hutton said that he had made it. Neither the deposition nor the statement was in complete accord with what Hutton said in his evidence-in-chief, and the cross-examination was intended to cast doubt on him and on the worth of his evidence. He said:

"But I gave an account twelve hours afterwards. I testified twelve hours afterwards."

Accordingly, counsel for the plaintiff asked him in re-examination:

"Q.—You say that that very day you made a statement to the police officer? A.—Which one do you mean?"

Q.—Did you see the police after [the plaintiff] had been attacked ?
A.—You mean 1949 ?

Q.—Yes. A.—I was brought out by one of the officers, I believe, to see a detective in the prison in one of the cells there to give this evidence.

Q.—Did he take down in writing what you said ? Did you sign a statement at that time ? A.—I do not know that I can remember. It is a long time to go back to, to three and a half years. Mr. Scott Henderson (for the plaintiff): I call for this witness's statement, if there is one. Mr. McKenna (for the defendants): My Lord, I believe that a claim of privilege has been made for the statements that were made at this time, on the ground that those statements were taken in circumstances where the Crown does not disclose the statements that were made. But I am sorry that the claim has been made, because one would like the document to be produced at once to my learned friend."

After a discussion, counsel for the plaintiff said that he would not pursue it lest it should cause difficulty with the Home Office—I forget the exact words—and that statement was not before the learned judge. Objection was taken to its production on the ground of privilege.

The judge did not form a very good view of the evidence of Hutton. I am not sure that he would have formed any better view if he had seen the statement which counsel for the plaintiff called for. But I am surprised that objection was taken. I cannot conceive that it served any good purpose. I do not intend this as criticism of anyone, for I know that the law in regard to privilege is not always easy to follow. But if there be two statements—the deposition and the later statement made not long before this trial—on which a witness for the plaintiff is cross-examined, and if he himself says: "I testified twelve hours after the happening", if he wants to see that to refresh his memory, and if counsel for the plaintiff wants the witness and the judge to see it, I have no doubt whatever in my mind that it ought to be produced. If it is not, the judge is not in as good a position to form a view on the witness as he would be if he had seen it. I go further, and I say that the administration of the law will become impossible if that attitude is adopted. Counsel for the defendants thought it his duty to draw attention to the fact that this was one of the documents for which privilege was claimed. If a position such as that arises, it ought, I think, to be clear to counsel on both sides that it is impossible for justice to appear to be done if a witness who wants to see his statement made twelve hours after the occurrence is not allowed to have it.

I wondered what the result might have been, and, therefore, today, after consultation with the other members of the court, I asked counsel for the defendants how long it would take him to get the necessary authority to show the document to counsel for the plaintiff. Counsel for the defendants said that it might take a little time, so the court adjourned. It appeared that this had not been considered. In the case of a claim of privilege made on behalf of the Home Office, we are told that the senior permanent official of the department has seen every document. After the adjournment counsel for the defendants obtained the consent which he regarded as sufficient to allow him to show the document to counsel for the plaintiff, and it was shown. There is nothing in it. We all thought that there might not be. I assume that counsel who appeared for the defendants at the trial had not seen it. There was no reason why it should not have been produced, nothing which could affect the public interest in any degree. I suppose that, if the claim of privilege is made in these wide terms, it may be difficult for counsel, but I think that the document should have been produced. A good deal of time would have been saved, and some of the anxiety of the learned judge would have been saved. That is one document. There are others resulting from the police inquiries generally. I do not think that any harm would be done to the public interest by allowing

the plaintiff in a case such as this to see the result of the police inquiries or—if it is not thought right that he should have the original statements, or copies of them—to let him have what junior counsel for the defendants described as an abstract. It is true that an abstract was not asked for because the plaintiff's solicitor regarded himself as faced with the claim of privilege.

The major claim of privilege covered documents which were in the nature of reports on the prisoner Hammill. I have not seen those reports, and I ought not to express an opinion on them, but one thing that the courts in this country have sought to make clear, generation after generation, is that there ought to be fair play. I know that the responsible officials in the Home Office desire that, but the danger is that, if a claim of privilege is made in the wide terms in which it was made in this case, it prevents anything being shown, and so one side has all the advantages and the other side is deprived of something which it might have without any danger whatever to the public weal.

This was an anxious and troublesome case. The plaintiff was a man awaiting trial who suffered a grievous injury. The desire of every court, above all things, is that every litigant should have a fair chance and appear to have a fair chance. If DEVLIN, J., at the end of this case had an unsatisfactory feeling, the position was not such as every judge and every good citizen likes it to be. Let me make clear that I am not saying there was the slightest desire on the part of anyone in the Home Office to be unfair in any sense of the word. I know that it is not so. The danger is the wide claim of privilege without consideration of individual documents. The matter was dealt with in the speech of VISCOUNT SIMON, L.C., in *Duncan v. Cammell Laird & Co., Ltd.* (1). The law then was not quite the same as it is now because of the Crown Proceedings Act, 1947, which has been passed since, though that, in effect, only reproduces the practice. Section 28 of the Act of 1947 provides:

“(1) Subject to and in accordance with rules of court and county court rules:—(a) in any civil proceedings in the High Court or a county court to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection . . .”

Until that time the Crown was not bound to give discovery.

“. . . (b) in any such proceedings as aforesaid, the Crown may be required by the court to answer interrogatories: Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. Any order of the court made under the powers conferred by para. (b) of this sub-section shall direct by what officer of the Crown the interrogatories are to be answered. (2) Without prejudice to the proviso to the preceding sub-section, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.”

It is clear that the public interest is that which counts. In *Duncan v. Cammell Laird & Co., Ltd.* (1) it was shown that the claim by the responsible Minister for privilege for documents might be put on two grounds. VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 592):

“This test may be found to be satisfied either (a) by having regard to the contents of the particular document or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.”

And so it is said here by counsel for the defendants that both these classes of documents belong to a class which, on the ground of public interest, “must

as a class be withheld from production". This case shows how wide an interpretation may be put on the words of VISCOUNT SIMON. It seems to me that it is desirable in a case such as this that there should be disclosure and production of documents which cannot harm the public interest, and that each individual document should be examined before a claim of privilege is made.

A VISCOUNT SIMON, L.C., cited (*ibid.*, 594) *Admiralty Commissioners v. Aberdeen Steam Trawling & Fishing Co.* (2) and the words of LORD DUNEDIN, Lord President, where he said (1909 S.C. 340):

"It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step indeed for the court to overrule that statement by the department."

B Here the plaintiff's advisers were faced with a claim that both classes of documents to which I have referred were of a kind which it would be injurious to the public interest to produce, and they were not produced. Earlier in his speech VISCOUNT SIMON, L.C., said ([1942] 1 All E.R. 591):

C "Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made."

I cannot help feeling that, if this question had been considered in all its implications, both in regard to police documents and in regard to hospital reports, it might well have been found that the disclosure of most of them could not have been fraught with any danger to the public interest, while it would have been desirable that they should be disclosed to the advisers of the injured plaintiff for reasons of fairness and in the interests of justice. I have taken some little time to express my opinion in a case which is not without importance. If it be necessary every time a document is required by the plaintiff—such as the document in Hutton's case—that a request has to be made to the Secretary of State or the permanent head of the department for that document, endless delay will be caused in litigation. I cannot believe that it was necessary, for the reasons which I have given, and, above all, because the witness who had made the statement wanted to see it to refresh his memory in order to see how far counsel was right or wrong in suggesting that his memory was unreliable. I cannot see any reason why that document should not have been produced. For the reasons that I have given I feel that this court can only say that, on the findings of the learned judge, the appeal must be dismissed.

H JENKINS, L.J.: I agree. I confess to great sympathy for the plaintiff who, while detained as a remand prisoner in Her Majesty's prison at Winchester, was the victim of a brutal, and, apparently, entirely unprovoked, attack by a fellow prisoner, Hammill, from which he sustained serious injuries. But the mere fact that the plaintiff while in prison was attacked and injured by a fellow prisoner does not entitle him to succeed against the government department responsible for the management of the prison, i.e., the Home Office. He must show that the injury which he sustained was due to some breach of duty on the part of those responsible for the management of the prison. This it has been sought to do in two ways. First, it is said that the injury was caused and brought about by the negligence of the defendants, their servants or agents. Secondly, it is said that the injury arose from breach of the defendants' statutory duty under certain rules of the Prison Rules, 1949. I entirely agree with the learned judge that the claim based on breach of the Prison Rules will not stand.

There remains the claim for negligence at common law. That claim was pleaded solely on the footing that the defendants knew or ought to have known that Hammill was a man of violent propensities, i.e., a person who might be

expected at any moment to make a violent and unprovoked attack on a fellow prisoner. The learned judge, having heard the evidence, and having seen the witnesses (and in particular having heard the evidence of the prison medical officer, Dr. Fenton) found, in effect, that, although, admittedly, Hammill was a mental defective, there were no circumstances in his history as then known, and no symptoms of his insanity then observable by reason of which the prison authorities either knew or ought to have known that he was any more violent or dangerous than an ordinary prisoner. In my view, on that finding of fact this claim must fail, and it would be wrong for us sitting in appeal to disturb the conclusion of the learned judge. He held (and, indeed, it was not in dispute) that the common law duty owed by the prison authorities to the plaintiff as an inmate of Winchester Prison was to take reasonable care for the safety of the plaintiff as a person in the custody of the prison authorities. The finding of the learned judge as to what the defendants knew or ought to have known in regard to Hammill's state of mind and his probable conduct absolved the defendants from taking any special precautions to prevent Hammill having access to other prisoners. Once the need for special vigilance based on actual or imputed knowledge of Hammill's dangerous abnormality is out of the way, in my view (though I regard the case as near the line), the conduct of the prison officer, McHugh, in leaving the C.2 block during the period of the slopping-out operation without locking up all the cells, and, in particular, in leaving Hammill's cell door open and the plaintiff's cell door open so that Hammill could have access to the plaintiff, irregular though it may have been, and remiss though McHugh may have been in thus absenting himself, could not have been reasonably expected to result in an attack being made by Hammill on the plaintiff, or (to view the matter more generally) in an attack being made by one or other of the prisoners on one or other of his fellow prisoners, the victim as it happened turning out to be the plaintiff, with Hammill as the aggressor.

To hold otherwise would, in my opinion, be placing too high a duty of care on the prison authorities. It would be a duty comparable to that which I would expect to be laid on authorities in charge of an institution for the reception of dangerous lunatics. When the task is to supervise people of that sort, it may very well be that it is negligent to leave them unsupervised even for an instant, but I do not think it would be right or reasonable to hold that there is any comparable risk of violent conduct amongst the ordinary run of prisoners such as those who were in the C.2 block on the day of this incident. I cannot leave this part of the case without adding that I agree with my Lord that, although the plaintiff has not succeeded in fixing the defendants with liability in the particular circumstances of this case, the evidence can hardly be said to have shown that the administration of the prison at the date in question was all that it should have been. No doubt, the authorities have their difficulties in the way of finding suitable staff, and so on, but I cannot regard the course of events on that day as reflecting any credit on the people in charge.

On the question of privileged documents to which my Lord has referred, I would only add this. It is clearly essential in the public interest that responsible government departments should be entitled to claim privilege for documents the disclosure of which would be against the public interest, and it is clearly right that the decision of the responsible Minister on the question whether privilege should be insisted on or not in respect of any particular document should be final. But I would urge that in the interests of justice—particularly in a case like the present, which concerns a claim of one of Her Majesty's subjects against a government department—documents within the ambit of privilege should be most carefully scrutinised, and the person entrusted with that task should, in regard to each document, ask himself whether it is relevant to the plaintiff's case, whether the plaintiff's case will be hampered or impeded if it is not made available, and, if so, whether the probability of any harm being

done to the public interest by disclosing it is sufficient to out-weigh those other considerations. I also think that in a case of this sort, where there is a large number of relevant documents within the ambit of privilege which may or may not become of real materiality to the case as it develops, there should be someone on the spot readily available—whether counsel or solicitor on the government side or an official from the department concerned—invested with authority to consider questions of privilege which may arise in the course of the case, and in his discretion to waive the claim of privilege. That, of course, would not apply to documents which from the outset appear to be such that they should on no account be disclosed for reasons of public interest. But in the case of ordinary documents (such as those in question in the present case) the disclosure of which could not, apparently, do any harm to anybody, I certainly think that it should be possible for the question to be disposed of in the course of the trial of an action without the delay imposed by reference back to the Minister. I agree with my Lord that the appeal fails, and should be dismissed.

MORRIS, L.J.: I have reached the same conclusion. I consider that the learned judge applied the appropriate test in regard to the evidence that was before him. He posed the question whether it had been shown that the defendants had failed to take reasonable care in regard to the plaintiff. It appears to me that, if there had been in the vicinity of the plaintiff in this prison someone who was likely, unless prevented or unless supervised, to offer violence to someone else, then it would be the duty of the prison authorities to see that such a potentially dangerous person did not have opportunity to do harm. On the evidence that was before the learned judge, I think that he was obliged to come to the conclusion that the case was not established to his satisfaction. It was not shown that the prison authorities had reasonable cause to think that Hammill was potentially violent, nor, in my judgment, was it shown that they had reasonable cause to think that there was any implement left in the prison which might be a temptation or be within the reach of someone who might use it to commit an act of violence. I, therefore, agree with the judgments that have been delivered.

I would add that I fully agree with what has been said in regard to the great importance of the duties which devolve on Ministers of the Crown when they have to consider the subject of privilege. At such times, as Ministers of the Crown and as servants of the public, they have to do their best to secure the interests of the public. In his speech in *Duncan v. Cammell Laird & Co., Ltd.* (1), VISCOUNT SIMON, L.C., used these words ([1942] 1 All E.R. 595):

“After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.”

But when considering the public interest and what might be “injurious to the public interest”, within the proviso to s. 28 (1) of the Crown Proceedings Act, 1947, it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done. It is, indeed, unfortunate in any case—unless considerations of public interest when weighed in the balance demand it—if it should appear that any document which might conceivably have assisted a party to the litigation should not be available. A Minister has the anxious and arduous and responsible task of deciding whether disclosure would be against the public interest. When he decides, his decision is final. But it is, I think, one element of the public interest that regard should be had to the due administration

of justice in such manner that it should always be done, and should be seen to be done.

Appeal dismissed.

Solicitors: *G. & G. Keith*, agents for *A. J. Bowker*, Winchester (for the plaintiff); *Treasury Solicitor* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

MORGAN v. TATE & LYLE, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 18, 19, 20, May 5, 1953.]

Income Tax—Deduction against profits—Expenditure on campaign against proposal to nationalise industry—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

To protect the company's business and assets from loss through the nationalisation of the industry in general and of its concern in particular, of which its directors believed there was a serious risk in certain political eventualities, a sugar refining company expended £15,339 on an anti-nationalisation campaign, including advertising, film making, film showing, the issue of pamphlets and ration-book holders (suitably inscribed), photography and recordings.

HELD (SINGLETON, L.J., dissentiente): the expenditure was incurred for the purpose of preventing the company from being disabled from carrying on its trade: dictum of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* ([1906] A.C. 453) and *Usher's Wiltshire Brewery, Ltd. v. Bruce* ([1915] A.C. 433) applied; and of protecting the business and assets of the company, and not in part to prevent the transfer of the right to receive the profits earned through the trade: *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* ([1952] 1 All E.R. 531), and *Smith's Potato Estates, Ltd. v. Bolland* ([1948] 2 All E.R. 367), distinguished; nor was the expenditure contrary to ordinary principles of commercial accounting, or concerned with something more than the company's undertaking because it related to the whole industry, since such a campaign could not be conducted in favour of one concern in the industry; and, therefore, the expenditure capable of being held to have been "money wholly and exclusively laid out or expended for the purposes of the trade" of the company within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and so to be deductible in arriving at the company's profits under the schedule.

Semble, the expenditure was not of a capital nature.

AS TO DEDUCTIONS FROM THE PROFITS OF TRADE UNDER CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, see HALSBURY, Hailsham Edn., Vol. 17, pp. 309-327 and 371, paras. 149-161 and 177.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 3 (a), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 156; and FOR CASES, see DIGEST, Vol. 28, pp. 42-49, Nos. 215-252.

Cases referred to:

- (1) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401.
- (2) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.
- (4) *Union Cold Storage Co., Ltd. v. Jones*, (1923), 129 L.T. 512; 8 Tax Cas. 725; 28 Digest 53, 270.

- (5) *Ward & Co., Ltd. v. Taxes Comr.*, [1923] A.C. 145; 28 Digest 42, o.
- (6) *Atherton v. British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421; 94 L.J.K.B. 319; 132 L.T. 288; *affd.* H.L., *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; 28 Digest 52, 264.
- (7) *Smith v. Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477; 28 Digest 52, 262.
- A (8) *Smith v. Lion Brewery Co., Ltd.*, [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 5 Tax Cas. 568; 28 Digest 57, 291.
- (9) *Mitchell v. Noble (B.W.), Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; *sub nom.* *Noble (B.W.), Ltd. v. Mitchell, Mitchell v. Noble (B.W.), Ltd.*, 11 Tax Cas. 372; Digest Supp.
- B (10) *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412; [1941] 1 K.B. 111; 110 L.J.K.B. 705; 23 Tax Cas. 597; 2nd Digest Supp.
- (11) *Associated Portland Cement Manufacturers, Ltd. v. Inland Revenue Comrs., Associated Portland Cement Manufacturers, Ltd. v. Kerr*, [1946] 1 All E.R. 68; 27 Tax Cas. 103; 2nd Digest Supp.
- (12) *Cooke v. Quick Shoe Repair Service*, (1949), 30 Tax Cas. 460; 2nd Digest Supp.
- C (13) *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.

APPEAL from an order of HARMAN, J., dated Dec. 18, 1952, dismissing the Crown's appeal by Case Stated from a decision of the General Commissioners of Income Tax for the City of London.

D The respondent company, the taxpayers, appealed against an assessment to income tax under Case I of sched. D to the Income Tax Act, 1918, for the year ending Apr. 5, 1951, in the sum of £2,200,000 less £100,000 capital allowances, on the ground that certain expenditure incurred in carrying out a propaganda campaign was deductible in computing the profits of the company. The

E expenditure, amounting to £15,339 15s. 2d., was incurred through an agent of the company, Aims of Industry, Ltd., whose activities included advertising film making, film showing, the issue of pamphlets and ration-book holders (suitably inscribed), photography, and recordings. The campaign was directed against the nationalisation of the sugar refining industry, in which the company

F was engaged, which was being advocated by the Labour Party and was included in the policy statement submitted to the party's annual conference in 1949, and which the directors of the company believed would result if the party was returned to power as the government at the general election, 1950. The company contended that the expenditure incurred in carrying out the propaganda campaign was for the sole purpose of preserving its business and assets and thereby enabling it to carry on its business, and that it was, therefore, money

G wholly and exclusively laid out for the purposes of the trade and was a permissible deduction from profits for income tax purposes. It said further that that position was not affected by the fact that the expenditure might have benefited to some extent the sugar refining industry as a whole or the stockholders of the company and that the ultimate form of nationalisation was immaterial. The

H Crown contended that the expenditure was made, not for the purpose of earning profits in the company's trade, but for the extraneous purpose of conducting a propaganda campaign against nationalisation of the sugar industry as a whole; that that campaign was for the dual purpose of (i) preventing the acquisition of the assets and business of the company by a national body and (ii) preventing the acquisition of the company's capital stock by a national body, depending on the particular form of nationalisation which might be adopted by the government; that in so far as the propaganda campaign was to

prevent the form of nationalisation by which the assets and business would be compulsorily acquired by a national body, the expenditure was not incurred directly for the earning of profits in the trade, but was the cost of conducting a campaign to decide who should earn the profits—the company or the State; that expenditure to protect the ownership of the company's capital stock was not expenditure connected with the company's trade; and, therefore, that the expenditure was not money wholly and exclusively laid out for the purposes of the company's trade and was not deductible. The commissioners held that the sum was money wholly and exclusively laid out for the purposes of the company's trade and was an admissible deduction from its profits for income tax purposes, and dismissed the Crown's appeal. HARMAN, J., dismissed the Crown's appeal against that decision. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Millard Tucker, Q.C., Borneman, Q.C., and D. C. Miller for the company.

Cur. adv. vult.

May 5. The following judgments were read.

SINGLETON, L.J.: During the year 1949 there were proposals for the extension of nationalisation to certain industries of which sugar refining was one. The position is shown in many documents exhibited to the Case, one of which was published in April, 1949, on the authority of the national executive committee of the Labour Party, which at that time provided the government of the country. It is a book of some thirty pages entitled "Labour Believes in Britain", and it was for consideration at the annual conference of the Labour Party at Whitsuntide, 1949. It contained this passage:

"The Sugar Monopoly. The privately owned British Sugar Corporation, Ltd., with a monopoly in sugar beet manufacture, was set up by a Conservative government. The legislation creating the monopoly will expire early in the next Parliament. Labour will not leave this monopoly in private ownership. Sugar refining is also controlled by a State-protected private monopoly which has enabled large profits to be made for private shareholders. One concern dominates the British sugar industry; it also has large interests in some of the colonial territories which the Labour government is pledged to develop. The sugar industry is vital both in war and peace. Labour intends to transfer to public ownership all the sugar manufacturing and refining concerns."

The company, the taxpayers in the present case, refines roughly fifty-three per cent. of all the sugar refined in this country. It has an issued capital of over £8,000,000. The directors of the company became convinced that the nationalisation of the sugar refining industry would become part of the Labour Party's official programme, and they were satisfied that the company was the "one concern" referred to in the extract set out above. They decided to take every legitimate step to oppose this. The president of the company is Lord Lyle of Westbourne. One of the documents attached to the Case, entitled "No appeasement", reproduces two of his speeches along with this note:

"In the fight against nationalisation of sugar refining, Lord Lyle, president of Tate & Lyle, Ltd., has made it clear that he and his board will oppose this step with every weapon at their command. The two recent speeches made by Lord Lyle to his shareholders caused world-wide interest. They are, therefore, reproduced here in full."

These speeches are strong indictments of nationalisation in general and bring forward substantial reasons against the proposal for nationalisation of the sugar refining industry in particular.

As, according to the Case, they were used in the propaganda campaign which followed, I think it right to set out passages from each.

From the first:

"The consumer under free enterprise is protected against unjustified price increases by the guarantees that refiners have given to Chancellors of the Exchequer, by potential competition with foreign white sugar, and by the course open to manufacturers to conduct their own refining operations.

- A Where would these safeguards be under a State monopoly? I do not hesitate to forecast that they would all go by the board. Competition would no longer keep a check on prices. Rising costs would be followed by a cut in quality, a restriction of choice, and a curtailment of services to the consumer. The workers of your company enjoy the highest wages and best working conditions in the industry. They have a pride in the company which they serve and we who are on the board are proud to serve with them. Can you imagine that the same spirit would exist under the remote control of bureaucracy? I believe that with the standardisation that goes hand in hand with bureaucracy the best they can hope for is a standstill in wages and working conditions while other sections of the industry catch up."

- C From the second:

"What is so disturbing, if I may be allowed for a moment to take a wider view, is the effect that the nationalisation of sugar refining will have on other efficient industries. The undisclosed motives for nationalising sugar refining can apply equally to any industry which is efficiently run and is making profits. The managements of such companies will be subjected to a war of nerves, and will be continually looking over their shoulders. When will the nationalists be wanting them? When will the boys be looking for new jobs? When will their profits be wanted to offset the growing losses of the industries nationalised the year before? Some industries, to quote the planners, have sinned by making 'a high profit'. When they begin to lose millions a year of the taxpayers' money, doubtless the planners will be satisfied and will then look about them for new victims. I have spoken at some length to ensure that you realise what we are up against. You will appreciate from the way I have spoken how important I consider it that the public should be kept informed of the plans of the nationalists. You will have noticed that since they were given the 'all clear' at Blackpool, they have made no further mention of their plans. The last thing that they want is for the public to know the facts. It is plainly our duty to supply them."

One or other of these speeches was made at an extraordinary meeting of stockholders of the company held on Sept. 15, 1949, at which the following resolution was passed:

- G "Believing as we do that nothing but harm to workers, consumers and stockholders alike can spring from the nationalisation of the sugar refining industry, the members of this company hereby empower the board of directors to do everything in their power to meet the threats of the nationalists who, learning nothing from the chaos, losses and labour unrest that they have created in other industries, now wish to seize the assets of this company . . ."

Before this time—indeed before the Labour Party conference of 1949—the company had on Mar. 31, 1949, entered into an agreement with a company known as Aims of Industry, Ltd. By this agreement, after reciting that the company was desirous of fostering and promoting the interests of the industry of sugar refining with the ultimate view of the preservation and extension of the goodwill of the company's business, Aims of Industry, Ltd., was appointed

the company's public relations officer and advertising agent for a period of five years at a fee of £5,000 per annum. Under cl. 2 of the said agreement, Aims of Industry, Ltd., undertook to use its best endeavours to foster and promote the interests of the said industry generally and to that end to seek to extend and develop the knowledge and information of the public generally in relation to the said industry, its processes, difficulties and achievements and its relation to the national economy, and it was provided further that nothing in the agreement contained should be deemed to impose on Aims of Industry, Ltd., any obligation to advertise the business of the company other than as a member of the said industry. It was also agreed that the company should place to the credit of a joint account (to be opened with Lloyds Bank, Ltd.) a sum of £75,000 for the purpose of meeting all expenditure recommended by Aims of Industry, Ltd., and approved by the company for furthering the aims and objects of the agreement. A

In fulfilment of the obligation imposed on them by the resolution referred to in an earlier paragraph, the directors decided to intensify their anti-nationalisation propaganda campaign, which was of national dimensions and which was in the hands of Aims of Industry, Ltd., in order to try to preserve the business and assets of the company intact. During the company's accounting year up to Oct. 1, 1949, Aims of Industry, Ltd., expended £29,398 5s. out of the £75,000 deposited with it. This sum of £29,398 5s. was entered in the company's profit and loss account for the fifty-two weeks ended Oct. 1, 1949, being included in an item of £42,183 for "advertising (including anti-nationalisation campaign)". In the accounts attached to this Case the item of £29,398 5s. is shown under central administration expenses. (There is another item for advertising, £12,785 1s. 2d., shown under selling expenses.) The activities of Aims of Industry, Ltd., included advertising, film making, film showing, the issue of pamphlets and ration-book holders (suitably inscribed), photography, recording, etc. There has been made a suggested allocation to show how the £29,398 5s. was spent. This is not a final division, but it provides a convenient way of looking at this case. It is: (1) General advertising £11,508 4s. 10d. (2) Anti-nationalisation (specific) £15,339 15s. 2d. (3) General £2,550 5s. 0d., totalling £29,398 5s. 0d. The company claims to deduct the whole of this sum, namely, £29,398 5s. in arriving at the balance of profits for the accounting period. The inspector of taxes contended, and still contends, that part of that sum, namely, £15,339 15s. 2d. is not a proper deduction. That is the dispute between the parties to this appeal. The general commissioners for the city of London set out the facts in the Case and state their conclusion in this way: B C D

"The commissioners found that the sum in question was money wholly and exclusively laid out for the purposes of the company's trade and was an admissible deduction from its profits for income tax purposes." E

HARMAN, J., on appeal, was of opinion that the commissioners came to a right conclusion. The inspector of taxes appeals to this court. F

The question which has to be determined cannot be treated as merely a question of fact for the determination of the commissioners. In *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1) LORD REID said ([1952] 1 All E.R. 535): G

"But it is, in my judgment, a question of law whether particular payments are of a nature capable of coming within the exception, and that is the issue here." H

Section 1 of the Income Tax Act, 1918, provides that the tax shall be charged in respect of all property, profits, or gains respectively described or comprised in the schedules and in accordance with the rules respectively applicable to those schedules. This case falls under sched. D and the rules to be considered are the Rule Applicable to Case I:

"The tax shall extend to every trade carried on in the United Kingdom

or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains . . .”,

and r. 1 (1) and r. 3 (a) of the Rules Applicable to Cases I and II. Rule 1 (1) is:

“The tax shall be charged without any other deduction than is by this Act allowed”,

and r. 3 reads:

A

“In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . .”

B

It is really on the application of this last r. 3 (a) to the facts of this case that the determination of the appeal depends. I paraphrase it: “No sum shall be deducted unless it is a disbursement wholly and exclusively expended for the purposes of the trade.” Can it be said that the sum of £15,339 15s. 2d., expressed as expenditure on “anti-nationalisation (specific)”, was money wholly and exclusively laid out or expended for the purposes of the trade?

C

Now, before stating their conclusion, the commissioners set out their findings of fact, and they say that they accepted the evidence of the three witnesses who were called before them. It is right that I should read the commissioners’ record of the evidence of Lord Lyle and of Mr. Booth, then secretary and now a director of the company. Lord Lyle said:

D

“He had been a director of the company for forty years. He was intimately acquainted with the whole of the sugar refining industry. The directors thought that, if nationalisation occurred, the State would take over the company’s assets and its business, and they decided that they would take such legal steps as they could to try to prevent this. The primary object of the propaganda campaign was to prevent the company from losing its business and to preserve its assets intact. He agreed that if the company lost its business the stockholders would also suffer and he also agreed that the preservation of the company’s business would, incidentally, save the stockholders from injury as well. He had never thought of the alternative method of nationalisation by which the State would have acquired all the capital stock of the company from its members. The directors’ intention was to protect the company—in so doing no doubt they protected the stockholders also; it would be their duty to protect them as well.”

E

F

Mr. Booth said:

“A good deal of the propaganda employed in the campaign was directed towards defending the industry as a whole, although the whole of the expenditure was incurred by the company. It would have been no use having a propaganda campaign to prevent the company alone being nationalised; only by campaigning against the nationalisation of the industry as a whole would the company’s own business be saved. Aims of Industry, Ltd., was looking after the company’s interests through the industry as a whole. It did occur to him that one way of nationalising the company would be for the State to acquire all the capital stock, but they had no right to assume which form nationalisation would take. There was a danger that it would take various forms, but they could only assume the worst and do their best to protect their own business. They were anxious to prevent nationalisation from taking place in any form.”

G

H

No one questions the right of the company to oppose nationalisation of the sugar refining industry. The question for consideration is whether the cost of so doing is money wholly and exclusively expended for the purposes of the

trade. LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) said ([1906] A.C. 453) that the words

"‘for the purposes of the trade’ . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.”

Speaking of this passage, LORD RADCLIFFE said in *Inland Revenue Comrs. v. Dowdall, O’Mahoney & Co., Ltd.* (1) ([1952] 1 All E.R. 542):

“There is much to be said for the criticism that LORD DAVEY’s speech in *Strong & Co., Ltd. v. Woodfield* (2) imposes too limiting a criterion as to what is a permissible deduction by way of trade expenditure, but I do not know a wider one that is not vulnerable in other ways, and the fact is that his criterion has stood for so long and been so often applied that it has become, as it were, part of our income tax language.”

Expense incurred in maintaining the properties or assets of the company in a state to earn profits for the business, and expense incurred in protecting the assets against thieves or marauders are properly deductible in arriving at the balance of profits or gains, and so too may be the cost of insurance of the premises owned. A different element creeps in when the expense is incurred for the purpose of opposing nationalisation of an industry or of a particular undertaking. Nothing in the nature of destruction of the assets of the undertaking is involved, nor is there a proposal to render the undertaking, or the industry, less profit bearing, whatever the result might be. It is natural to assume that, if the government took control of an undertaking, it would be their desire to increase rather than to diminish its efficiency and profit-earning capabilities. The proposal was that the ownership of the undertaking, and of the industry, should be taken over by the State, and that thereafter it should be managed by or on behalf of the State. (For the purposes of this appeal I do not draw any distinction between the two forms which nationalisation has taken and which are referred to in the Case.) The directors and the stockholders were anxious to prevent nationalisation of the industry. They wished to retain control of their business, and, no doubt, they thought they would be better placed if they did so.

Counsel for the company placed reliance on the speeches of EARL LOREBURN and LORD SUMNER in *Usher’s Wiltshire Brewery, Ltd. v. Bruce* (3). I do not think that much help is to be gained from them in the solution of this question. Nor do I find help in the words of LORD ATKINSON when he was dealing with insurance premiums ([1915] A.C. 452):

“They are found to be usual and proper trade outgoings, and are made as such by the appellants.”

Those words were based on a finding of fact in the supplemental Case. It cannot be said that the amount of £15,339 15s. 2d. was expenditure on usual and proper trade outgoings. The nearest approach to that—and it is a long way short of it—is the evidence of Mr. Nicholson, the auditor,

“that in accordance with ordinary commercial accountancy practice the said £29,398 5s. must be charged against the profit to which it related. Any item of expenditure which did not produce a capital asset had to be so charged.”

I take that as meaning that the expenditure was not a capital expense and thus it must be treated as a revenue expense.

The suggested allocation shows that the sum of £15,339 15s. 2d. is attributed by the company to expenditure on "anti-nationalisation (specific)". It seems to me that the money was expended (a) for the purpose of opposing nationalisation of the industry and of the company's undertaking; (b) for the purpose of preventing the company's assets being acquired by the State; (c) for the purpose of securing that the stockholders should be able to retain their interest in the undertaking; (d) for the purpose of maintaining the industry of sugar refining in private control and management as opposed to management by the State. I readily assume that the directors—and the stockholders—believed that it was desirable in the interests of consumers and of workpeople alike that the industry should not be nationalised. I hope I have not formed too wide a view as to the purposes of the expenditure. It is gleaned from the documents forming part of the Case and from the evidence accepted by the commissioners. If all these purposes fall within the words "wholly and exclusively laid out or expended for the purposes of the trade" this appeal must fail, for it matters not that there may be advantage in some other direction if the money was wholly and exclusively expended for the purposes of the trade. The contention put forward on behalf of the company is that the expenditure was incurred solely for the purposes of the trade of the company, that it was properly debited as an expense, and, in so far as it was made to protect the assets, it was a proper deduction against the profits of the year in that it was expenditure to protect the assets of the profit bearing undertaking. The Solicitor-General, on behalf of the Crown, submitted that the expenditure could not be said to be money wholly and exclusively laid out for the purposes of the company's trade, but that it was money expended for an extraneous purpose, namely, the purpose of conducting a campaign against nationalisation of the sugar refining industry as a whole and of the company's business and assets in particular, and, further, that it was incurred in a campaign to ensure as far as possible that the earning of profits should remain in the hands of the company, and should not go into the hands of the State. The expenditure, he claimed, was in no sense directed to bringing grist to their mill—to use an expression of ROWLATT, J., in *Union Cold Storage Co., Ltd. v. Jones* (4) (129 L.T. 516). He added that expenditure to keep the ownership of the stock in the hands of the stockholders could not be regarded as a proper deduction under the rules.

The question is not an easy one to answer. If the government of the day proposed an extension of nationalisation which would affect certain industries and an individual or a trading concern engaged in one of those industries incurred expense, by subscription or otherwise, in opposing the proposal, can it be said that the expenditure is wholly and exclusively laid out for the purposes of the trade? If it is, the government bears almost half the cost at the present rate of tax, whatever the result. And it is not a far cry to the case of a subscription to the funds of the party in opposition. There is no authority on the Income Tax Act, 1918, which provides any real help. There was cited to us the decision of the Privy Council in *Ward & Co., Ltd. v. Taxes Comr.* (5). That case arose under s. 86 (1) of the Land and Income Tax Act, 1916, under which

" . . . no deduction shall be made in respect of . . . (a) Expenditure or loss of any kind not exclusively incurred in the production of the assessable income derived from that source . . . "

In view of the difference between that section and the rule with which we are concerned, no guidance is given towards the solution of the question with which this court is faced, but it may be worth while repeating some words of VISCOUNT CAVE, L.C., which were to the same effect as those used in the New Zealand Court of Appeal ([1923] A.C. 149):

"The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary

expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place either in the balance sheet or in the profit and loss account of the appellants . . ."

The expenditure in that case was incurred in a campaign in opposition to a measure of prohibition. The fact that it was disallowed has, as I have said, no bearing on the point at issue in this appeal, but the words of the Lord Chancellor are not without interest. Perhaps the passage most helpful to the contention put forward on behalf of the company is in the speech of VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables v. Atherton* (6) ([1926] A.C. 211):

"It was made clear . . . in *Usher's* case (3) and *Smith v. Incorporated Council of Law Reporting for England and Wales* (7) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the commissioners in the present case bring the payment in question within that description."

In each case the important question is to determine the purposes of the expenditure. Whichever way one looks the words "wholly and exclusively" are facing one. They are the governing words of the rule. If there are purposes such as the desire to defeat nationalisation of the industry, or to keep the stockholders in control of the undertaking, can it be said that the money was expended wholly and exclusively for the purposes of the trade? Such purposes as I have indicated take the case quite out of the ordinary run and no authority provides much help. It is necessary to go back to the words of r. 3 (a) of the Rules Applicable to Cases I and II. If I am right in my conception of the purposes of the expenditure of the sum of £15,339 15s. 2d. I cannot bring myself to think that the expenditure was wholly and exclusively for the purposes of the trade. Even if it be conceded that one of the reasons for the expenditure was the purposes of the trade, it cannot, I think, be said that this was the only purpose. There were other purposes outside the earning of profits and outside the purposes of the trade. Clearly one of those purposes was to keep the earnings in the hands of the company—or of its stockholders—and to avoid government acquisition of them and of the assets of the company. Under nationalisation the trade and earnings, or profits, of the undertaking might have been the same or more, the same management might have remained and the same workpeople might have been employed, but the profits would not have gone to the same people. The desire to retain those in the hands of the stockholders and to retain control of the undertaking in the hands of individuals rather than to allow the State to take both were, to my mind, among the purposes for which the expenditure was incurred. I am in favour of allowing the appeal.

JENKINS, L.J.: This is an appeal by one of Her Majesty's inspectors of taxes from an order of HARMAN, J., dated Dec. 18, 1952, dismissing his appeal from a decision of the general commissioners for the city of London to the effect that a sum spent by the respondent company on an advertising campaign designed to influence public opinion against, and thereby if possible avert, the nationalisation of the sugar refining industry in general, and the undertaking of the respondent company in particular, was "money wholly and exclusively laid out or expended for the purposes of the" respondent company's "trade", within the meaning of para. (a) of r. 3 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, and as such deductible in computing the profits of the respondent company for the purposes of its assessment to income tax for the year ended Apr. 5, 1951.

The respondent company, which is a company limited by shares incorporated in the year 1903, carries on an extensive sugar refining business, and is said in the Case Stated to refine roughly fifty-three per cent. of all the sugar refined in this country. It also held at all material times a controlling interest in three other British sugar companies, one operating in this country and the others in Jamaica and Trinidad respectively. It is also a member of the British Sugar Refiners' Association, an organisation for protecting the trade interests of the industry. The circumstances in which the respondent company's "anti-nationalisation" campaign was launched are fully described in the Case Stated. It appears from para. 4 that

"During the years immediately following the political changes in 1945, the directors of the respondent company were becoming increasingly concerned by reason of statements, written and verbal, made by supporters of the Labour government advocating the nationalisation of the sugar industry"

and that

"Amongst these was a pamphlet by Mr. Ian Mikardo, M.P., which stated (inter alia): 'The products which most obviously suggest themselves for transfer to publicly owned production are margarine, flour, sugar, bricks, shoe-machinery, cement and some specialised chemicals'."

From para. 5 it appears that

"early in 1949 it became evident to the board of directors from reports and articles appearing in the Press that the Labour Party executive was now discussing the question of including in the Labour Party's draft general election programme a project for nationalising the sugar refining industry."

Paragraph 5 goes on to set out as "typical" a number of extracts from the Press, in each of which the sugar refining industry was mentioned as one of the likely subjects for nationalisation. From para. 6 it appears that

"In April, 1949, the Labour Party executive's statement on policy for discussion at the party conference at Blackpool was issued under the title of 'Labour Believes in Britain' "

and that: "This confirmed the directors' apprehensions." Paragraph 6 adds an extract from the publication in question, headed: "The Sugar Monopoly", which included the observation:

"One concern dominates the British sugar industry; it also has large interests in some of the colonial territories which the Labour government is pledged to develop",

and ended with the words:

"Labour intends to transfer to public ownership all the sugar manufacturing and refining concerns."

Paragraph 6 goes on to say that

"On perusal of this publication, the board of directors entertained no doubt that the nationalisation of the sugar refining industry would become part of the Labour Party's considered official programme and furthermore that the company itself was the 'one concern' therein referred to";

and that the directors "accordingly decided to take every legitimate step to oppose this."

From para. 7 it appears that, in accordance with this decision, Lord Lyle, the president of the respondent company, wrote in his capacity as chairman of the Sugar Refiners' Association a letter to the Rt. Hon. Herbert Morrison, M.P., dated July 14, 1949, requesting that, before any final decision was reached to include in the Labour Party's election policy a proposal to nationalise the sugar

industry, Mr. Morrison, as chairman of the Labour Party's committee on election policy, would agree to receive a small deputation from the association; and that this request was refused by a letter in reply from the secretary of the policy committee. From para. 8 it appears that

"efforts to obtain consent to the said deputation having failed, the directors were more than ever convinced that nationalisation of the industry was intended and that the company would thereby lose its business and assets"

and that:

"Accordingly at an extraordinary meeting of the stockholders of the company the following resolution was proposed and passed: 'Believing as we do that nothing but harm to workers, consumers and stockholders alike can spring from the nationalisation of the sugar refining industry, the members of this company hereby empower the board of directors to do everything in their power to meet the threats of the nationalists who, learning nothing from the chaos, losses and labour unrest that they have created in other industries, now wish to seize the assets of this company . . .'"

From para. 9 it appears that on Mar. 31, 1949 (before the Labour Party conference referred to in para. 6), the respondent company had entered into an agreement with a company called Aims of Industry, Ltd., whereby, after a recital to the effect that the company was desirous of fostering and promoting the industry of sugar refining with the ultimate view of the preservation and extension of the goodwill of the company's business, Aims of Industry, Ltd., was appointed the company's public relations officer and advertising agent for a period of five years at a fee of £5,000 per annum. Aims of Industry, Ltd., undertook to use its best endeavours to promote the interests of the industry generally, and to that end to seek to extend the knowledge and information of the public generally "in relation to the said industry . . . and its relation to the national economy", with a proviso to the effect that nothing contained in the agreement should be deemed to impose on Aims of Industry, Ltd., any obligation to advertise the company other than as a member of the said industry. And it was also agreed that the company should place to the credit of a joint account at a specified bank a sum of £75,000 for the purpose of meeting all expenditure recommended by Aims of Industry, Ltd., and approved by the company for furthering the aims and objects of the agreement. Paragraph 10 states that

"In fulfilment of the obligation imposed upon them by the resolution referred to in para. 8 hereof, the directors decided to intensify their anti-nationalisation propaganda campaign which was of national dimensions and which was in the hands of Aims of Industry, Ltd., in order to try to preserve the business and assets of the company intact."

Paragraph 11 refers to various nationalisations which had taken place before the date on which the respondent company's propaganda campaign had been decided on, and points out that, whereas in the cases of the coal, railway, gas and electricity industries nationalisation broadly took the form of the compulsory acquisition of the respective businesses in return for compensation usually by way of government stock, the method in the cases of the Bank of England and Cable & Wireless, Ltd., had been the compulsory transfer of the shares or stock forming the capital of the companies to nominees of the Treasury or a public body, a method also adopted by the Iron and Steel Act, 1949, as foreshadowed at the material time by the Iron and Steel Bill, which had received its second reading in the House of Commons in November, 1948. The paragraph adds that

"Where the nationalisation of an industry takes the latter form the

companies engaged in the industry retain their assets and continue to carry on their businesses.”

As appears from para. 12, Aims of Industry, Ltd., during the respondent company's accounting year to Oct. 1, 1949 (the basis of the assessment under appeal), in fact expended £29,398 5s. out of the £75,000 deposited under the above-mentioned agreement. This sum of £29,398 5s. was entered in the company's profit and loss account for the fifty-two weeks ended Oct. 1, 1949,

- A being included in an item of £42,183 for “Advertising (including anti-nationalisation campaign)”, and was also shown in the company's detailed accounts (“Schedule of expenses”) as submitted to the inspector of taxes under the heading “Central administration. Aims of Industry, London”. The activities of Aims of Industry, Ltd., during the accounting period in question included advertising, film making, film showing, the issue of pamphlets and
- B ration-book holders (suitably inscribed), photography, recordings, etc. A document produced by the respondent company headed: “Aims of Industry, Ltd.—Joint account expenses—Year ended Sept. 29, 1949” contains details of the expenditure of the said sum of £29,398 5s. on these various activities for the year ended September, 1949, and provides a summary of such expenditure with a suggested allocation between “general advertising” “anti-nationalisation (specific)” and “general expenses” as under:—
- C

Suggested Allocation: (1) General advertising £11,508 4s., (2) Anti-nationalisation (specific) £15,339 15s. 2d., (3) General £2,550 5s.

- The respondent company claimed to deduct the whole of the £29,398 5s. as a trading expense and this claim was only disputed as to so much of the total as related specifically to the anti-nationalisation campaign (i.e., item (2) above put by the respondent company at £15,339 15s. 2d.). No issue was raised as to the correctness of the company's apportionment of the total between
- D item (2) “anti-nationalisation (specific)” and the other two items, as it was agreed that the exact amount to be regarded as properly attributable to item (2) could, if necessary, be settled by negotiation once the question of principle had been decided.

- E The annexures to the Case Stated include a number of documents put in to indicate the nature of the publicity employed in the company's anti-nationalisation campaign. It is unnecessary to describe them in detail, for it is not in dispute that they were devised and issued for the specific purpose of influencing public opinion against the nationalisation of the sugar refining industry in general and of the respondent company's undertaking in particular.
- F Three witnesses, whose evidence the commissioners accepted, were called on behalf of the respondent company. The effect of their evidence is thus summarised in para. 15 of the Case:

“Lord Lyle of Westbourne, president of the board of directors of the company gave evidence to the following effect. He had been a director of the company for forty years. He was intimately acquainted with the whole of the sugar refining industry. The directors thought that, if nationalisation occurred, the State would take over the company's assets and its business, and they decided that they would take such legal steps as they could to try to prevent this. The primary object of the propaganda campaign was to prevent the company from losing its business and to preserve its assets intact. He agreed that, if the company lost its business, the stockholders would also suffer and he also agreed that the preservation of the company's business would, incidentally, save the stockholders from injury as well. He had never thought of the alternative method of nationalisation by which the State would have acquired all the capital stock of the company from its members. The directors' intention was to protect the company—in so doing no doubt they protected the stockholders also; it would be their duty to protect them as well. Mr. William

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Robert Booth, director of the company and secretary since 1945, gave evidence to the following effect. A good deal of the propaganda employed in the campaign was directed towards defending the industry as a whole, although the whole of the expenditure was incurred by the company. It would have been no use having a propaganda campaign to prevent the company alone being nationalised; only by campaigning against the nationalisation of the industry as a whole would the company's own business be saved. Aims of Industry, Ltd., was looking after the company's interests through the industry as a whole. It did occur to him that one way of nationalising the company would be for the State to acquire all the capital stock, but they had no right to assume which form nationalisation would take. There was a danger that it would take various forms, but they could only assume the worst and do their best to protect their own business. They were anxious to prevent nationalisation from taking place in any form. Mr. John Arthur Nicholson, a chartered accountant and member of the firm of Edmund D. White & Sons, auditors to the company, . . . formally produced the auditor's report and accounts. He stated that, in accordance with ordinary commercial accountancy practice, the said £29,398 5s. must be charged against the profit to which it related. Any item of expenditure which did not produce a capital asset had to be so charged."

Such being the facts, the question in the appeal is whether on these facts the commissioners and the learned judge were right in law in holding, as they did, that the respondent company's expenditure on its anti-nationalisation campaign was "money wholly and exclusively laid out or expended for the purposes of the" respondent company's "trade" within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. In answering this question it must be borne in mind that the commissioners are the judges of fact, and, accordingly, that their decision should not be disturbed if on the facts as found by them the disputed expenditure is capable in law of being held to satisfy the above-stated requirement of r. 3 (a). The relevant statutory provisions are these. The Income Tax Act, 1918, s. 209 (1), provides:

"In arriving at the amount of profits or gains for the purpose of income tax—(a) no other deductions shall be made than such as are expressly enumerated in this Act."

By sched. D, para. 1:

"Tax under this schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere."

By para. 2:

"Tax under this schedule shall be charged under the following Cases respectively; that is to say,—Case I.—Tax in respect of any trade not contained in any other schedule."

Then the Rule Applicable to Case I of sched. D is:

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains . . ."

The Rules Applicable to Cases I and II, so far as relevant, are as follows. Rule 1 (1):

"The tax shall be charged without any other deduction than is by this Act allowed."

Rule 3:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade . . .";

to which one might add para. (f) of the same rule:

A "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment or vocation."

B The curiously negative structure of these provisions, or their predecessors, has been the subject of much comment. Section 209 (1) (a) enjoins that, in arriving at the amounts of profits or gains for the purpose of income tax, no other deductions shall be made than such as are expressly enumerated in the Act. But, turning to the Rules Applicable to Cases I and II of sched. D, one finds in r. 3, instead of an enumeration of permitted deductions, an enumeration of items the deduction of which is prohibited, with certain exceptions from or qualifications of those prohibitions. Thus, r. 3 (a) does not provide that money wholly and exclusively laid out or expended for the purposes of the trade may be deducted, but that no sum shall be deducted in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade. It is, however, obvious that, if no deduction at all of expenses from gross receipts was allowed, it would be impossible to arrive at the balance of the profits and gains of a trade on which tax under Case I of sched. D is to be assessed. Accordingly, it has long been well settled that the effect of these provisions as to deductions is that the balance of the profits and gains of a trade must be ascertained in accordance with the ordinary principles of commercial trading, by deducting from the gross receipts all expenditure properly deductible from them on those principles, save in so far as any amount so deducted falls within any of the statutory prohibitions contained in the relevant rules, in which case it must be added back for the purpose of arriving at the balance of profits and gains assessable to tax: see *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3), per EARL LOREBURN ([1915] A.C. 444), LORD PARKER OF WADDINGTON (*ibid.*, 458), LORD SUMNER (*ibid.*, 467, 468), and LORD PARMOOR (*ibid.*, 473, 474).

F It appears to have been argued for the Crown before the learned judge (though it had not been so contended before the commissioners) that, even if the expenditure on the respondent company's anti-nationalisation campaign was laid out wholly and exclusively for the purposes of the respondent company's trade, it was not proper to be deducted in ascertaining the respondent company's profits according to the ordinary principles of commercial trading, because it was of a capital nature, and, accordingly, that, irrespective of any statutory prohibition, it was not a permissible deduction for income tax purposes. G This submission was (as I think, rightly) rejected by the learned judge, and direct reliance on it as a substantive ground of appeal was (if I understood him correctly) disclaimed by the Solicitor-General in the course of the argument before us. It was, however, suggested in this court, though, perhaps, somewhat faintly, that, on grounds which I confess I had difficulty in following, the expenditure in question, though not strictly speaking of a capital nature, was nevertheless not properly deductible in ascertaining the company's profits on the ordinary principles of commercial trading. This argument was never fully or clearly developed, and was, I think, in the end virtually abandoned, but if and so far as it should be considered as remaining on foot, I reject it. There is no trace of it in the Crown's contentions as set out in the Case Stated, and I think it is really concluded against him by the evidence of Mr. Nicholson as summarised and accepted by the commissioners. H

One other point can be shortly disposed of. It was contended on behalf of the Crown before the commissioners and before the learned judge that the expenditure on the anti-nationalisation campaign, even if laid out for the purposes of the respondent company's trade, was not wholly and exclusively so laid out, inasmuch as it was concerned with the sugar refining industry as a whole and not confined to the respondent company's undertaking. With regard to this submission the learned judge said:

"There is, in my judgment, nothing in this point. It was clear that a campaign of this sort could not be conducted in favour of one concern in the industry and that the only way to protect the respondents was to protect their competitors along with them. Therefore, the fact that the whole industry was included did not make the money the less laid out exclusively for the purposes of the respondents' trade."

I need do no more than say that I entirely agree with the learned judge on this point, for it was abandoned by the Solicitor-General in the course of the argument before us.

There remains as the one live issue in the case the question I have already posed, namely, whether, on the facts as found by the commissioners, the disputed expenditure was in law rightly held by them and by the learned judge to have been wholly and exclusively laid out or expended for the purposes of the respondent company's trade within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D; or, perhaps, I should rather say whether on the facts as found it was capable in law of being held to have been so laid out or expended. The deceptively simple words "wholly and exclusively . . . for the purposes of the trade", which at first sight suggest a plain question of fact well within the competence of experienced commissioners, have been the subject of much judicial discussion, and at this time of day it is out of the question for anyone to maintain that they do not involve a question of law.

In *Strong & Co., Ltd. v. Woodfield* (2) LORD DAVEY placed on the corresponding provision of the Income Tax Act, 1842, the following construction, which has held the field ever since ([1906] A.C. 453):

"These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

The actual sum there held not to have been laid out or expended for the purposes of the trade was a sum of damages payable by the taxpayers (the appellants) to a customer sleeping at one of their inns who was injured by the fall of a chimney.

In *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) the disputed deductions were in respect of the following expenses in connection with the tied houses of a brewery company: (a) repairs to tied houses; (b) differences between rents of leasehold houses or sched. A assessments of freehold houses and the rents received from tied tenants; (c) fire and licence insurance premiums; (d) rates and taxes, and (f) legal and other costs. All these expenses were held in the House of Lords to be admissible deductions as being money wholly laid out or expended for the purposes of the trade of the brewery company. The following passages from the speeches in the House of Lords with respect to two of these items may usefully be quoted. With respect to item (a) (the repairs) LORD ATKINSON said ([1915] A.C. 450):

"Now the supplemental statement of the facts in para. A sets forth that though the tenants are under their agreements bound to make the necessary repairs, the appellants, in fact, execute them at their own expense, because

it is found to be to their interest commercially so to do rather than to enforce the obligations of their tenants; that the cost of the repairs is incurred not as a matter of charity, but of commercial expediency in order to avoid the loss of tenants, and the consequent transfers, to which the licensing justices object. The meaning of para. 8 taken together with this para. A is, I think, simply this, that in the proper and reasonable conduct by the appellants of their trade they are obliged to defray the cost of these repairs, inasmuch as the same are necessary to enable the houses to serve the very purpose for which the appellants have solely and exclusively acquired and used them. I may say for myself that I am wholly unable to follow the line of reasoning which would lead one to the conclusion that where premises have been acquired and used wholly and exclusively for a particular purpose, the expenditure upon them necessary to enable them to fulfil that purpose is not expenditure incurred solely and exclusively for the very purpose for which they have been acquired and used. I think therefore that the condensed meaning of these paragraphs when properly construed is simply this, that the expenditure for repairs is incurred solely and exclusively for the purposes of the appellants' trade."

C With respect to the same item LORD PARKER OF WADDINGTON said (*ibid.*, 461):

"Though each tenancy agreement contains a repairing covenant on the part of the tenant, the tenant in fact does no repairs. The brewery company have found by experience that as a matter of commercial expediency it is better to do the repairs themselves rather than, by insisting on performance of the covenants, to run the risk of loss of tenants and consequent transfers to which the licensing justices object. The appellants claim that the amount so spent in repairs ought to be deducted in ascertaining the balance of profits and gains of their trade, such repairs having, as found in the Case, been solely repairs which the appellants were bound to do in order to maintain the licensed houses in a condition fit to use as licensed houses, and the sum expended not being an excessive sum to be expended in such repairs. I am of opinion that the appellants are right in this contention."

With respect to item (c) (the insurance premiums) LORD ATKINSON said this (*ibid.*, 452):

"As to item C, the purposes for which the insurances upon the premises are effected are set out. They are found to be usual and proper trade outgoings, and are made as such by the appellants. They are designed to cover the loss of the fabric by fire and the loss sustained if the licences were not renewed. *Smith v. Lion Brewery Co., Ltd.* (8) applies, I think, to the latter disbursement, and the remarks I have already made apply to the former as well as to the remaining items D and F."

G In *Smith v. Incorporated Council of Law Reporting for England and Wales* (7) where a gratuity paid to a retiring law reporter was claimed as a deductible expense of the council's trade, SCRUTTON, J., in holding the deduction of the sum in question admissible, expressed what, I think, must now be regarded as the untenable view that the question whether a sum was wholly and exclusively laid out or expended for the purposes of the trade was a question of fact, but in the course of his judgment he gave some useful illustrations of sums which might be held to answer that description ([1914] 3 K.B. 684):

"There may be cases where it is clear even to a judge who knows nothing about the trade, that a particular payment could not be wholly or exclusively laid out for the purposes of the trade. I do not desire to discuss politics, but I take examples which seem to me fairly clear. Payments for political purposes might conceivably be for the purposes of trade. It

might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade; but one can easily imagine cases, such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade."

In *Union Cold Storage Co., Ltd. v. Jones* (4), a company which had made over premises situated abroad to an American company for a term of years continued after the transfer to pay fire insurance premiums in respect of the premises. ROWLATT, J., and the Court of Appeal held that the premiums so paid were not deductible, ROWLATT, J., observing (129 L.T. 516):

"The appellant company have parted with this business . . . and they have got the ownership left in them of some premises abroad and they think fit or may be compelled, it does not matter which, to insure them against fire. That is not bringing grist to their mill or bringing customers to their door . . ."

In *British Insulated & Helsby Cables v. Atherton* (6) (where the actual decision was to the effect that a lump sum paid by a company to form the nucleus of a pension fund for its employees was in the nature of capital expenditure and, therefore, not deductible in arriving at the company's profits) VISCOUNT CAVE, L.C., said ([1926] A.C. 211):

"My Lords, I think it clear that the deduction from the profits of the above-mentioned sum of £31,784 is not prohibited by the first (sic.) Rule Applicable to Cases I and II, which prohibits the deduction of a disbursement not being money wholly and exclusively laid out or expended for the purposes of the trade. It was made clear in the above cited cases of *Usher's Wiltshire Brewery v. Bruce* (3) and *Smith v. Incorporated Council of Law Reporting for England and Wales* (7) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the commissioners in the present case bring the payment in question within that description. They found (in words which I have already quoted) that the payment was made for the sound commercial purpose of enabling the company to retain the services of existing and future members of their staff and of increasing the efficiency of the staff; and after referring to the contention of the Crown that the sum of £31,784 was not money wholly and exclusively laid out for the purposes of the trade under the rule above referred to, they found that the deduction was admissible—thus in effect, although not in terms, negating the Crown's contention. I think that there was ample material to support the findings of the commissioners, and accordingly that this prohibition does not apply."

In *Mitchell v. B. W. Noble, Ltd.* (9) a large payment made by a company to a retiring director in settlement of a dispute with him was held by ROWLATT, J., and the Court of Appeal to be deductible. LORD HANWORTH, M.R., said ([1927] 1 K.B. 737):

"It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business, unfettered and unimpered by the

presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once."

SARGANT, L.J., said (*ibid.*, 738):

A "Now, first, as to the question whether this was a disbursement wholly and exclusively laid out or expended for the purposes of the trade, it seems to me that there is nothing at all to show that it was not so exclusively laid out. The object, as disclosed by para. 9 of the Case, was that of preserving the status and reputation of the company, which the directors felt would be somewhat imperilled by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid B that and to preserve the status and dividend-earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade, profession or vocation of the company."

C In *Southern v. Borax Consolidated, Ltd.* (10) a company incurred legal expenses in defending proceedings in America in which its title to certain premises there was attacked, and LAWRENCE, J., in holding these expenses deductible said ([1940] 4 All E.R. 419):

"It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title, and not the value, of the company's business does not make it any different."

D That case was approved in *Associated Portland Cement Manufacturers, Ltd. v. Inland Revenue Comrs.* (11), per LORD GREENE, M.R. ([1946] 1 All E.R. 72).

E In *Cooke v. Quick Shoe Repair Service* (12) a firm purchased a business on terms that the vendor should discharge all liabilities of the business outstanding at the date of sale. The vendor failed to do so and the firm accordingly discharged the liabilities itself in order to preserve the goodwill and to ensure continuity of supplies, and the sums so expended were held by CROOM-JOHNSON, J., to be deductible on the principles stated in *Smith v. Incorporated Council of Law Reporting for England and Wales* (7), *Atherton v. British Insulated & Helsby Cables, Ltd.* (6), *Southern v. Borax Consolidated, Ltd.* (10), and *Mitchell v. B. W. Noble, Ltd.* (9).

F Lastly, so far as English authorities are concerned, I should refer to the two recent cases in the House of Lords of *Smith's Potato Estates, Ltd. v. Bolland* (13) and *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1). In *Smith's Potato Estates, Ltd. v. Bolland* (13) the House held by a majority that the costs of contesting an excess profits tax assessment were not deductible. LORD PORTER says of the phrase "purposes of the trade" ([1948] 2 All E.R. 370):

G "The phraseology and its meaning have been dealt with in a considerable number of cases, but before considering their effect I think it desirable to state the conclusion at which I should have arrived from a study of the wording of the section itself. The widest meaning attributed to it, and that for which the appellants contend, is, perhaps, best expressed by saying that it includes every expense to which the trader is put because he carries H on the trade."

And (*ibid.*, 371):

"The opposite view maintained by the Crown is, perhaps, best expressed in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 448, 453) where LORD DAVEY says: 'These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade . . .' My Lords, that expression has often been referred to and approved, but it was used in

reference to the circumstances of the case then under consideration, and I doubt if it carries the matter to a final conclusion. It still leaves open the question what expense is incurred for the purpose of enabling a trader to earn profits, and the adoption of a phrase helpful in analysing the meaning of words in an Act of Parliament with reference to a particular set of circumstances is not necessarily either useful or conclusive in all cases. It is probably safer to retain the wording of the Act itself, and, by applying it to the facts established, to discover whether the deduction falls within its terms or not."

LORD PORTER comments thus on *Strong & Co., Ltd. v. Woodifield* (2) (*ibid.*):

"My Lords, *Strong & Co., Ltd. v. Woodifield* (2) may be said to form the starting point for deducing the principles at stake in the present appeal, and, though the words of LORD DAVEY quoted above are the expression most frequently referred to, I think that those of LORD LOREBURN, L.C., have equal, if not greater, importance. He says ([1906] A.C. 448, 452): 'It does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader'. Further, LORD DAVEY, after pointing out that Case I related to trades, manufactures, adventures or concerns in the nature of trade, goes on to say (*ibid.*, 453): 'It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits'. These expressions of opinion, given some forty years ago, and accepted ever since are, in my view, inconsistent with the appellants' contention, but it is said they are at best dicta and are inconsistent with the principles on which such authorities as *Smith v. Lion Brewery Co., Ltd.* (8), and *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) are based, and in particular with the observations of VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables v. Atherton* (6) ([1926] A.C. 205, 211, 212) . . ."

Of the passage in the last-mentioned case to which I have already referred, LORD PORTER says this ([1948] 2 All E.R. 372):

"My Lords, this statement was obiter only as the actual decision was merely that the expenditure was capital expenditure, and, therefore, not deductible, but the language does require careful consideration. In that case the question actually in issue was whether subscriptions by a company towards a pension fund were to be deducted in ascertaining the balance of profits and gains of its trade. It was true that the expenditure did not at once affect its revenue, but it was a method of ensuring the better and more contented service of its employees and in that sense it did directly affect the success of its enterprise. It was exclusively laid out to enable the company to be more successful: no part of it was incurred in order to ascertain the Revenue's proportion of the profits when made."

LORD SIMONDS said (*ibid.*, 374):

"My Lords, I suppose that few expressions have been discussed more often in the courts than that which you have once again to consider, 'money wholly and exclusively laid out or expended for the purposes of the trade,' but it is their application rather than their meaning that is in doubt. I agree with the submission of learned counsel that it does not help to substitute other words for those which are found in the statute

and then to put a gloss on those other words, but it is, I think, important to emphasise that the words 'for the purposes of the trade' in their context, i.e., where a computation of 'profits' for the ascertainment of taxable income is being made, must mean 'for the purpose of enabling a person to carry on and earn profits in the trade.' These familiar words I cite from LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 448, 453). They have been cited and applied over and over again, and, if they are kept firmly in mind, they dispose in limine of the argument which prevailed with ATKINSON, J., and has been urged before your Lordships."

In *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1) the House held that Irish taxes were not deductible. LORD REID referred to LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (2) and said ([1952] 1 All E.R. 539):

"This explanation has always been regarded as authoritative and is difficult to reconcile with the respondents' contention."

LORD RADCLIFFE, after quoting again LORD DAVEY's speech in the last mentioned case, said (*ibid.*, 542):

"In this case, there is no material that makes it possible to say that these taxes (let alone any particular proportion of them) were paid for the purpose of earning such profits as were earned in the United Kingdom. There is much to be said for the criticism that LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (2) imposes too limiting a criterion as to what is a permissible deduction by way of trade expenditure, but I do not know a wider one that is not vulnerable in other ways, and the fact is that his criterion has stood for so long and been so often applied that it has become, as it were, part of our income tax language."

The foregoing review of authorities, though, I fear, unduly long, is by no means exhaustive. Many other cases might be referred to, but no useful purpose would be served by further multiplying citations. Each case depends to a great extent on its particular facts and is of assistance only in so far as some general principle emerges from it, and I think the cases which I have selected for reference can be regarded as sufficiently expounding and illustrating the law to be applied to the particular facts of the case now before the court. The principles which emerge seem to be these: (i) the prohibition against the deduction of disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade means that, in order to be deductible, a disbursement or expense must be laid out or expended wholly and exclusively for the purpose of enabling the trader concerned to carry on and earn profits in the trade: LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 453); but (ii) notwithstanding LORD DAVEY's additional observation to the effect that the disbursement must be made "for the purpose of earning the profits," LORD LOREBURN's observation in the same case (*ibid.*, 452) to the effect that disbursements to be deductible must be "really incidental to the trade itself", and ROWLATT, J.'s reference in the *Union Cold Storage* case (4) (129 L.T. 516) to "bringing grist to the mill," it is clear that disbursements to be deductible need not be directly or immediately productive of profit.

"... a sum of money expended ... voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade ..."

per VISCOUNT CAVE, L.C., in *Atherton's* case (6) ([1926] A.C. 212); and (iii) payments made for the purpose of preserving the assets or goodwill of a business, and thereby safeguarding its earning capacity, and payments for protecting the trader from losses in his trade or from being deprived of the means of

carrying it on, may be wholly and exclusively laid out for the purposes of the trade, just as much as payments made for the immediate purpose of producing or increasing profits; compare the fire insurance premiums in the *Usher's Wiltshire Brewery* case (3), the payment to the retiring director in *Mitchell v. B. W. Noble, Ltd.* (9), the legal expenses in the *Borax* case (10), and the discharge of the liabilities of the predecessor in business in the *Quick Shoe Repair* case (12); but (iv) payments made out of profits when earned (such as the Irish tax in *Dowdall, O'Mahoney & Co., Ltd.* (1)) or in relation to the determination of a liability to tax on those profits (as in *Smith's Potato Estates* (13)) or (by parity of reasoning) payments made with a view to preventing the transfer from one person or class of persons to another of the right to receive, through the trader, the profits when earned, are not made for the purposes of the trade within the meaning of the statutory prohibition. A

The effect of the facts found by the commissioners in the present case, and, in particular, of the evidence of Lord Lyle and Mr. Booth which they accepted, was that the directors believed that there was a real risk of the "nationalisation" of the sugar refining industry in general and of the company's undertaking in particular, and (with the qualification mentioned below) further believed that, if this occurred, the State would take over the company's assets and business, thus bringing completely to an end the whole of the trading activities of the company in its business of sugar refining. The qualification to which I have just referred is that, whereas, according to the evidence as summarised in the Case, Lord Lyle had B

"never thought of the alternative method of nationalisation by which the State would have acquired all the capital stock of the company from its members," D

Mr. Booth said:

"It did occur to him that one way of nationalising the company would be for the State to acquire all the capital stock, but they had no right to assume which form nationalisation would take. There was a danger that it would take various forms, but they could only assume the worst and do their best to protect their own business. They were anxious to prevent nationalisation from taking place in any form." E

It should, therefore, be taken that the directors' belief that in the event of nationalisation the State would take over the company's assets and business was tempered by recognition on the part of at least one of them of the possibility that nationalisation might take the less direct form of a compulsory acquisition by or on behalf of the State of all the issued capital stock of the company. F

The evidence of these two directors having been accepted by the commissioners, it must be taken for the purposes of this appeal that the board of the company genuinely believed that there was a serious risk of the introduction and passing of legislation for the nationalisation of the sugar refining industry in general and the company's undertaking in particular, and further genuinely believed that there was a serious risk that any such legislation would involve the taking over by or on behalf of the State of the company's assets and business; and it must also be taken that the real and genuine object of the anti-nationalisation campaign was (as Lord Lyle in effect put it) primarily to prevent the company from losing its business and to preserve its assets intact, though incidentally the preservation of the company's business would save the stockholders from injury as well, or (in other words) to preserve the assets and business of the company, and by so doing protect the interests of the company's stockholders. G H

The suggestion that the expenditure on the anti-nationalisation campaign was not properly deductible from profits according to the ordinary principles of commercial trading being out of the way, I cannot, for my part, find any

sufficient ground for the view that, on the facts found and evidence accepted by the commissioners, this expenditure was incapable in law of being held to have been wholly and exclusively laid out or expended "for the purposes of" the company's "trade" within the meaning of that expression as construed and explained by the authorities.

- Two grounds for that view were advanced on behalf of the Crown. First, it was said that nationalisation, even in the full and direct form of a compulsory acquisition of the whole of the assets and undertaking of the company, would not destroy the company's business, but merely transfer it from the ownership of the company into the ownership of whatever body or authority the nationalising legislation might constitute for the purpose of carrying it on. Thus, it was argued that the expenditure in question was laid out, not for the purpose of preserving the company's business, but for the purpose of preventing the company's business from being taken away from the company and transferred to, and thenceforth carried on by, the new body or authority. I confess myself unable to follow this argument. The trade with which we are here concerned is surely the trade carried on by the company; the purposes for which the disputed expenditure, in order to be allowable as a deduction, must be shown to have been laid out are surely the purposes of the trade so carried on; and, when LORD DAVEY in *Strong & Co., Ltd. v. Woodifield* (2) explained expenditure for the purposes of the trade as expenditure for the purpose of enabling a person to carry on and earn profits in the trade, surely he meant for the purpose of enabling the trader claiming to deduct that expenditure to carry on and earn profits in *his* trade. It is clear on the authorities that LORD DAVEY's formula includes expenditure for the purpose of preventing a person from being disabled from carrying on and earning profits in the trade. Here, too, it seems to me reasonably plain that the relevant trade is that of the trader claiming to make the deduction. There is no doubt that legislation compulsorily divesting a trader of the whole of the assets and goodwill of his business, and (one may suppose) precluding him from establishing any similar business in the future, would utterly disable him from carrying on and earning profits in his trade. In such a case the destination provided by the legislation for the goodwill and assets so divested would, as it seems to me, be wholly immaterial for the purposes of the present question. Such assets and goodwill might be merged with those of other businesses similarly taken over in the hands of some statutory body or authority. Alternatively, a separate business might be carried on by the acquiring body or authority in succession to the hypothetical trader I have mentioned, with and by means of the assets and goodwill compulsorily acquired from him. But whichever course was taken *his* trade and *his* ability to earn profits in that trade would be clean gone. One may add, so far as the present case is concerned, that there is no reason for supposing that, if nationalisation had supervened, the second of the above-mentioned courses would have been taken rather than the first.
- The second argument presented for the Crown was to the effect that nationalisation, if it had taken place at all, might have been carried out by means of a compulsory acquisition by or on behalf of the State of the whole of the capital stock of the company, in which case the assets and business of the company would have been preserved intact in the hands of the company; that, as nationalisation might possibly have taken this form, the company's anti-nationalisation campaign must be taken to have been partly directed against this possible form of nationalisation; and that, so far as the campaign was so directed, it was concerned, not with enabling the company to continue to carry on and earn profits in its trade, but with the destination of its profits when earned; and, accordingly, that, on the principle of *Dowdall, O'Mahoney & Co., Ltd.* (1) and *Smith's Potato Estates, Ltd.* (13), the expenditure incurred in the campaign was to this extent not laid out for the purposes of the company's

trade, and, therefore, not wholly and exclusively so laid out. I cannot accept this argument. At the time of the anti-nationalisation campaign all that could be said with certainty was that there was a risk of nationalisation. What form nationalisation might take if it took place at all no one could say. The directors of the company believed that, if it did take place, there was a serious risk (to put it no higher) that the company's assets and business would be taken over by the State. They, accordingly, launched their anti-nationalisation campaign for the purpose of protecting the company's assets and business against that risk. It might, of course, be that in the actual event nationalisation would not take place at all, for reasons wholly unconnected with the campaign. But that would not have affected the quality of the expenditure on the campaign, though in the result it might be said to have served no useful purpose. Again, nationalisation might take place in the form of a compulsory acquisition of the business and assets of the company. In that case the campaign would have failed, and in the result the money spent on the campaign would have been thrown away. But that would not have affected the quality of the expenditure, any more than the quality of a trader's expenditure on fire insurance is affected by the circumstance that his buildings never in fact catch fire. Finally, nationalisation might take place in some less direct form such as the compulsory acquisition by or on behalf of the State of the whole of the capital stock of the company. In that case the risk against which the campaign was designed to protect the company (i.e., the loss of its assets and business) would not have materialised, though for practical purposes a substantially similar result would indirectly have been achieved. But, again, I fail to see how that could affect the quality of the expenditure. Given a decision by the directors that they ought as a matter of commercial expediency to do what they could by means of publicity and propaganda to save the company from being deprived of its assets and business through nationalisation (and I think it is clear that this on the facts found must be imputed to them) I fail to see how they could implement that decision otherwise than by campaigning against nationalisation, or how it can be said that their purpose was not to protect the business and assets of the company because nationalisation might possibly take the indirect form of a compulsory acquisition of capital stock, as distinct from the indirect form of a compulsory acquisition of the assets and undertaking of the company.

I have only to add, with respect to the Privy Council case of *Ward & Co., Ltd. v. Taxes Comr.* (5), that, while the expenditure in question affords a closer parallel to the disputed expenditure in the present case than is to be found in any of the other cases of which I am aware, the language of the material New Zealand enactment which prohibited the deduction of expenditure "not exclusively incurred in the production of the assessable income" was so markedly different from, and so much narrower than, the language of the enactment governing the present case that I cannot regard it as providing any authority against the conclusion to which I have come. As LORD CAVE said at the end of his judgment ([1923] A.C. 150):

"It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

For the reasons I have endeavoured to state, I would dismiss this appeal.

HODSON, L.J. (read by **JENKINS, L.J.**): The question in this appeal is whether expense incurred in a propaganda campaign against nationalisation of the sugar refining industry organised by the respondent company is deductible for income tax purposes in computing the balance of profits and gains of the company. If this expense is deductible it must be because it was wholly and exclusively laid out or expended for the purposes of the trade of the respondent company. The Crown contends that none of this expenditure can

be regarded as expenditure in carrying on the trade or as expenditure incurred for earning profits in the trade, but that on the contrary it was incurred in order to secure that the ownership of the assets of the company should remain in the same hands. It is said that, the object being to secure that the present owners remain the owners, the object is not to secure profits, and just as expenditure incurred in acquiring a capital asset is not deductible, so expenditure incurred in the prevention of acquisition is equally not deductible.

- A The question has not arisen before in the courts of this country, but a similar case has arisen in the Privy Council on appeal from the Court of Appeal of New Zealand, namely, *Ward & Co., Ltd. v. Taxes Comr.* (5). A poll of voters being about to be held under statutory authority on the question whether or not prohibition of intoxicants should be introduced, a brewery company carrying on business in New Zealand expended money in printing and distributing anti-prohibition literature. The company sought to deduct the expenditure in the assessment of the income derived from their business for the purposes of the Land and Income Tax Act, 1916, of New Zealand. By s. 86 (1) (a) of that Act no deduction was to be made in respect of expenditure "not exclusively incurred in the production of the assessable income". It was held that the company was not entitled to make the deduction having regard to the language of the sub-section. It is to be observed that the words "exclusively incurred in the production of the assessable income" are different from and narrower than the words "wholly and exclusively laid out or expended for the purposes of the trade" and that the Board of the Privy Council concluded their judgment by stating that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing on the question then for decision. I do not think that the decision on the narrower words of the New Zealand Act is of great assistance here. It is interesting to note that the argument addressed to the board by the taxpayer and rejected, having regard to the language of the New Zealand Act, was in the main that addressed to the court in this case. This argument found its support in the speeches delivered in the House of Lords in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3), interpreting the words of the Income Tax Act, 1842, which correspond with the rules now in force in this country. The argument was in substance that the expenditure in question did not differ in kind from that laid out on insurance.

- I, therefore, turn to *Usher's* case (3) in which one of the disputed items related to fire and licence insurance premiums. The Court of Appeal had said that the fire insurance premiums were not wholly or exclusively laid out or expended for the purposes of the company's trade or business and were not legitimate deductions under sched. D, being paid to insure the "fabric" to protect the landlords from loss by destruction of their property. It was pointed out that what was insured against was the destruction by fire of the houses. As to the licence insurance premiums, these, it was said, were paid to insure against loss of the licences in cases where no compensation was payable out of the compensation fund. It was held by the Court of Appeal that they were payable, in the main if not wholly, to protect the company as owners of the property from any diminution of the value of the houses as the result of the licences being taken away without any right to compensation. Later the judgment continues by pointing out that the sums received under such a policy by the brewery company recompense them for the diminution of the value of the property. Accordingly, both fire and licence insurance premiums were disallowed. The judgment of the Court of Appeal appears to me to proceed on the same lines as the argument addressed to us by the Crown in this case. This judgment was, however, reversed by the House of Lords. Their Lordships were unanimous in holding that these items were not within the prohibition, but as a matter of law could be held properly to be "wholly and exclusively laid out for the

purpose of the trade". LORD ATKINSON says in *Usher's* case (3) ([1915] A.C. 452):

" . . . the purposes for which the insurances upon the premises are effected are set out. They are found to be usual and proper trade outgoings, and are made as such by the appellants. They are designed to cover the loss of the fabric by fire and the loss sustained if the licences were not renewed. *Smith v. Lion Brewery Co., Ltd.* (8) applies, I think, to the latter disbursement, and the remarks I have already made apply to the former as well as to the remaining items D and F."

In my opinion, the decision in *Usher's* case (3) supports the view contended for by the respondent company in this case. It was, however, contended by the Crown that if the test laid down by the well-known dictum of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 453), is applied, the deduction ought not to be allowed. He said of the words "for the purpose of the trade" in the Act of 1842:

"These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. . . . It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

The question, as LORD PORTER pointed out in *Smith's Potato Estates, Ltd. v. Bolland* (13) ([1948] 2 All E.R. 371), is still left open as to what expense is incurred for the purpose of enabling a trader to earn profits. These words cannot be read literally. Fire insurance premiums on the premises in which the trade is carried on do not increase the profits, but they are necessary to maintain the assets of the trade in a condition to earn profits. A fire may never happen, nationalisation may never happen. But it is open as a matter of law, in my judgment, to find, as the commissioners have found in the present case, that the expenditure incurred in carrying out the propaganda campaign against nationalising the sugar refining industry was wholly and exclusively laid out for the purposes of the company's trade and was accordingly an admissible deduction for income tax purposes. It was laid out to prevent the seizure of the company's business assets so as to enable the company to continue as in the past to earn profits in the trade carried on by the company.

I reject, therefore, the contention that the expenditure was laid out for purposes so indirect and remote from the trade carried on by the company that it was not in law open to the commissioners to find as they did. To use the language of VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables v. Atherton* (6), in which it was held that a lump sum paid by a company to form the nucleus of a pension fund for its employees was capital expenditure and accordingly not deductible ([1926] A.C. 212):

" . . . a sum of money expended . . . voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

The point which prevailed in *Atherton's* case (6), namely, that the payment in question was a capital payment, was not taken before the Special Commissioners in this case and was not argued in this court as a separate point. The passage which I have read from LORD CAVE's speech appears to me to bear on the question to be decided in this case and to support the contention of the company. In my opinion, the expenditure is a proper debit item to be charged against the incomings of the trade when computing the balance of the profits of it, and is none the less a proper revenue charge because it is laid out for the purpose of preserving the assets of the company. It is not, I think, a good answer to say that the asset is not in danger and the only question is a change of ownership. If the trader has his business taken from him by the

State, whatever form nationalisation may take, he cannot continue to carry on his trade. Accordingly, expenditure laid out in protecting himself against nationalisation is directed towards enabling him to retain the trade which he is carrying on. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Pennefather & Co.* (for the company).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

TIMMINS v. TIMMINS.

[COURT OF APPEAL (Denning and Hodson, L.JJ., and Lloyd-Jacob, J.), April 15, 16, 17, May 18, 1953.]

Divorce—Restitution of conjugal rights—Answer to petition—"Grave and weighty" conduct falling short of cruelty.

A husband was inclined to be overbearing, domineering, dictatorial, and insistent on maintaining his rights as a husband and on having the household conducted in accordance with his ideas. He was of hasty temper and habitually expressed himself in rapid unmeasured terms. On one occasion (more than two years before they finally parted) he struck his wife on the shoulders and the mouth. The court found that his conduct might have had an ill effect on the wife's health, but that it had been condoned. A month before the separation the wife suffered a mental breakdown and spent a fortnight in the mental ward of a hospital, suffering from delusions, and, in particular, from a persecution mania. A fortnight after her return from hospital she left her husband, taking one of their three children with her. On finding her, the husband took the child away, although it was in tears. When, after proceedings had started, she returned to him, saying she had come back for three days, he told her: "You will come back for good or not at all".

HELD: in the absence of proof of an intention by the husband to injure the wife there was no ground for reversing the decision of the trial judge that the husband was not guilty of cruelty, but (HODSON, L.J., dissentiente) the husband's conduct was a grave and weighty matter which gave the wife good cause for leaving him and prevented him from obtaining a decree of restitution of conjugal rights unless and until he satisfied the court that, if she returned to him, he would behave with conjugal kindness, and, therefore, was a defence to the husband's suit for restitution.

Observations of DENNING, L.J., in *Pike v. Pike* ([1953] 1 All E.R. 235), explained.

AS TO ACTS CONSTITUTING CRUELTY AS A GROUND OF DIVORCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-653, paras. 954-960; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 294-306, Nos. 2393-2534.

AS TO JUST CAUSE FOR LEAVING A SPOUSE AS A DEFENCE TO A PETITION FOR RESTITUTION OF CONJUGAL RIGHTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 646, 647, paras. 947, 948; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 288-290, Nos. 2329-2353.

Cases referred to:

- (1) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 507; 2nd Digest Supp.
- (2) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226.
- (3) *King v. King*, [1952] 2 All E.R. 584; [1953] A.C. 128.
- (4) *Cox v. Cox*, [1952] 2 T.L.R. 141.
- (5) *Fowler v. Fowler*, [1952] 2 T.L.R. 143.

- (6) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 27 Digest, Replacement, 366, 3027.
- (7) *Oldroyd v. Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 27 Digest, Replacement, 289, 2349.
- (8) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 27 Digest, Replacement, 356, 2948.
- (9) *Beer v. Beer*, (1906), 94 L.T. 704; 27 Digest, Replacement, 289, 2340.
- (10) *Butland v. Butland*, (1913), 29 T.L.R. 729; 27 Digest, Replacement, 444, 3754.
- (11) *G. v. G.*, [1930] P. 72; 142 L.T. 311; 94 J.P. 79; *sub nom. G.-M. v. G.-A.D.*, 99 L.J.P. 14; 27 Digest, Replacement, 289, 2347.
- (12) *Russell v. Russell*, (1935), 80 Sol. Jo. 16.
- (13) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest, Replacement, 367, 3040.
- (14) *Chilton v. Chilton*, [1952] 1 All E.R. 1322; [1952] P. 196; 116 J.P. 313.
- (15) *Pike v. Pike*, [1953] 1 All E.R. 232.
- (16) *Dixon v. Dixon*, [1953] 1 All E.R. 910.
- (17) *Edwards v. Edwards*, [1949] 2 All E.R. 145; [1950] P. 8; [1949] L.J.R. 1335; 113 J.P. 383; 27 Digest, Replacement, 366, 3022.
- (18) *Yeatman v. Yeatman*, (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 27 Digest, Replacement, 365, 3019.
- (19) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.

APPEAL from an order of WALLINGTON, J., dated Oct. 17, 1952, granting the husband a decree for the restitution of conjugal rights, and dismissing the wife's answer to the husband's petition, in which she claimed a decree of divorce on the ground of cruelty.

The wife contended that the husband's conduct constituted cruelty entitling her to a decree of divorce, and that, even if it did not amount to cruelty, it was of so grave and weighty a nature as to entitle her to leave her husband and, therefore, to be a defence to his petition for the restitution of conjugal rights. WALLINGTON, J., gave judgment for the husband on both points. The wife appealed.

Ifor B. Lloyd, Q.C., and *Fairweather* for the wife.

Simon, Q.C., and *Shenfield* for the husband.

Cur. adv. vult.

May 18. The following judgments were read.

DENNING, L.J.: The parties married on Feb. 2, 1938, when the husband was twenty-seven and the wife twenty-three. They separated on Apr. 13, 1951, when the wife left the home. They have three children who at the date of the separation were aged seven, five and three. On May 10, 1951, the husband filed a petition for restitution of conjugal rights. The wife put in an answer in which she said she had just cause for leaving him and claimed a divorce for cruelty. The judge has rejected the wife's charges of cruelty and granted the husband a decree for restitution. The wife appeals to this court.

There is one salient fact in the case. On Mar. 13, 1951, just a month before the separation, the wife had a mental break-down and spent a fortnight in the mental ward of a hospital. The nature of the break-down was described by the medical officer of the hospital in this way:

"She was agitated and suffering from delusions. She said she was having messages from God and that God was speaking to her. She said that her husband had tried to kill her with a knife and poison her with some fluid 'which was not brandy as he said it was.'"

By Mar. 26, 1951, she had greatly improved and on Mar. 30, 1951, she was allowed to go home.

She had only been home two weeks, however, when on Apr. 13, 1951, she left, taking the middle child, a girl aged five, with her. She said in evidence that the reason she left was because at night in bed her husband put his hands round her throat to strangle her. But there was nothing to corroborate her on this point and the judge did not accept her evidence. After she left, the husband had great difficulty in finding where she had gone. He eventually found her and the child three weeks later at a village eight miles away. He took the child away from her—the child was in tears about it—and took her back to the others. Two weeks later, he fetched the wife home also, but she only stayed till five o'clock the next morning and then left finally. Several months later, long after proceedings had started, she came back and said she had come for three days. The husband said: "You will come back for good or not at all." She went away again, and has never returned.

In the course of the case the wife made many charges of violence against the husband. When you remember that this wife has suffered from a persecution mania, the judge was fully justified in holding that he could not accept her evidence unless it was corroborated. The judge has found no specific incident proved except one which the husband admits, viz., that in December, 1948, he hit his wife on the shoulders and in the mouth. This was, as the judge found, "wholly without excuse", but it was over two years before the final parting.

Apart from that one incident, the only thing proved against the husband was that he was bad tempered, domineering and overbearing, but this was a serious matter because of its effect on the wife's health. This is what the judge said about the husband:

"I have come to the conclusion that he is a person who is inclined to be overbearing, domineering, insistent on maintaining his rights as a husband and on having the household conducted in accordance with his ideas, and that he has a hasty temper and habitually expresses himself in rather rapid unmeasured terms, which may have had an effect on the mind of the wife from time to time and tended to disturb the quietude of the matrimonial home. I am very anxious about this case because I am wondering whether, if I make an order for restitution of conjugal rights and the wife goes back, he might not be again overbearing, domineering and dictatorial, as I am satisfied he can be if he wishes to be, so that an effect can be produced on the wife's mind which may cause another break-down. I confess to anxiety in case the wife returns, but these are not matters which can weigh with me because, if the husband is entitled to the order for restitution, he ought to have it. Much though I regret it, that seems to me to be quite clearly the position here."

As I read those findings, the judge thought that the husband's domineering conduct might well have brought about his wife's first break-down, and might bring about another, but, nevertheless, she was bound to go back to him.

Before I deal with the law, I wish to say that the judge's findings of fact were amply justified by the evidence. Not only were there the inexcusable blows in December, 1948, but there was also the way the husband treated the wife after her illness. On one occasion he took the child away from her in tears. On another he told her she must come back for good or not at all. That is hardly the way to treat a wife who has borne him three children, and has only recently come out of hospital after a mental break-down. Once you accept the fact that the husband had the character and temperament described by the judge, you have an explanation of the break-down, which is otherwise unexplained. The judge clearly accepted the evidence of the doctor who attended her in that mental ward, Dr. Tweddle, who gave these answers in the course of cross-examination:

"Q.—When there is maladjustment—living together in a state of friction for years, it does sometimes produce this kind of break-down?"

A.—Yes, it could do. Q.—It could come about in a sense innocently, but it does come about nevertheless? A.—Yes. Q.—If the husband is domineering, opinionated, displays a rather violent and unreasonable temper, that sort of thing, that may produce it? A.—Yes. Q.—Quite apart from any physical violence, if it goes on long enough? A.—Yes. Q.—You do get a break-down of the weaker party? A.—Certainly.”

On the evidence so given and facts so found, I am a little surprised that the judge acquitted the husband of cruelty. It seems clear that the husband's conduct caused injury to the wife's health, or, at any rate, reasonable apprehension of it, and it can hardly be denied that it was grave and weighty, seeing that it was such as to be likely to cause a mental break-down. But the judge has expressly found that her break-down was not due to any “wrongful conduct” on the part of the husband. Having regard to his other findings, this must mean, I think, that in his domineering conduct the husband had no intent to injure or to inflict misery on the wife. It was simply a defect of temperament manifesting itself in a most unpleasant way. Now, it is well settled that an intent to injure, if not an essential element, is at any rate a most important element, in cruelty. In the absence of an intent to injure, a judge may well be justified in refusing to find cruelty: see per LORD DU PARCQ, in *Watt (or Thomas) v. Thomas* (1), LORD REID in *Jamieson v. Jamieson* (2) and in *King v. King* (3), and see also the decisions of this court in *Cox v. Cox* (4), and *Fowler v. Fowler* (5), per HODSON, L.J. In these circumstances, the judge having acquitted this husband of cruelty, I do not think we can interfere with his decision on that part of the case.

The other part, the decree of restitution, is a different matter, for the judge seems to have thought that, as matter of law, once the husband was acquitted of cruelty, he was entitled to a decree of restitution. I do not think that is right. Take this very case. On the facts as found by the judge, I ask myself: Is this court bound to order the wife to return to the husband? What would be the result of such an order? Either she will return in obedience to the order, in which case she may have another mental break-down—the judge was very anxious about that. Or (what is more likely) she will refuse to return, in which case she will forfeit any right to maintenance and will at the end of three years be liable to be divorced for desertion without cause. I decline to put this poor woman to such a cruel alternative. She has borne this husband three children, and has suffered a mental break-down, through no fault of her own, that is certain, but, possibly, as the judge thinks, through her husband's conduct. The judge observed that he did not want to make an order against her to return. He said he much regretted it, but thought he had no option. I think he had an option. He ought on his findings to have refused an order for restitution.

The authorities are numerous, but there is one passage in the judgment of LORD HERSCHELL, L.C., in *Mackenzie v. Mackenzie* (6), which is so apt that I quote it ([1895] A.C. 390):

“Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as saevitia or cruelty; can he when his own misconduct has led his wife to separate herself from him, come into court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence?”

That was a Scottish case, but the words of LORD HERSCHELL were accepted as good law in England by GORELL BARNES, J., in *Oldroyd v. Oldroyd* (7) ([1896] P. 179) which has always been regarded as laying down the law on this point. Since that time it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction, that conduct which for one reason or another falls short of cruelty may, nevertheless, afford good cause for leaving

and be a defence to a suit for restitution. Instances are false accusations: *Russell v. Russell* (8); drunkenness: *Beer v. Beer* (9) per SIR GORELL BARNES, P.; drunkenness and violence short of cruelty: *Butland v. Butland* (10) per BARGRAVE DEANE, J.; extravagance: *G. v. G.* (11) per HILL, J.; wife's persistent friendship with another man: *Russell v. Russell* (12) per BUCKNILL, J.; husband's association with other women: *Glenister v. Glenister* (13); and *Chilton v. Chilton* (14) per LORD MERRIMAN, P. In my opinion, domineering conduct comes within this principle, at any rate, when it is such as to be likely to cause a mental break-down. It may not be cruelty—it may fall short of that because of the absence of any intent to injure—but, nevertheless, it prevents the husband from getting a decree of restitution unless and until he satisfies the court that, if she returns, he will behave with conjugal kindness. He must get over his bad temper, and cease to be overbearing. The refusal of the decree does not amount to a decree of judicial separation. It only means that at present the husband cannot insist on the return of the wife. But as soon as the court is satisfied that he will behave properly, he will be entitled to it.

We were referred to *Pike v. Pike* (15), and, in view of some comments made on it by DAVIES, J., in *Dixon v. Dixon* (16), I think I ought to explain some of the things I there said. In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a "grave and weighty" character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty because it lacks the element of injury to health: as in *Russell v. Russell* (8) and *Edwards v. Edwards* (17); or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but, nevertheless, it may give good cause for leaving, as the cases which I have cited earlier amply show. On the other hand, conduct which is not "of a grave and weighty character," and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman v. Yeatman* (18). It is conduct of that kind to which I referred in *Pike v. Pike* (15) when I said ([1953] 1 All E.R. 235) that conduct "less than cruelty" does not justify a spouse in leaving. In the present case, the conduct of the husband was, I think, of a grave and weighty character, and the only reason why it was not cruelty was because there was no intent to injure. It comes, therefore, within the earlier cases to which I referred. I would allow this appeal so far as to refuse the husband a decree of restitution, but I would not disturb the judge's finding that cruelty was not established.

HODSON, L.J.: On this appeal the respondent wife appeals from a decree of restitution of conjugal rights made against her by WALLINGTON, J., on Oct. 17, 1952, and from the rejection of her prayer for divorce on the ground of the petitioner husband's cruelty. The petition for restitution was presented by the husband on May 10, 1951, his wife having left him on Apr. 13, 1951. The wife by her answer admitted the leaving, but said she had just cause for so doing by reason of the matters set out thereafter. There follows in the answer a general allegation of cruelty and a number of charges of a serious character in the main accusing the husband of violence or threats of violence. No particulars of the general allegation were given or asked for.

The parties were married in February, 1938, and they had three children, born in 1943, 1946 and 1947 respectively. The charges made in the answer begin in December, 1948, and cover the period extending to the separation in 1951 and include two matters which arose in May, 1951, after the separation. A feature of the case is that on Mar. 13, 1951, the wife was admitted to hospital in Dudley suffering from a mental break-down. She returned home discharged to the care of her husband after a fortnight, but left him finally as stated on Apr. 13. During the period of her mental illness she displayed symptoms which were, in the opinion of the doctor who saw her and gave evidence at the trial, of

the nature of delusions of persecution at the hands of her husband. The charges which she made against her husband included charges not only of violence, but also of attempts and threats to murder her. One of the attempts to murder was said to be an attempt by poisoning. This was not included in the petition, but was one of the matters of which she spoke to the doctors when in the mental hospital and was repeated by her on oath in the witness box.

All the charges, with exceptions which I will mention, were dependent on the wife's uncorroborated testimony and were rejected by the judge as being incredible, although no suggestion was made by him or by counsel for the husband that she was wilfully misleading the court. The learned judge considered the character of the charges as well as her evidence given in support of them and came to the conclusion that he could not accept her evidence as accurate, quite apart from any considerations which arose by reason of her mental break-down. All of these uncorroborated charges were denied by the husband and none of the witnesses called had seen overt acts of the kind described by the wife although they had had considerable opportunity of observing the husband and wife together. I think that the learned judge was abundantly justified in arriving at this conclusion of fact. I think in referring to the character of the charges he must have been referring to the inherent improbability of murderous attacks and threats of the kind alleged.

Further, when one looks at the allegations to see whether corroboration would be likely to be forthcoming if the charges were true one finds that in two instances at least there is a noticeable absence of corroboration. For example, in para. 11 of the answer, as sworn by the wife, the following appears:

"On a day in the month of March, 1949, or the month of April at 23, Westfield Road, aforesaid, the respondent was entertaining a woman friend when the petitioner picked up a knife and told the respondent that if she did not tell her friend to go he would stick the knife through the respondent."

The wife gave evidence in support of this charge, but said that the woman friend, viz., a Mrs. Whittle, was not even present at the time when this incident occurred, but was in the house immediately before and afterwards. Mrs. Whittle was called on the husband's behalf and said that neither then nor at any other time did she see anything amiss in the husband's treatment of his wife.

Again, in para. 14, it was alleged that in March, 1951, at 23, Westfield Road, the petitioner clenched his hands round the respondent's throat saying that he would kill her before long. This incident, she said, occurred immediately before she was taken to hospital. In describing it at the trial she said that her husband put his hands round her throat to strangle her.

When she entered the hospital, she was examined for external injury and none was found such as was to be expected if anything approximating to strangulation had occurred. When tested in this way the conclusion of the learned judge is, I think, shown to be well founded so far as these two incidents are concerned. It is also a matter for comment that although these charges as originally pleaded occurred only in the period beginning in December, 1948, and ending with the termination of the married life, giving the impression that the earlier years were calm and that she was not subject to violent attacks on the part of the husband, yet when asked about the beginning of her marriage she gave evidence that her husband started round about a month after she got married, that he knocked her about and had violent fits of temper. If this were true it is at least surprising that no mention of it appears in the pleaded case, which was, I think, a different case in many respects from that put forward at the trial.

There remain for consideration those matters which were admitted by the husband. First, in December, 1948, he admitted having struck his wife with

his fist on the shoulders and in the mouth. The learned judge expressed himself as follows on this matter:

A "But at the same time I am equally satisfied that although on one occasion he did act in a manner which, in my opinion, was wholly without excuse, and did in fact several times strike his wife with his fist, he is not a man to indulge in that sort of thing or in any physical violence except under very strong provocation. On one occasion there was provocation. He acted in a way which some men would have acted, and some would not. What happened was that a Dr. L. had visited him (the husband) in bed when he had an attack of influenza, and after the doctor on one occasion left his bedroom he heard whispering going on somewhere outside his bedroom and coming to the top of the staircase and looking down he there saw the doctor kissing his wife. He ran down and seizing a milk bottle, he held it above the head of the doctor as if he intended to strike him, but he says that instead of that, that is, venting his not unnatural anger on the doctor and having respect, he says, for the profession of the doctor, he telephoned to the police and then set about his wife, hitting her with his fist on both her shoulders and once on her face. So far as I can see that was the only act of violence that I can find proved in this case."

D I agree with the learned judge that the assault was wholly without excuse, but with all respect to him I do not agree with the qualifying passage tending to show that he thought there was provocation which afforded some justification. Further, I cannot agree that the finding that the husband saw the doctor kissing the wife ought to have been reached. This matter was never put to the wife in cross-examination, nor was she called to deal with it. The doctor, whose name was given in evidence, was never called as a witness, nor had he any opportunity of knowing what was alleged against him. It is on the face of it highly improbable that a professional man on leaving his patient would behave in this manner, and I should have thought that the most that could be said was that the husband thought he saw something of the sort. Whether he thought he saw this incident or actually saw it, the violent attack by this man with his fists was, as the learned judge first said, wholly unjustified, and for myself I would admit no qualification to this conclusion. When all is said, however, this incident occurred more than two years before the parting and as an act of cruelty it must be taken to be condoned, and on the case as I see it there is nothing which can be taken to revive it. The state of the wife's health in 1951 was not, according to the learned judge's finding, related in any way to the wrongful conduct on the part of the husband, and I do not think that this finding can be disturbed.

G There remain two incidents which took place after the wife had left home. She had taken with her the second child of the marriage, leaving the eldest and youngest with their father. The husband, finding the second child with her mother, took her from her mother notwithstanding that the child was crying and unhappy at being taken from the mother. On another occasion, the wife having returned home saying she would like to stay for three days, she was treated with a certain lack of kindness by the husband who said, in effect, that either she was to come home for good or not at all. Having regard to the wife's recent break-down this attitude of the husband made, not unnaturally, a bad impression on the mind of the learned judge, but did not make him reach a conclusion that cruelty had been established. In this I agree with him. The two matters I have mentioned were wholly insufficient to revive the single act of 1948 so as to establish a case of cruelty.

Having reached his conclusion on this part of the case, the learned judge came to the conclusion that there was nothing to justify his refusing a decree of restitution of conjugal rights. In this, again, I agree with him. It has been argued before us that the learned judge failed in some way to appreciate that

conduct not amounting to cruelty was capable in law of amounting to just cause for a wife refusing to live with her husband. In my judgment, this question does not arise. The learned judge negatived, with one exception, any wrongful acts on the part of the husband. His criticism of the husband's character and his expressed apprehensions as to the future cannot be translated into findings adverse to the husband of overt acts, findings which he has expressly refrained from making in other parts of his judgment. Cruelty does not, so to speak, shade off into just cause.

Since some observations of mine in earlier cases have, I am afraid, given rise to difficulty, I would refer not to my own judgments, but to a judgment of BUCKNILL, L.J. ([1949] 2 All E.R. 149) in *Edwards v. Edwards* (17), cited by DAVIES, J., in *Dixon v. Dixon* (16) ([1953] 1 All E.R. 918):

"If HODSON, J., meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her in refusing to live with her husband, with great respect to the learned judge, it seems to me that that decision is inconsistent with the judgments in *Russell v. Russell* (8) and *Buchler v. Buchler* (19) which this court ought to follow. I myself think that that is not what the judge meant to say. I think he meant to say in effect: 'Here is a case where the blows inflicted by the husband on the wife either amounted to cruelty in that they injured her health, or were likely to injure it, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case to justify desertion, the court ought not to say: "Although they were, in effect, trivial blows, they justify her in leaving the husband"'. "

The just cause, which on the authorities must be proved, must be "grave and weighty": *Yeatman v. Yeatman* (18), per LORD PENZANCE (L.R. 1 P. & D. 494); "grave and convincing": *Buchler v. Buchler* ([1947] 1 All E.R. 321), per LORD GREENE, M.R. It may, as LORD PENZANCE said, be distinct from a matrimonial offence. For example, such conduct may be distinct from cruelty in that it lacks the element of causing injury to health or reasonable apprehension of the same. To that extent such conduct falls short of or is less than cruelty, to use the language that is to be found in many of the authorities, but it none the less must be grave and weighty and these attributes are not, I think, to be found as a rule in the kind of case to which BUCKNILL, L.J., was referring in the passage which I have read from *Edwards v. Edwards* (17).

I cannot read into the judgment of the learned judge, critical as he was of the husband's character, and anxious lest the impact of his personality on the wife might lead to another break-down of his wife's health, any justification for a finding of fact that the wife had established such misconduct on her husband's part as amounts to a grave and weighty matter justifying her in living apart from him. Moreover, medical evidence was called, but no witness said that it would be dangerous for the wife to return to her husband. She was discharged from hospital in the care of her husband when he appeared to the medical authorities to be concerned for her welfare. I would dismiss the appeal.

LLOYD-JACOB, J.: I would respectfully adopt DENNING, L.J.'s statement of the facts. The learned judge, having had the advantage of seeing and hearing the respondent, came to the conclusion that he could not accept her testimony save where it was supported by corroboration. Having so found, he came to the conclusion that this disposed of the case. I agree that, so far as concerned the respondent's cross-petition for divorce on the ground of cruelty, this finding did dispose of the matter, for the only admitted act of violence had been condoned by a period of cohabitation exceeding two years. There remained, however, the respondent wife's answer to the petition for restitution of conjugal rights. On this branch of the case, the learned judge came to the conclusion

that the petitioner was a person inclined to be overbearing, domineering, and insistent on maintaining his rights as a husband to have the household conducted in accordance with his desires, and that he had a hasty temper and habitually expressed himself in rather rapid unmeasured terms, which might have had an effect on the mind of the wife from time to time and tended to disturb the quietude of the matrimonial home. He further found that the petitioner was not a man to indulge in any physical violence, except under very strong provocation. These criticisms of the petitioner as a measure of his frailty of temper are not in themselves any evidence of a matrimonial offence, and the court is concerned with them only to the extent to which they are manifested in such intolerable excess as to create grave and weighty reasons for causing this respondent to deny herself the comfort and protection of her husband and family and the matrimonial home. The learned judge had felt constrained to hold that the respondent wife's break-down in mental health had not been proved to have been due to any wrongful conduct on the part of the husband. Having regard to the absence of any evidence pointing to any other cause, this finding must be interpreted as meaning, not that the husband's conduct had no effect on the wife's mental health, but that such conduct was not shown to be wrongful. Indeed, that the former meaning was plainly intended is indicated by the learned judge's confession of anxiety should the wife obey the order and return to her husband, in which event, he said, an effect could be produced on the wife's mind which might cause another break-down.

In my judgment, the petitioner is not entitled to an order for the restitution of conjugal rights unless and until he can satisfy the court that the respondent will not be hazarding her mental health should she obey the order of the court. The preservation of her sanity is, in my judgment, a grave and weighty matter, and for the husband to behave in an overbearing, domineering and dictatorial manner, when he has once appreciated the consequences of such behaviour to her state of mind, would no longer be an exercise of his frailty, but a wickedly cruel matrimonial offence. The petitioner's conduct in relation to the removal of his second child from the mother's custody, and his rejection of his wife's offer to return to the matrimonial home for a few days, illustrate such a lack of consideration as to satisfy me that a return under an order of the court might be fraught with the gravest peril. I could not be a party to such a consequence. I would allow the appeal so far as concerns the husband's decree of restitution.

Appeal allowed in respect of the decree for the restitution of conjugal rights, dismissed in respect of the claim for a decree of divorce.

Solicitors: *Langhams & Letts*, agents for *Philip Baker & Co.*, Birmingham (for the wife); *Bentleys, Stokes & Lowless*, agents for *Turner, Bayley & Co.*, Dudley (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

*Re CUNLIFFE-OWEN (deceased). MOUNTAIN AND ANOTHER
v. INLAND REVENUE COMMISSIONERS.*

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.),
May 11, 12, 1953.]

Legacy Duty—Exemption—“Event” occurring after commencement of Finance Act, 1949—Determination of interest—Completion of administration and distribution of estate after July 30, 1949—Finance Act, 1949 (c. 47), s. 27 (2) (b), (e).

A testator, who died on Dec. 14, 1947, and whose will was proved on Feb. 3, 1948, made common form provisions in his will for the ascertainment and distribution of his residuary estate, bequeathing shares thereof to a stranger in blood and his children absolutely. The executors claimed that no legacy duty was payable in respect of any part of the residuary estate distributed by them since July 30, 1949 (when the Finance Act, 1949, s. 27, came into operation).

HELD: it could not be said that pending completion of the administration a residuary legatee had no interest in the residuary estate beyond a mere expectancy, nor that, as a corollary, the executors had any estate or interest in the assets of which on a distribution by the executors there was a “determination” within s. 27 (2) (b) of the Act of 1949; the assent of the executors to the vesting of the estate in the legatees did not depend for its validity and effect on the testator’s will, but on the executors’ own volition, and, furthermore (a) neither the assent, nor the completion of the administration, could be said as regards each legatee to affect “the right to the legacy or the enjoyment thereof”, and (b) the distribution did not change “the nature of the property comprised” in the legacies, and, therefore, no “event” within s. 27 (2) (e) occurred on the distribution; and, accordingly, the legacy duty chargeable was not payable in connection with any of the events referred to in s. 27, and no exemption was thereby conferred.

Lord Sudeley v. A.-G. ([1897] A.C. 11), and *Barnardo’s Homes v. Income Tax Special Comrs.* ([1921] 2 A.C. 1), considered.

Dicta of SIR WILFRID GREENE, M.R., in *Corbett v. Inland Revenue Comrs.* ([1937] 4 All E.R. 704, 705, 707), explained.

Re Gibbs ([1951] 2 All E.R. 63), approved.

FOR THE FINANCE ACT, 1949, s. 27, see HALSBURY’S STATUTES, Second Edn., Vol. 28, p. 522.

Cases referred to:

- (1) *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 23 Digest 463, 5354.
- (2) *Barnardo’s Homes v. Income Tax Special Comrs.*, [1921] 2 A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; *sub nom. R. v. Income Tax Acts Special Purposes Comrs. Ex p. Barnardo’s Homes National Incorporated Assocn.*, 7 Tax Cas. 646; 23 Digest 394, 4653.
- (3) *Corbett v. Inland Revenue Comrs.*, [1937] 4 All E.R. 700; [1938] 1 K.B. 567; 107 L.J.K.B. 276; 158 L.T. 98; 21 Tax Cas. 449; Digest Supp.
- (4) *Re Gibbs*, [1951] 2 All E.R. 63; [1951] Ch. 933; 2nd Digest Supp.
- (5) *Cooper v. Cooper*, (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 23 Digest 468, 5375.
- (6) *Vanneck v. Benham*, [1917] 1 Ch. 60; 86 L.J.Ch. 7; 115 L.T. 588; 23 Digest 468, 5376.
- (7) *Blake v. Bayne*, [1908] A.C. 371; 77 L.J.P.C. 97; 99 L.T. 35; 23 Digest 225, 2719.
- (8) *Allhusen v. Whittell*, (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest 464, 5358.

- (9) *Attenborough v. Solomon*, [1913] A.C. 76; 82 L.J.Ch. 178; 107 L.T. 833; 23 Digest 390, 4607.
- (10) *Re D'Avigdor-Goldsmid*, [1951] 2 All E.R. 543; [1951] Ch. 1038; 2nd Digest Supp.
- (11) *Inland Revenue Comrs. v. Smith*, [1930] 1 K.B. 713; 99 L.J.K.B. 361; 142 L.T. 517; 15 Tax Cas. 661; Digest Supp.

A APPEAL by the executors of the will of Sir Hugo Cunliffe-Owen, Bart., deceased, from an order of UPJOHN, J., dated Jan. 13, 1953.

B The testator, who died on Dec. 14, 1947, and whose will was proved on Feb. 3, 1948, by his will gave directions in common form for the ascertainment and distribution of his residuary estate to the residuary legatees, who, in the events which had happened, took absolute interests. Distribution was (in part) not made before the commencement of the Finance Act, 1949, and the executors claimed that, by virtue of s. 27 thereof, any assets distributed thereafter were exempt from legacy duty. UPJOHN, J., regarded himself as bound by the decision of DANCKWERTS, J., in *Re Gibbs* (4) ([1951] 2 All E.R. 63) and, therefore, held that legacy duty was payable notwithstanding that distribution did not take place until after July 30, 1949.

C *Pennycuik, Q.C.*, and *J. A. Wolfe* for the plaintiffs, the executors.
The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and *J. H. Stamp* for the Crown.

D SIR RAYMOND EVERSHED, M.R.: On Nov. 22, 1947, the late Sir Hugo Cunliffe-Owen made his will, which was proved by the present plaintiffs on Feb. 3, 1948, the testator having died on Dec. 14, 1947. The estate was very considerable. The will made provision in a form which it is not, I think, necessary to read (but which is in what is called common form) for the ascertainment and distribution of residue among certain persons. Since the date of the death, there have, I understand, been some deeds of arrangement entered into which have affected in some degree the exact beneficial interests taken under the will. For present purposes, it is sufficient to state that half the residue went to a stranger in blood absolutely, and the other half was divided between the testator's son, who took three-quarters of it, and his two daughters who took equally the other quarter. Under the provisions of the Legacy Duty Act, 1796, but having regard also to the change in the rate of legacy duty brought about by the Finance Act, 1947, the first half of the residue attracted legacy duty at the rate of twenty per cent. and the other half at the rate of two per cent.—subject in each case to the question now before the court. What I have said will indicate that the amount of duty involved in respect of residue is very considerable. It is, however, the claim of the executors in the present action that no legacy duty is payable in respect of residue or, at any rate, in respect of such part of the residue as has been distributed since July 30, 1949, or will be distributed in the future. That claim rests on the provisions of the Finance Act, 1949, s. 27, which had the effect of abolishing legacy duty and succession duty in the cases specified in the section.

G It will, I think, be convenient if I read at once substantially the whole of s. 27:

H “ (1) Legacy duty and succession duty shall not be chargeable on a legacy derived from a testator or intestate dying after the commencement of this Part of this Act, [July 30, 1949] or on a succession conferred after that commencement, nor on any other legacy or succession in so far as the duty would apart from this section be payable in connection with any such event as is mentioned in the next following sub-section. (2) The events referred to in the foregoing sub-section are any of the following events happening after [July 30, 1949] that is to say—(a) the death of any person;

(b) the determination or failure of any charge, estate, interest or trust; (c) the exercise of a power of appointment; (d) the making of any payment or the application of any property, if the duty would apart from this section be chargeable . . . (e) any other event which, under the provisions of the relevant will or disposition or the rules governing the distribution of the intestate's estate, affects the right to the legacy or succession or to the enjoyment thereof or which changes the nature of the property comprised therein or any part of that property. (3) The reference in sub-s. (1) of this section to duty being payable in connection with an event shall, in relation to legacy duty, include its being payable when the legacy is paid, delivered, retained, satisfied or discharged in connection with that event, and for the purposes of this section the expression 'legacy' includes residue and share of residue."

Sub-section (4) relates exclusively to succession duty, and for the purposes of the present appeal it has been agreed between the executors and the Crown that we may confine our attention to the claim for exemption from legacy duty.

Put in a sentence, the claim of the executors in this case is that they are exempt from the liability to pay legacy duty, as I have already said, in respect of all residue distributed since July 30, 1949, and in respect of that which remains to be distributed henceforth, by virtue of the language of the section I have read and in particular by virtue of the provisions of sub-s. (2) (b) and (e) thereof. It is said (and this is the main premise on which the case rests for the executors) that pending final administration or pending some interim distribution a residuary legatee has—and I am using the language of counsel for the executors—only an expectancy in the eye of the law, i.e., a right at most to receive in the future whatever may be found available when provision has been made for debts and other obligations or when such debts and other obligations have been satisfied. It is only, say the executors, on the occasion of an actual distribution, or, alternatively, when administration is complete, that the interest of the residuary legatee ripens into or becomes a possessory interest. Only then does he become entitled to enjoy (in part or wholly) the subject-matter of his legacy. It, therefore, follows, say they, that when a distribution is made an interest or estate which previously existed in the executors "determines" within the meaning of sub-s. (2) (b). Alternatively, it is said that on an assent to a partial distribution, or on the final winding-up of the estate, an "event" occurs under para. (e) which under the provisions of the will of this testator either affects the right of the residuary legatee to the legacy or to the enjoyment of the legacy or which changes the nature of the property of which the legacy consists. It follows, therefore, say they, that, if the determination or the event, as the case may be, occurs after July 30, 1949, exemption from legacy duty in respect of what is distributed is afforded by virtue of s. 27. The premise which I have tried to state depends in turn very largely on certain expressions used in the House of Lords in such cases as *Lord Sudeley v. A.-G.* (1) and *Barnardo's Homes v. Income Tax Special Comrs.* (2), and also on expressions of SIR WILFRID GREENE, M.R., in *Corbett v. Inland Revenue Comrs.* (3), to which cases I shall have to return presently. The problem presented must in the end turn on the construction, according to their ordinary sense, of the words which have been used in this particular section. No one who has attended to the argument presented to this court will, I imagine, be willing to say that the problem is other than difficult.

The Solicitor-General, in presenting the case for the Crown, drew attention to the fact that the relevant language which I have already read is not the first expression of the kind on the part of Parliament. I referred a short time ago to the circumstance that by the Finance Act, 1947, legacy duty was doubled, and s. 49 of the Act of 1947, in achieving that process of duplication, used exactly the same language in sub-s. (3) as Parliament used again when it sought to

put an end to legacy duty in the Finance Act, 1949, s. 27 (2). It spoke, in 1947, of "events" in connection with which legacy duty was payable and it specified the same series of events as is specified in s. 27 (2) of the Act of 1949. Since both Acts relate to the same subject-matter, viz., legacy duty, it is, I assume legitimate for the court, in trying to solve the problem of construction, to pay regard, if it is of assistance, to the earlier expression of Parliamentary intention. Counsel for the Crown made the point that if the argument presented in this court is correct, it would follow (and I think counsel for the executors did not shrink from this result) that the question whether in any particular case legacy duty at double the previous rate would be payable would or might depend on the exact date when executors chose to assent to a legacy or when they had completed the administration of their estate. It was said that it would be a surprising result, that the amount of duty should depend on an accidental circumstance of that kind, or if accidental circumstance be not an entirely correct phrase, on a matter so much in the discretion of the executors in the performance of their administrative duties. Still, the question is: What has been said by Parliament and what is the effect of the language they have used? I say no more, therefore, on the earlier Act than this (and what may be said about that Act equally may be said about this Act) that, to my mind, at first sight, it is remarkable that (if the executors are right) the incidence of double duty in the one case and exemption in the other should depend on events of the character which I have mentioned, viz., the decision of executors to make a partial or final distribution or on their having completed the process of administration which, as everybody knows, may be prolonged for good or other reasons over a great length of time. The problem none the less is, as I have just said, a question what is the sensible meaning of the language used.

When the matter came before UPJOHN, J., he regarded himself as bound by an earlier decision in *Re Gibbs* (4), in which DANCKWERTS, J., construed the relevant provisions of this section in a sense which was fatal to the subject in that case. I have come to the conclusion that the decision of DANCKWERTS, J., in *Re Gibbs* (4), was correct and that he rightly construed the relevant provisions of this somewhat difficult section, but it is plainly due to the careful arguments to which we have attended that I should state my own reasons for that conclusion though I am, in large measure, content to adopt the language used by DANCKWERTS, J., in *Re Gibbs* (4).

First, I must say something about *Lord Sudeley v. A.-G.* (1), *Barnardo's Homes v. Income Tax Special Comrs.* (2), and *Corbett v. Inland Revenue Comrs.* (3) which, as I have said, largely form the basis of the arguments which the executors have put forward.

In the *Sudeley* case (1) the question was whether one who was entitled to residue under the will of another, but who had died before the completion of the administration of that other's estate, was to be treated as having acquired an interest as residuary legatee in certain specific assets which were situate in New Zealand (for if so those assets would not be subject to English duty on the legatee's death), or whether the residuary legatee must be treated as having an interest generally in the estate of the first testator which was being wound up in England and in respect of which, as an English asset, duty would be leviable in this country. The House of Lords decided in favour of the latter view. In the course of his reasons LORD HERSCHELL (to take his speech as an example) pointed out ([1897] A.C. 18) that, administration not being completed, the legatee had no "estate, right, or interest, legal or equitable" in the specific New Zealand real property.

In the *Barnardo's* case (2) a similar view was the basis of the decision that sums paid on account (pending the completion of the administration) to the charity, Dr. Barnardo's Homes, which consisted in fact of income from which tax had been deducted, could not be treated as being or as having been the income

of the charity so as to enable the charity to claim a return of the income tax as having been paid on the charity's behalf. Again (and I need not refer to the precise language of the speeches, particularly that of VISCOUNT FINLAY which was later quoted in the *Corbett* case (3)) the decision rested on the view that the legatee, Dr. Barnardo's Homes, could not, in the circumstances, say that it was entitled to any of the items of property out of which their legacy was ultimately payable. Those two cases, as it seems to me, taken by themselves, do not carry the executors the distance which they seek to be carried. It is one thing to say that, pending final administration, a residuary legatee is not entitled to any estate, right, or interest whether legal or equitable in any specific item of property, but it is another thing to say (and it does not follow from the first proposition, in my opinion) that pending administration the residuary legatee has no interest in the estate at all or is enjoying a mere expectancy. A

In the case in this court of *Corbett v. Inland Revenue Comrs.* (3), there is certain language which, read apart from its context, might appear to go somewhat further. Before, therefore, I refer to it I draw attention to cases such as *Cooper v. Cooper* (5), to which counsel for the Crown referred, for that case seems to me to refute the proposition which is said, as I venture to think erroneously, to flow from *Lord Sudeley v. A.-G.* (1) and *Barnardo's Homes v. Income Tax Special Comrs.* (2), viz., the proposition that pending final administration and distribution the residuary legatee has no title or interest at all in residue. If it is thought that cases such as *Lord Sudeley v. A.-G.* (1) and *Barnardo's Homes* (2) are not easily reconcilable with *Cooper v. Cooper* (5) (which was not, in fact, cited in *Lord Sudeley's* case (1)), the solution, as it seems to me, can be found in the language which YOUNGER, J., used in *Vanneck v. Benham* (6). YOUNGER, J., there used language which I respectfully adopt and to which, indeed, I do not desire to add anything of my own. After saying that it was unfortunate that *Cooper v. Cooper* (5) was not cited in *Lord Sudeley v. A.-G.* (1), and also that *Lord Sudeley's* case (1) was not cited in *Blake v. Bayne* (7), he goes on ([1917] 1 Ch. 76): B C D

"But I think it is not difficult to arrive at the true distinction between the two lines of authority which at first sight may seem to be in conflict. The distinction, it appears to me, is that an interest in an intestate's estate is sufficiently specific to raise a case of election, [which was the *Cooper* case (5)] representing as that interest does all the money's worth of the property comprised therein, but that such interest is not sufficiently specific, apart from agreement with the next of kin where there are more than one, to enable any one of the next of kin to say to the administrator 'This or that thing is mine. Hand it over to me'." E F

In *Corbett v. Inland Revenue Comrs.* (3), SIR WILFRID GREENE, M.R., had referred to what had been said in the *Barnardo* case (2) and went on ([1937] 4 All E.R. 704): G

"It is quite obvious from that observation that, in the view of VISCOUNT BUCKMASTER, at any rate, the principle underlying the *Barnardo* case (2) was not a limited principle turning entirely on the precise language of the provisions of the Income Tax Act relating to the exemption of charities. He read it, as I read it, as deciding the case of the charity concerned upon the larger principle that, until the residue is ascertained in the due course of administration, the beneficiaries have no title to that residue." H

If the learned Master of the Rolls had said "have no title to residue" instead of "to that residue", I think counsel for the executors might well have fastened on such language as supporting the underlying principle on which he sought to rely, but I think in the context SIR WILFRID GREENE, M.R. meant no more than that, as was, indeed, pointed out in the *Lord Sudeley* case (1), until residue had been finally ascertained, the beneficiaries could not say as respects any or

all of the items which eventually made it up: "This or that is mine. Hand it to me". Later, SIR WILFRID GREENE, M.R., said (*ibid.*, 705):

"But, in the case of executors, it is not true to say (and this is how I read the opinion of VISCOUNT FINLAY) [in the *Barnardo* case (2)] that the income, when received by executors pending the conclusion of the administration, is the income of the beneficiaries in that sense."

A Again, I think the last three words make clear that the Master of the Rolls was not seeking to go at all beyond what had been laid down in the two House of Lords cases. In my judgment, the same observation may again be made with regard to the language used where SIR WILFRID GREENE, M.R., came to his conclusion on the effect of the rule in *Allhusen v. Whittell* (8), and he used the words (*ibid.*, 707):

B "In my opinion, the existence of the rule in *Allhusen v. Whittell* (8) cannot alter the fundamental fact that, during the period of administration, the income is the executor's income and nobody else's. As LORD ATKINSON said, and as had been pointed out by LORD STERNDAL, M.R., and by ATKIN, L.J. (as he then was), in the Court of Appeal, the residue does not exist until the estate is cleared."

C I cannot, therefore, accept the proposition that either on the authority of the cases referred to or otherwise, pending final administration, or pending a partial distribution, the residuary legatee has no interest in residue beyond what counsel for the executors has called a mere expectancy. I think his title to the residue is there from the start and, indeed, the *Sudeley* case (1) shows that if he should die before he actually comes into possession of it his estate will be liable to pay duty on the value of that interest in residue ascertained as best may be in the circumstances. The effect, undoubtedly, of the conclusion of administration or of a partial distribution is to enable the legatee to say, and to say for the first time as regards the subject-matter distributed: "This particular property is now mine".

E With that introduction, and having stated what I believe to be the limits of the proposition for which *Sudeley's* case (1) and *Barnardo's* case (2) are authorities, I turn to consider the argument which, as I have stated, turns on para. (b) and para. (e) of s. 27 (2) of the Act of 1949. I take first para. (b). Can it be said that when a partial distribution or a final distribution is made, then there is within the meaning of this sub-section the "determination" of an estate or interest? In his opening speech counsel for the executors put his

F emphasis on the submission that since, quoad the subject-matter distributed, the beneficiary had, pending the distribution, no beneficial interest in it, there, therefore, must be inferred and there must exist an equitable interest in the subject-matter so distributed, which equitable interest belonged to the executors until the moment of distribution, but then determined. I think that in approaching the construction of this sub-section it is legitimate to note that the various

G instances given seem to me, at any rate, *prima facie*, to be referable to beneficial interests of some kind or another. After all, the sub-section is dealing with events in connection with which legacy duty is or would, but for the section, be payable, and legacy duty is payable (putting it quite broadly) when the legatee gets his legacy. The phrase "determination or failure of an estate or interest" is one commonly met with in conveyances and documents of that

H kind and would, I think, *prima facie*, be treated as appropriate to beneficial interests of some sort or another. It seems to me, I confess, as a matter of language, that even if an equitable estate in the executors does come to an end on the happening of the event in question, it would be an inappropriate use of language to speak of that event as "determining" such an interest in the executors. But I do not think it right to regard the estate of an executor, pending distribution, as having some equitable quality as well as, but distinct from, the legal estate which, undoubtedly, is vested in the executors. I do not

think it right to suppose that every piece of property must have in it the double characteristic of a legal and an equitable estate. The equitable estate in the sense of a proprietary interest which exists and is treated in these courts as existing in many species of property is, in many cases, no more than the consequence of the circumstance that the person entitled to it has during the development of our equity been treated as entitled to particular equitable remedies. It is obvious, in any event, that the executors have no beneficial interest. Their duty is to apply the assets in their hands in due course of administration. I do not, therefore, accept the view that there is any "equitable interest" in the executors which can be fairly said to determine when they hand over any part of the residue.

In the course of his reply, counsel for the executors fastened rather on something which had been said on the other side and said that what determined was what was called in *Attenborough v. Solomon* (9) in the House of Lords (to which case I will come back presently) the plenum dominium of the executors. Pending distribution, all the items making up the estate are in the plenum dominium of the executors. They have a good title, e.g., to charge them for the purpose of raising money. When they hand any asset over to the legatee it is obvious that the dominium then comes to an end. Equally, the plenum dominium would come to an end if they paid a creditor, so far as the subject-matter handed over is concerned. As a matter, therefore, of the language used, and without attempting to expound the matter any further, it seems to me that sub-s. (2) (b), in speaking of the "determination . . . of any . . . estate [or] interest", is not directed to and is not fairly descriptive of that which happens when an executor parts with assets which were formerly in his hands by handing them over, in the course of partial distribution or otherwise, to a residuary legatee. I, accordingly (construing the paragraph as I have tried to do according to its ordinary significance), reject the argument that on payment to a residuary legatee there can fairly be said to occur a "determination of estate or interest".

There remains, however, para. (e) which has seemed to me to present a more difficult problem, and so, I gather, DANCKWERTS, J., also thought. I shall be forgiven, I hope, if I read it again in order to state what is the argument on para. (e):

"any other event which, under the provisions of the relevant will . . . affects the right to the legacy . . . or to the enjoyment thereof or which changes the nature of the property comprised therein . . ."

Again, I think (though counsel for the executors will not, I trust, regard me as saying this in any critical sense), that the argument of the executors somewhat shifted its emphasis in reply from what it had been when opened, for the emphasis put by counsel in opening was rather on the final completion of administration as constituting the "event" within the meaning of the paragraph. In reply, he was content to take as the "event" the assent by the executor to the vesting in the legatee in possession of the whole or any part of the subject-matter of his legacy—a shifting of emphasis which may have been due in no small measure to an argument put forward by junior counsel for the Crown, to which I shall refer in a moment. I venture to repeat, in approaching this question, what I have already indicated, viz., that without desiring to lay it down that the "other event" must be necessarily ejusdem generis with those mentioned in para. (a), para. (b), para. (c) and para. (d), still, as a first impression created on my mind by the sub-section, I should not expect to find that the "event" in para. (e) is a purely administrative act. But whatever the event is, it must (according to the paragraph) be an event which *under the provisions of the will*, has a certain effect. Junior counsel for the Crown pointed out that an assent by an executor is something which may be, and in strictness frequently is, altogether unrelated to any direction which the will may contain. Whatever the will may say, the

executor has a duty to administer the estate, pay the creditors, and so forth, and he may decide at any point of time to assent to any part of any legatee's legacy being handed over to that legatee. He may do so if he wishes without having the assets or any single asset sold, notwithstanding the most comprehensive trusts for sale which he may find in the will.

A The point is made clear by VISCOUNT HALDANE, L.C., in his speech in *Attenborough v. Solomon* (9). The question in that case was whether the executor of the will there in question was still acting in that capacity when he pledged certain property of his testator. If Mr. Solomon was still an executor, then his right to pledge was unquestioned. If, however, he had ceased to be an executor and had become a trustee, then no less plainly he had no right whatever to pledge the particular asset. The particular transaction took place some fourteen years after the testator's death, but it was argued that, since sometimes B administration continues for a very long period of time, the court ought to treat Mr. Solomon as being still an executor when he made the particular pledge. It is in connection with that submission that the language which I am about to cite from LORD HALDANE was used. He said ([1913] A.C. 81):

C " . . . the meaning of a residuary account must of course be construed with reference to its purpose. It is not a document which is intended to have the operation of a declaration of trust; but it may be looked at as against the executor as evidence of what he regarded as being the position of the estate. I think it is plain from that document that Mr. J. D. Solomon regarded the debts as having been all paid and the estate as ready to be held upon the trusts of the will which affected it in the hands of the trustees . . . D The general principles of law which govern this case are not doubtful. The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator, which vests him with the plenum dominium over the testator's chattels. He takes that, I say, by virtue of his office. The will becomes operative so far E as its dispositions of personalty are concerned only if and when the executor assents to those dispositions."

As LORD HALDANE observed, the question whether an assent has taken place, whether there has been full administration, is a question of fact depending on the executor's determination, and may often be a matter of fact not at all easy to ascertain or determine with precision. If that is so, it lends some F colour, at any rate, to the view which I take that para. (e) is not likely to be referring to an event so uncertain and difficult of precise definition.

The question is, having particular regard to the language used by LORD HALDANE: Can it be said that an assent is an "event" under the provisions of the will within the meaning of para. (e)? In a sense it can, no doubt, be said, as G counsel for the executor said in this case, that the executors were carrying out the directions of the will. Still, I think the point made by junior counsel for the Crown is well founded. The assent really is something which depends for its validity and effect, not on the provisions of the will, but on the executor's own volition in the conduct by him of his duties of administration according to the general law. But, further, I am also of opinion that the assent or the final administration, whichever event is regarded, cannot strictly be said to "affect H the right to the legacy or to the enjoyment thereof". I do not, of course, forget that on the assent taking effect the legatee for the first time is entitled to say, as regards the property distributed: "This now is mine". From that point of time he enjoys a possession of that property, but still, according to the language used, it seems to me that what is here spoken of is an event which affects something which was already pre-existing. I have already said that as a matter of law I think the right to the legacy previously existed, and existed from the testator's death. The actual or physical enjoyment may spring up

from the moment of the distribution, but then, if it did not exist before, the event in question cannot fairly be said to have "affected" it.

Finally, it was said that the "event" of distribution or the final winding-up "changed the nature of the property comprised" therein. I also reject that argument. Those words, in my judgment, refer to something which changes the nature of the property as distinct from the interest in it. For example, in the case of heirlooms, if a sale takes place, then the nature of the subject-matter of the legacy changes and that is a circumstance very relevant to the liability to pay duty. But in a case such as the present the nature of the property distributed is, in point of fact, identical immediately before and immediately after the assent. The assent itself does not affect the nature of the property which is the subject of the distribution.

For these reasons I reject all the arguments based on para. (e), but I think further force is added to the contrary contention by sub-s. (3), and as regards the effect of that sub-section, I am, for my part, content to adopt what was said by DANCKWERTS, J., in *Re Gibbs* (4). Before I read that part of his judgment, I would also like to read and adopt (because it is, in my judgment, correct) what the learned judge said on the more general question. DANCKWERTS, J., said ([1951] 2 All E.R. 68):

" . . . it seems to me that the title of the residuary legatee to a residuary estate remains the same both before and after the completion of administration notwithstanding that it is not until it is complete that he can say that any particular asset or any particular income is his and not merely part of the general estate of the testator."

In my judgment, that is a correct summary of the conclusion on the general argument. The learned judge then goes on to deal with sub-s. (3) (*ibid.*):

"When I turn to sub-s. (3) which refers back, not to sub-s. (2), but to sub-s. (1), it seems to me that the argument which was put forward by counsel for the Crown that the administrative act was not an event within the meaning of the section is plainly right. It would have been easy for the legislature, if they had so intended, to say that the reference to duty being payable in connection with an event should be a reference to duty being payable in connection with the payment, delivery, retainer, satisfaction, or discharge of the legacy. That would have brought in the rules about payment which are contained in the Legacy Duty Act, 1796, but that is not what the sub-section says. The sub-section refers to the duty being payable in connection with the event. Then, when s. 27 deals in sub-s. (3) with delivery and retainer, the words are 'shall, in relation to legacy duty, include its being payable when the legacy is paid, delivered, retained, satisfied or discharged in connection with that event . . .'"

In other words, the event is something different from the "delivery, retainer, satisfaction, discharge or payment". As I have said, I respectfully adopt that part of the learned judge's judgment which seems to me somewhat strongly to support the view that an assent or a retainer (which is in effect the same thing) is not an event within the contemplation of para. (e).

A point was taken during the argument in connection with sub-s. (3). Counsel for the executors noted that the word used is "include" and not "mean". I agree that according to the ordinary sense of the language "include" is a word of expansion. It is, I agree, difficult to think of any case in which legacy duty might be payable strictly "in connection with" one of the events stated in sub-s. (2), without recourse to the exposition in sub-s. (3). My answer is that the word "include" may well have been used *ex abundanti cautela*, and in any revenue statute I think caution may be easily justified. Other points I shall, I hope, be forgiven for not mentioning in detail, but, as regards para. (e), I should add that, in my judgment, no help can be got from the phrase "the rules

governing the distribution of the intestate's estate", for, as I think, those words refer to Part IV of the Administration of Estates Act, 1925, and do not, therefore, serve to introduce the language of Part III which contains the purely administrative matters provided for in that Act. If those administrative events were introduced, it might, no doubt, assist the executors to say that the "event" stated in para. (e) might, at any rate, include a purely administrative event. As I say, however, in my judgment, the rules referred to are rules for the beneficial devolution of an intestate's estate which are to be found in Part IV of the Act of 1925.

For the reasons which I have stated I think that the judgment of DANCKWERTS, J., in *Re Gibbs* (4) was correct and that UPJOHN, J., was, therefore, right in dismissing the present action.

DENNING, L.J.: I agree. Stripped of all trimmings, the executors' argument came to this, that on any legacy paid after the Act of 1949 no legacy duty is payable. As a corollary, they admitted that on any legacy paid after the Act of 1947 and before the Act of 1949 double duty was payable. All I would say is that, if that was the intention of the legislature, there would have been nothing easier than to say it, and they have not said it. Apart from that, it would be most capricious to give such an operation to the Act because it would mean that the incidence of duty would depend on the expedition or the dilatoriness of the executors.

Counsel for the executors relied, first, on s. 27 (2) (b) of the Act of 1949. When counsel opened the case, he asserted that until the executors had administered the testator's estate they had the entire legal and equitable interest in the property comprised in it, and that when they completed the administration and became trustees, then there was a "determination or failure" of their equitable interest and, therefore, an event within s. 27 (2) (b). He relied on *Lord Sudeley v. A.-G.* (1). I entirely dissent from that proposition. An executor has, of course, the legal interest in the property, but he has not the equitable or beneficial interest. Subject to the payment of duties, the legatees have the beneficial interest in it, and they have that interest from the date of the death. When the estate is administered the interest remains intact. It does not fail or determine.

Secondly, counsel relied on s. 27 (2) (e). He said that when the executors gave their assent to a legacy, that assent "affected the right to the legacy or to the enjoyment thereof" and, therefore, was an event within the paragraph. As to that, I would say the right of a legatee to his legacy, whether specific or residuary, arises on the death, but it can be asserted only by calling on the executor to do his duty: *Cooper v. Cooper* (5). The assent by the executor does not affect the nature of the right or even the enjoyment of it. It only links the right to specific property. It is merely the occasion when the right is realised. This distinction—between the right itself and the realisation of it—is one well known to the law. It is repeatedly taken in the cases where a debt is said to be debitum in praesenti, solvendum in futuro, and is illustrated by *Re D'Avigdor-Goldsmid* (10) in the House of Lords. It seems to me that on this question of "affecting enjoyment thereof", the answer is that the assent may affect the enjoyment of the property comprised in the right, but it does not affect the enjoyment of the right itself. For these reasons I entirely agree with the judgment which my Lord has proposed.

ROMER, L.J.: I also agree and have very little to add. In the course of the executors' opening, counsel suggested, as I understood it, that there is always some equitable element or interest attaching to the ownership of property. I cannot accept that at all. It is quite true that there are certain interests in property which were the creation of the courts of equity and certain remedies which the courts of equity evolved, but to say that there is always an element of equitable title in the ownership of property is, in my opinion, unsound.

Starting from that premise, it was then suggested that an executor during the period of administration has not only the legal interest in the assets, but also some kind of equitable interest (not amounting to a beneficial interest) which the court would cease to recognise when the estate is cleared. For my part, I cannot see of what that interest can be said to consist. If there is such an interest, presumably it would be capable of definition and no satisfactory explanation either of its nature or of its quality was forthcoming in the course of the argument. In my opinion, the executors have no equitable interest during the period of administration in the manner that was suggested.

As an alternative way of putting it, it was said that every time the executor assents to a pecuniary legacy or to the payment or retention of a share of the residue, there is pro tanto a determination or failure of the executors' estate or interest in the assets. If that be so, there would be a succession or series of determinations or failures of that character as the executors paid the debts and legacies. I am quite satisfied that that was very far removed from the conception which the legislature had in its mind in enacting s. 27 (2) (b). The language there, "the determination or failure of any charge, estate, interest or trust" is well-known language signifying a reference to beneficial interests as, indeed, in my opinion, is the language of para. (a), para. (c) and para. (d) as well. It is my view that all these specific events enumerated there are referable to beneficial interests and are not in the least directed to mere acts of administration. I think myself that para. (e), which starts with the words "any other event", in itself casts some light on para. (a), para. (b), para. (c) and para. (d), and that they themselves cast some light on para. (e). DANCKWERTS, J., rather applied the ejusdem construction to para. (e), having regard to the opening words which I have mentioned—"any other event", and I think he was right. Apart from that phrase, which would tend to bring forward into para. (e) the beneficial elements which are derived from para. (a) to para. (d), one then finds in para. (e) a reference to "rules governing the distribution of the intestate's estate". It seems to me to be reasonably plain, as my Lord has indicated in his judgment, that that is a reference to Part IV of the Administration of Estates Act, 1925, which is entitled: "Distribution of residuary estate", which means the residuary estates of intestates and is not referable to Part III which is entitled "Administration of assets". The word "rules" is a curious word to use, but it seems to me to be quite in conformity with the view that it is a reference to Part IV and does not bring in the totality of the provisions of the Administration of Estates Act, 1925, which relate to administration and distribution generally. Had it referred generally to the provision as to intestates' estates, it might have been more adapted to that purpose. So I think myself that, taking para. (a), para. (b), para. (c) and para. (d) both by themselves and also in conjunction with para. (e), the conclusion is that the events in all of these subsidiary provisions are referable and referable alone to events of a beneficial character. If that be so, it is enough to dispose of the suggestion that an assent is an event within the meaning of para. (e) because that is merely an act of administration, but, apart from that, the point which, I think, is quite decisive against the executors on para. (e) is that the event must be one which is an event under the provisions of the will. For the reasons to which junior counsel for the Crown referred (supported as they are by what VISCOUNT HALDANE, L.C., said in *Attenborough v. Solomon* (9), and the further observations of this court in *Inland Revenue Comrs. v. Smith* (11)) it appears to me to be virtually impossible to say that an assent by executors is a provision under the will. It is nothing of the kind. It is an administrative act imposed by the law on executors which they are bound to perform, regardless of anything in the will contained, and which is so far removed from being a provision of the will that none of the beneficial provisions of the will come into operation at all until the assent has been given. Therefore, if it is said that the assent

is a provision under the will which affects the right to the legacy, one looks to the will, and one looks in vain, to find a provision there which could be regarded as having the result for which the executors contend. I think that point is decisive on para. (e) and I say no more about it.

In conclusion, I would like to associate myself with what my Lord said and to express my complete concurrence with the passage in the judgment of DANCKWERTS, J., in *Re Gibbs* (4), where he said ([1951] 2 All E.R. 68):

"... it seems to me that the title of the residuary legatee to a residuary estate remains the same both before and after the completion of administration notwithstanding that it is not until it is complete that he can say that any particular asset or any particular income is his and not merely part of the general estate of the testator."

B If I may respectfully say so, that appears to me to be a lucid and entirely accurate statement of the law in that respect. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *W. Gordon Hill* (for the executors); *Solicitor of Inland Revenue*.
[Reported by F. GUTTMAN, Esq., *Barrister-at-Law*.]

JENNINGS (INSPECTOR OF TAXES) v. MIDDLESBROUGH CORPORATION.

[CHANCERY DIVISION (Upjohn, J.), April 29, 30, May 20, 1953.]

Income Tax—Profits—Profits arising from ownership and occupation of land—Town hall used for activities in the nature of trade—No apportionment of profits between trade and ownership of land—Income Tax Act, 1918 (c. 40), sched. A, sched. D, Rules Applicable to Cases I and II, r. 5.

A municipal corporation carried on three classes of activities at their town hall: the organisation of public dances, roller skating, and the hiring out of the hall for meetings of charitable and religious societies and political bodies. Charges for dancing and roller skating were made which covered a band (or music from gramophone records), lighting, heating, and sitting-out accommodation, and there were also provided, at an extra charge, refreshments, cloak-room accommodation, and the hire of skates. Charges for the hire of the hall for meetings covered provision of chairs and heating, and small additional charges were made for stewards, cloak-room attendants and lighting, if required. The corporation made a profit on these activities.

HELD: no apportionment of the profits fell to be made between those referable to the provision of chattels and services and those (covered by the sched. A assessment) referable to the exploitation of the corporation's right of property in the town hall, the whole of the profits being assessable under Case I of sched. D, with an allowance therefrom, by virtue of r. 5 of the Rules Applicable to Cases I and II of sched. D, of the amount of the sched. A assessment of the town hall.

Dictum of VISCOUNT CAVE in *Coman v. Rotunda Hospital, Dublin (Governors)* ([1921] 1 A.C. 22), applied.

Dictum of LORD GREENE, M.R., in *Croft v. Sywell Aerodrome, Ltd.* ([1942] 1 All E.R. 119), not followed.

AS TO PROFITS FALLING WITHIN CHARGE UNDER TWO OR MORE SCHEDULES, see *HALSBURY*, Hailsham Edn., Vol. 17, pp. 31, 32, 83, paras. 50, 53, 168; and FOR CASES, see *DIGEST*, Vol. 28, pp. 20, 22, Nos. 99, 116-119.

Cases referred to:

(1) *Croft v. Sywell Aerodrome, Ltd., Sywell Aerodrome, Ltd. v. Croft*, [1942] 1 All E.R. 110; [1942] 1 K.B. 317; 111 L.J.K.B. 215; 24 Tax Cas. 126; 2nd Digest Supp.

- (2) *Coman v. Rotunda Hospital, Dublin (Governors)*, [1921] 1 A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; *sub nom. Rotunda Hospital, Dublin (Governors) v. Coman*, 7 Tax Cas. 517; 28 Digest 82, 462.
- (3) *Fry v. Salisbury House Estate, Ltd., Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (4) *Shop Investments, Ltd. v. Sweet*, [1940] 1 All E.R. 533; 163 L.T. 92; 23 Tax Cas. 39; 2nd Digest Supp. A
- (5) *Glanely (Lord) v. Wightman*, [1933] A.C. 618; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634; Digest Supp.
- (6) *Carlisle & Silloth Golf Club v. Smith*, [1913] 3 K.B. 75; 82 L.J.K.B. 837; 108 L.T. 785; 6 Tax Cas. 198; 28 Digest 17, 90.

CASE STATED by the Special Commissioners of Income Tax. B

The Middlesbrough Corporation appealed against assessments to income tax for 1938-39 to 1946-47 inclusive made on them under sched. D to the Income Tax Act, 1918, in respect of profits arising from activities in relation to their town hall. Such activities comprised hiring the hall out for meetings and other gatherings, the organisation of public dances in the hall, and the organisation of roller skating for the public in the crypt. In connection with all three activities, the corporation provided the necessary services such as seating, lighting, heating, a dance band, refreshments and cloak-room facilities. They made charges to persons hiring the hall and to members of the public admitted thereto for dancing and roller skating, and the total charges after deducting all expenditure resulted in each year in a profit. The assessments were made on the footing that the whole of this profit was assessable to income tax under sched. D, subject to a deduction in respect of the net annual value of the hall assessed under sched. A. The corporation contended that the profits fell to be apportioned as between (i) those referable to the corporation's exploitation of their right of property in the hall, which they contended was covered by the sched. A assessment on the hall, and (ii) those referable to the provision of chattels and services which alone fell to be assessed under sched. D. The Crown contended that the corporation's activities at the hall constituted a trade or adventure or concern in the nature of trade, the whole of the profits of which were chargeable to income tax under Case I of sched. D, subject only to an allowance in respect of the annual value of the hall prescribed by r. 5 of the Rules Applicable to Cases I and II, and that no such segregation or apportionment of profits as the corporation claimed fell to be made. The commissioners found that the corporation's activities were conducted regularly, systematically and on commercial principles, and constituted the carrying on of a concern in the nature of trade the profits of which were assessable to income tax under Case I of sched. D, and that the differences between the three activities were differences of degree and not of principle. They held that, on the authority of the reasoning of LORD GREENE, M.R., in *Croft v. Sywell Aerodrome, Ltd.* (1) ([1942] 1 All E.R. 110), the profits under all three heads must be apportioned between those referable to the corporation's exploitation of their right of property in the hall, covered by the sched. A assessment on the hall and excluded from the sched. D assessment, and those referable to the provision of chattels and services. They apportioned the profits totalling in nine years £31,415, between services, £10,996, and property, £20,419. The Crown appealed. C
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Cyril King, Q.C., and *Sir Reginald Hills* for the Crown.

Grant, Q.C., *Mustoe, Q.C.*, and *R. R. D. Phillips* for the corporation.

Cur. adv. vult.

May 20. UPJOHN, J., read the following judgment. This is an appeal by the Crown from a decision of the Special Commissioners of Income Tax who directed that an apportionment be made of profits accruing to the respondent

corporation in respect of certain activities carried on by them in their town hall, the relevant years of assessment being from 1938-39 to 1946-47 inclusive. The law was then altered in the Finance Act, 1948, and the point which I have to decide cannot, I understand, arise for the future.

A In 1887 the corporation created a fine town hall in the then fashionable neo-Gothic style. The hall is a large one and contains a hall capable of seating some sixteen hundred persons and under it a crypt. The hall is not used for meetings of the town council or for the purpose of transacting its day-to-day business, for there are separate council offices, but the primary object of building the hall was to use it for civic functions, though in practice it is not so used very often. During the relevant years of assessment it was used, perhaps, some six times in the year for elections, meetings relating to air raid precautions, B mayor's receptions, or occasionally even a Hallé concert. During that period the corporation, no doubt with the laudable purpose of saving the ratepayers' money and providing amenities for them and their children, were accustomed to organise and run public dances some three times a week, making a small charge of 1s. 6d. per person on Tuesdays and Thursdays and 3s. on Saturdays. For this a band was provided by the corporation and, of course, lighting, C heating, sitting-out accommodation and so on. In addition, refreshments and cloak-room accommodation were available at small extra charges. In the crypt, the corporation twice a week, on Mondays and Wednesdays, provided roller skating facilities, the charge for admission being 1s. 6d. per person, which covered lighting, heating and music from gramophone records. Refreshments, cloak-room accommodation and the hire of roller skates were available at small additional charges. Furthermore, the corporation made a practice of licensing D the use of the hall to various societies, charitable and religious, to hold meetings. It was also used for such purposes as school speech days, police social parties and meetings of political bodies. Fees were charged for this to such bodies requiring the use of the hall according to a scale. The fees so paid included provision of chairs and heating, but stewards and cloak-room attendants and lighting when required were available at slight additional charges.

E As a result of those activities the Special Commissioners have held as a fact, and there was no dispute about that before me, that the corporation were during the relevant years of assessment carrying on on their property, the town hall, a concern in the nature of trade which is assessable to income tax under Case I of sched. D. The question I have to consider is whether the profits of such trade ought to be apportioned between the activities referable to the provision of chattels and services, e.g., chairs for meetings, bands for dancing, F roller skates and music for skating, on the one hand, and the activity referable to the exploitation of the corporation's right of property in the town hall, on the other hand. The Special Commissioners, conceiving themselves bound by some observations of the Master of the Rolls in *Croft v. Sywell Aerodrome, Ltd.* (1), have held that an apportionment must be made. The whole question G is whether that is right. The Special Commissioners have prepared a supplemental Case Stated making an apportionment, but I am not concerned with the detailed figures, and the Crown, although not agreeing with the accuracy of the figures, felt they could not properly challenge them before me.

H The Crown's case is a perfectly simple one. They submit that the corporation, who are admittedly in occupation of the town hall, are assessable to tax on the profits of the whole of their activities. They submit that there is no room for making any apportionment, for that matter is dealt with by r. 5 of the Rules Applicable to Cases I and II of sched. D, which (as amended by the Finance Act, 1926, s. 36 (1)) is in these terms:

"(1) The computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments, or heritages occupied for the purpose of the trade or profession and separately assessed and charged

under sched. A . . . (2) Where, in estimating the amount of annual profits or gains arising or accruing from any trade, profession, employment, or vocation and chargeable to tax under this schedule, any sum is deducted on account of the annual value of the lands, tenements, hereditaments, and heritages used for the purpose of such trade, profession, employment, or vocation, the sum so deducted shall not exceed the amount of the assessment of the lands, tenements, hereditaments and heritages for the purpose of tax under sched. A as reduced for the purpose of collection."

They submit that the scheme of the Act is that, where a subject remains in occupation of his property and carries on trade thereon, he is, of course, exercising his beneficial rights in the property and to that extent he is exercising rights on which he is being taxed under sched. A. Therefore, when one comes to compute the profits of the activities carried on on such property, it is not fair that the subject should be taxed again, and so provision is made by r. 5 to deduct the sched. A tax. That submission is supported by *Coman v. Rotunda Hospital, Dublin (Governors)* (2). That case was very similar to the present case, and on the facts the commissioners found, and, in my judgment, found correctly, that the *Rotunda* case (2) was indistinguishable from the present. That case depended on the Income Tax Act, 1842, but it is agreed that the relevant provisions were the same as in the Income Tax Act, 1918. The headnote was as follows ([1921] 1 A.C. 1):

"The governors of a hospital let out certain rooms contiguous to the hospital for entertainments for periods varying from one night to six months at charges which included the use of heating and seating and applied the profits arising from these lettings to the general support of the hospital:—*Held*, that these profits were assessable to income tax under sched. D as being profits arising from a concern in the nature of trade within Case I, and were not within any of the exemptions conferred by the Income Tax Acts by reason of their being applied to charitable purposes or otherwise. Decision of the Court of Appeal in Ireland reversed."

The question arose incidentally whether the assessment was properly made under Case I or Case VI. As the headnote shows, the majority of their Lordships held that it was Case I, but it was not a vital matter, for there was no suggestion of an apportionment in that case, and so there was no material difference in an assessment under either Case. That is an important matter when I come to consider the corporation's argument. VISCOUNT CAVE said (*ibid.*, 22):

"It is pointed out, however, on behalf of the respondents that by virtue of the regulations contained in the Act of 1842 (which by s. 5 of the Act of 1853 are incorporated in that Act so far as consistent with its provisions), and particularly of r. 1 in s. 100, any profits liable to assessment under sched. A are expressly excluded from sched. D; and it is argued that the profits from the Rotunda rooms fall within that category. Accordingly, the first question to be determined is whether these profits are assessable under sched. A. It is contended that they are so assessable in one of two ways—namely, either (1) as being profits of lands, tenements, hereditaments or heritages and so falling within the general description of property comprised in sched. A and within r. 1 in s. 60 of the Act of 1842, or (2) as being profits of a concern of the like nature with ironworks, gasworks and the other undertakings specified under the third heading of r. 3 in the same section. With regard to the former of these contentions, I am unable to see how the profits in question can be said to be derived from the Rotunda rooms alone. They result, not from the letting of bare rooms, but from the whole venture consisting of the equipment and disposal of the rooms with their fixtures and furniture, and the provision of the services of heating, lighting and attendance. They may perhaps be described as

A profits of a trade or concern in the nature of trade, that is to say, of the business of providing and letting rooms for entertainments, and so as falling under Case I in s. 100, sched. D; but if not then they fall under Case VI as profits or gains not falling under any of the earlier rules. In some respects they resemble profits derived from letting furnished houses or apartments, which are regularly assessed under sched. D. It is no doubt true that a substantial part of the profits in question arises from the occupation and use of the tenements occupied for the purposes of the business; but this is precisely the event contemplated by the second of the rules contained in s. 100 and applicable to Cases I and II, which provides that the computation of the duty to be charged in respect of any particular trade, manufacture, adventure or concern is to be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such trade, manufacture, adventure, or concern, and effect has been given to that rule by deducting the sched. A assessment. It may be that in the present case the share of profits so attributed to the elements in the concern other than the rooms themselves is excessive; but, if so, that is the effect of s. 9 of the Finance Act, 1898, which provides that the sum deducted under the rule above quoted is not to exceed the sched. A assessment. The hardship (if there be any) may be obviated by getting the sched. A assessment increased. As to the alternative argument, that the profits in question are assessable under para. 3 of r. 3, it is sufficient to say that the undertaking in the present case cannot be held to be 'of the like nature' with ironworks, gasworks, and the other concerns mentioned in that paragraph."

D That, in a nutshell, is the Crown's case.

The case for the corporation is this. It was clearly established by *Fry v. Salisbury House Estate, Ltd.* (3), that, where profits arise from the use of land, such as renting it, those profits are covered by the sched. A assessment, and the Crown cannot tax those profits again under sched. D. LORD ATKIN said

E ([1930] A.C. 458):

"My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under sched. A cannot be said in respect of his income from land to be earning profits from 'trade'. This view appears to commend itself to some of your Lordships. I do not dissent from it, but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants and collieries, and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading. Personally I prefer to say that, even if they do trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under

F sched. A and not sched. D. I agree that this appeal should be dismissed."

G The law was altered by statute in 1940, but that is the principle.

The same principle has been expressed with felicity by LORD GREENE, M.R., in the *Sywell* case (1) to which I shall have to refer in detail later. He said ([1942] 1 All E.R. 113):

H "The effect of these decisions is that, where profits are referable to property or occupation, the Crown, like the subject, is bound by the statutory measure in accordance with which such profits fall to be ascertained. A further principle, I think, also emerges—namely, that, even if the profits in question are made by means of a highly organised commercial operation, such as in ordinary parlance would be described as a trading operation, the relevant schedule, be it sched. A or sched. B, must be applied. Once a profit is referable to property or occupation, it must remain in

that category. It cannot be taken out of that category by calling the operation which gives rise to it a trading operation."

The corporation contend here that a large part of the profits they receive are referable to the actual use they make of their town hall, that is, the use of the hall and crypt for dancing, roller skating and meetings, and they submit, therefore, that there must be an apportionment. The *Rotunda* case (2), they submit, is not against them, for the point on apportionment was never taken. They rely principally on the observations of LORD GREENE, M.R., in the *Sywell* case (1) and on the rather earlier decision of *Shop Investments, Ltd. v. Sweet* (4), but I need not refer to that case, for it is fully dealt with in the *Sywell* case (1) by LORD GREENE.

I turn, then, to the *Sywell* case (1). In that case, a company, which owned an aerodrome equipped with hangars, lecture rooms, a kitchen, and other buildings, let to an aviation company at a rent a number of the buildings with the right to use the aerodrome for the flying purposes of a Royal Air Force school of flying in common with other users of the aerodrome for the term of four years from June 10, 1936, and they also granted the aviation company a licence in consideration of a yearly payment giving it the sole right to use a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. The aerodrome company also granted licences to flying clubs to use the aerodrome, and they further received income from garage rents, housing and landing fees of aeroplanes, and a percentage of the earnings of another company from the sale of ice cream. The company were responsible for keeping the aerodrome in good order and for this purpose employed a groundsman. It was held by LORD GREENE, M.R., and CLAUSON, L.J. (DU PARCQ, L.J., dissenting) that all the activities of the company at the aerodrome arose from the exercise and exploitation of their rights of property, and were, therefore, covered by an assessment to income tax under sched. A, and that the company was not assessable under sched. D, Cases I or VI. *Fry v. Salisbury House Estate, Ltd.* (3) and *Lord Glanely v. Wightman* (5) were applied, *Coman v. Rotunda Hospital, Dublin (Governors)* (2) and *Carlisle & Silloth Golf Club v. Smith* (6) were distinguished, and *Shop Investments, Ltd. v. Sweet* (4) approved. The first point to be noted is that all the activities of the company arose from the exercise and exploitation of their property and there was no finding of fact that the company was carrying on any trade, the provision of such services as were provided being either ancillary to the exercise of their rights of property or treated as de minimis. LORD GREENE, M.R., was at pains to point out, by reference to many examples, the difference between the exploitation of a right of property or occupation and the carrying on of the land of activities of a sort which anyone is entitled to do wherever he may be. I will read one passage only on this point from his judgment (*ibid.*, 115):

"These considerations appear to me to provide an answer to the question why, and on what principle, a person who, for example, sets up a refreshment stall on his land, or provides services for people admitted to his land, is not exhaustively taxed under sched. A or sched. B (as the case may be) in respect of the profits so earned. Such a person, in my view, is not exploiting his rights of property or of occupation, save in the sense, and to the limited extent, that he must own or occupy the land before he can erect and carry on the refreshment stall or perform the services. The profits earned in such a case are referable, not to the exercise of the rights of property or of occupation, since the customers come on to the land for the purpose of obtaining refreshments or procuring the benefit of the services. If, on the other hand, the owner of land having (let me suppose) a remarkable view, or some historic monument, merely allows the public to come on to the land in return for an admission fee, I cannot myself see why it should be said that his profits are not covered by the sched. A assessment, since

all that he is doing is to exploit his right of property by granting licences to come upon the land. The fact that he keeps the paths in order or the monument in repair in order to make a visit more attractive to the public again appears to me to make no difference, any more than does the action of the landlord of a house in keeping it in repair."

A As a matter of principle I confess that those observations seem to me to support the Crown's contention. I cannot think that LORD GREENE could have thought that any part of the profits of running a refreshment stall should be apportioned because the persons come on to the land not merely to purchase a cup of tea but incidentally to sit down and enjoy the air and the scenery while drinking it. The activity is one whole activity, viz., carrying on a trade. So, here in principle this is one trade or, possibly, three branches of one trade. The B customers of the corporation enter the town hall not merely to make use of the corporation's land but to carry on thereon activities which can be carried on on any suitable premises—holding meetings, dancing and roller skating. It could hardly be suggested that a shopkeeper who keeps a large departmental store and who by an attractive display of many different commodities all obtainable under one roof invites customers to come on his vast emporium and C to wander round the various departments could claim an apportionment of the profits of his trade because great use is made by the customers of his premises. It was said the distinction is that the profits in such a case are made from sales and not from the use of land. I do not regard the distinction as valid. In the present case the customers are buying, not goods, but the right to dance, to hold meetings or to roller skate. In all these cases the customers are making D use admittedly in varying degrees of the premises whereon these activities are carried on, but, in each case the profits result from a trade. The beneficial user of the owner's land involved in these activities is for taxation purposes taken care of by r. 5.

E I must now refer to certain observations of the Master of the Rolls in the *Sywell* case (1) which form the keystone of the corporation's case. After reviewing the earlier authorities, he said (*ibid.*, 119):

"The last case was *Shop Investments, Ltd. v. Sweet* (4), a decision of WROTTESELEY, J., whose judgment, if I may say so, I have found particularly illuminating, and, in my opinion, manifestly correct. There the appellant company, whose business was that of acquiring and modernising properties and letting or selling the properties so modernised, F had on one occasion, contrary to their usual practice, let a cinema furnished with all its equipment and plant. Assessments were made in respect of the profits of this letting, the amount of the sched. A assessment being allowed as a deduction. The company contended, wrongly, that the profits were covered by the sched. A assessment. It also contended that the profits made by letting the furniture and so forth must be separated from the profit G made by letting the cinema building itself, for which purpose an estimate must be made of what part of the total rent was referable to the furniture and so forth. The object of this contention was, of course, to enable the company to show that a proportionate part of the rent greater than the assessed annual value was attributable to the building itself. WROTTESELEY, J., agreed with this contention, and, in my opinion, rightly so. If the H owner of a building, the assessed annual value of which is £x, can let it unfurnished for £x plus £y, he cannot be separately taxed in respect of the sum of £y. If, instead of letting it unfurnished, he furnishes it and lets it furnished for £x plus £y plus £z, to tax him on £y plus £z would be to exact double tax in respect of £y, which, as the result of the artificial measure of profits adopted under sched. A, has already in law borne tax. An apportionment such as was made in this case could, I think, have been claimed in the *Rotunda* case (2) and the *Carlisle & Silloth Golf Club v.*

Smith (6), and similar cases if the point had been considered, and if (as seems unlikely) any benefit could thereby have accrued to the taxpayer in those cases."

No doubt, it was that last sentence on which the commissioners in this case relied. In the *Shop Investments* case (4), it was admitted that the company fell to be assessed in respect of their letting of furniture and fittings, and the sole question was as to the method of apportionment of a gross rental which covered a lease of the cinema and of the furniture and fittings. WROTTESELEY, J., negatived the view that the company carried on the business of letting furnished cinemas: see [1940] 1 All E.R. 537; and held that it was not right to apportion the rent by attributing to the unfurnished letting element of the gross rent only such part thereof as was represented by the amount of the sched. A assessment. It was a matter of factual apportionment. The vital point, in my judgment, was that the case was not dealing with a Case I assessment at all, for the company was not carrying on a trade, so, presumably, the assessment fell to be made under Case VI, and, as there is no rule corresponding to r. 5 for cases falling under Case VI, it is a matter for apportionment in each case. With the greatest possible respect to LORD GREENE, M.R., his remarks (which were obiter) as to the possibility of making an apportionment in the *Rotunda* case (2) overlook this vital distinction. LORD GREENE was not himself concerned with a Case I assessment and there seems no reason to suppose that r. 5 was brought to his attention. I should normally always follow the dicta of that great master of the law, but, in this case, his remarks seem to me to be in conflict with the very terms of r. 5 and with the observations of LORD CAVE which I have read in the *Rotunda* case (2). In my judgment, that rule and those observations govern the present case and exclude any apportionment. The appeal of the Crown must be allowed. The matter must be remitted to the Special Commissioners with a direction that there is to be no apportionment of the profits of the trade found by them to have been carried on on the town hall, but the corporation are entitled in computing the profits of such trade in each year to deduct the amount of the sched. A assessment. The corporation must pay the costs of this appeal.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Lewin, Gregory, Torr, Durnford & Co.*, agents for *E. C. Parr*, town clerk of Middlesbrough (for the corporation).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

MULREADY v. J. H. & W. BELL, LTD. AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.JJ.), May 12, 20, 1953.]

Negligence—Liability of contractor to servant of sub-contractor—Retention by contractor of control over performance of work—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 31 (1).

A The first defendants contracted with the second defendants to carry out work in the construction of the second defendants' factory, and made an agreement with a sub-contractor to do part of that work, comprising the installation of three ventilators in the roof. The plaintiff, a labourer employed by the sub-contractor, while engaged on the work fell seventy feet and suffered injury including the loss of a leg. He was awarded £8,500 general and special damages against the first defendants for failure to take suitable precautions to prevent his falling as required by the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (1).

B HELD: the first defendants, having undertaken to carry out work which included the installation of the ventilators could not avoid their duty to ensure that reg. 31 (1) was complied with in connection with that part of the work by sub-contracting it, and, therefore, they were liable to the plaintiff.

C Dictum of LORD BLACKBURN in *Dalton v. Angus* (1881) (6 App. Cas. 829), applied.

D HELD, further, the damages ought to be reduced to £6,492 10s. on the ground that the general damages of about £7,600 were £2,000 higher than were usually awarded in comparable cases.

Costs—"Bullock" order—Different causes of action against two defendants—R.S.C., Ord. 16, r. 7.

E A "Bullock" order, requiring a defendant against whom judgment in an action has been obtained to pay the costs of a second defendant (against whom the action has been dismissed) direct to that defendant, is not an appropriate order where the plaintiff has alleged independent causes of action against the two defendants and the two breaches of duty alleged are in no way connected.

F In an action against two defendants in respect of injury suffered by the plaintiff in an accident, the claim against the second defendants, based on an alleged breach of a statutory duty to provide means to ensure his safety while working on a roof under the Factories Act, 1937, s. 26 (2), was dismissed on the ground that the premises on which the accident occurred were not yet a factory within the meaning of the Act, but the plaintiff was awarded damages against the first defendants for breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (1).

G The court made an order (a "Bullock" order) for the costs of the second defendants to be paid direct to them by the first defendants. On appeal, HELD: the order for costs must be set aside and an order made for the plaintiff to pay the second defendants' costs.

Decision of PEARSON, J. ([1952] 2 All E.R. 663), varied.

H FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, regs. 4 and 31, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 212 and 224.

Cases referred to:

- (1) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 46 J.P. 132; *sub nom. Public Works Comrs. v. Angus & Co. Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844; 19 Digest 7, 4.
- (2) *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 34 Digest 31, 89.

- (3) *Penny v. Wimbledon Urban Council*, [1898] 2 Q.B. 212; 67 L.J.Q.B. 754; *affd.* C.A., [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 34 Digest 161, 1260.

APPEAL by the first defendants against an order of PEARSON, J., dated July 9, 1952, made at Manchester Assizes and reported [1952] 2 All E.R. 663, awarding the plaintiff £8,500 damages against the first defendants for breach of their duty to take suitable precautions against his falling from a roof on which he was working, contrary to the Building (Safety, Health and Welfare) Regulations, 1948, reg. 31 (1), and dismissing his claim for damages against the second defendants, for alleged breach of statutory duty under the Factories Act, 1937, s. 26 (2), in failing to provide means to ensure his safety while working on the roof. PEARSON, J., also ordered the first defendants to pay the second defendants' costs direct to the second defendants.

The first defendants had contracted with the second defendants to carry out work in connection with the construction of the second defendants' factory, and had made an agreement with a sub-contractor for the carrying out of part of that work. The plaintiff was employed by the sub-contractor and was injured in the course of the execution of the sub-contractor's part of the work. His injury was found by PEARSON, J., to be due to a breach of the regulation. The first defendants contended that, the work having been carried out by the sub-contractor under the sub-contract, the first defendants were not in breach of the regulations and that the damages awarded were excessive. They also appealed by leave of PEARSON, J., against the order for the payment of the second defendants' costs on the ground that those costs should be paid by the plaintiff.

Spafford and C. N. Glidewell for the plaintiff.

Nelson, Q.C., and *Forrest, Q.C.*, for the first defendants.

Wingate-Saul for the second defendants.

Cur. adv. vult.

May 20. LORD GODDARD, C.J., read the following judgment of the court. This is an appeal from PEARSON, J., who gave judgment for the plaintiff in the sum of £8,500 against the first defendants, and at the same time entered judgment for the second defendants. There is no appeal by the plaintiff against that judgment, but the first defendants appeal against the finding of the learned judge that they were liable to the plaintiff and against the amount of damages awarded. They also appeal by leave of the judge against his order directing that they should pay the costs of the second defendants, contending that those costs should be paid and borne by the plaintiff.

Dealing first with liability, Orr's Zinc White, Ltd., the second defendants, were the owners of a building which was in the course of erection. When that building is completed, it will, no doubt, be a factory within the Factories Acts as it will house plant for the production of gas. The first defendants had entered into a direct contract with the second defendants to supply and fix the sheets forming the sides and roof of the building, the steel frame of which was in course of erection by another company who do not figure in this case. The first defendants were not only to supply and fix the sheeting, but also to install three ventilators in the roof, and they found it convenient, instead of employing their own workmen, to carry out this work by a sub-contractor. Accordingly, they came to a somewhat loose arrangement with a man named Bernard Keating, who, together with his brother, had some experience of sheeting, to do the work for them. Keating was to engage and pay for what labour was required. The first defendants paid him on a piece-work basis at a standard price of so much a foot or sheet.

Keating engaged labourers, of whom the plaintiff was one. He paid them and stamped their cards, and there is no dispute that these men, including

the plaintiff, were his servants and not those of the first defendants. This work seems to have been supervised by Bernard Keating's brother, Patrick, who certainly had no long experience of sheeting, as, until a year or two before the material time, his work had been that of a shop assistant.

A The contract with Keating was arranged orally. There was no written document, and the judge has found that Keating was to supply the labour and do the work while the first defendants were to supply the necessary material and equipment, except hand tools. He described the arrangement as a sub-contract of a very partial and minor character, and he found that the work was to be done under the supervision and control, and in accordance with the instructions, of the first defendants, with regard to both the work to be done and the manner in which it was to be done. We are not clear what exactly the learned judge
B meant by a sub-contract of a very partial and minor character. The sheeting and roofing of this building was a considerable job. We think he probably meant no more than that it was an informal sub-contract, and one in which the main contractor, i.e., the first defendants, retained a considerable degree of control, more than would usually be exercised where a formal sub-contract had been executed. In any case, there appears, undoubtedly, to have been a contract
C between the first defendants and Keating for the execution of a part of the work which the first defendants had undertaken for the second defendants and we propose to decide the appeal on that footing.

In the course of this work the plaintiff, who, as I have said, had been engaged and paid by Keating, fell from the roof, a distance of some seventy feet, and sustained severe injuries. It was not disputed that no suitable precautions
D had been taken to prevent him from falling, as required by reg. 31 of the Building (Safety, Health and Welfare) Regulations, 1948, made under the provisions of the Factories Act, 1937.

Turning now to the regulations, the words of reg. 4 material to this case are:

"It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply
E . . . (ii) to comply with such of the requirements of [inter alia] reg. 31 as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen."

If reference is made to the full terms of the regulation, it will be observed that the second paragraph differs in one important respect from the first which we have not set out. The first paragraph refers expressly to the observance
F of those regulations which affect workmen employed by the contractor or employer, while the second requires compliance with the requirements of certain regulations, including reg. 31, as relate to any work, act or operation performed or about to be performed by the contractor, and contains no reference to workmen employed by him. Regulation 31 (1) is in these terms:

G "Where work is done on the sloping surface of a roof and, taking into account the pitch, the nature of the surface, and the state of the weather, a person employed is likely to slip down or off the roof, then unless he has adequate hand-hold or foot-hold or is not liable to fall a distance of more than six feet six inches from the edge of the roof, suitable precautions shall be taken to prevent his so falling."

H Counsel for the first defendants contended that the performance of the work on the roof was here carried out by Keating as contractor and not by the first defendants, and that consequently the latter could not be held to be in breach of the regulation. He said no case was to be found in the books where a head contractor has been held liable in these circumstances, and while that appears to be so, equally there is no case which decides that he is not.

The learned judge decided this case on a somewhat narrow ground, viz., that here the first defendants had not divested themselves of the control and direction

of the work so that they could be regarded as themselves performing the act of fixing the ventilators, which was what the plaintiff was actually doing when he fell. He said ([1952] 2 All E.R. 665):

"They [the first defendants] were still in effective charge and control.

I hold that they were undertaking an operation within the meaning of reg. 4, and were performing the act of fixing the ventilators."

While, in our opinion, his judgment can be supported on those grounds, for ourselves we are prepared to decide the case on the ground that the first defendants were the contractors who had agreed with the building owners to do the work, i.e., to perform the work on the roof and fix the ventilators. Accordingly, we do not see how it makes any difference whether they chose to perform it by their own workmen or by means of a sub-contract. We cannot doubt that they had undertaken to perform the work, and had it not been done, or had it been done in an unsatisfactory manner, it would have been against the first defendants only, and not against their sub-contractors, that the building owners would have had a remedy. The duty is to provide suitable precautions to prevent men working on the roof from falling, and that is thrown on the person who performs the work who can, no doubt, choose how he will perform it. If, then, a duty was cast on the first defendants, who had undertaken to perform the roof work, they cannot avoid it by sub-contracting. The ordinary principle of law which, in our opinion, applies, is nowhere more clearly stated than by LORD BLACKBURN in *Dalton v. Angus* (1), where he said (6 App. Cas. 829):

"... a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

This passage was referred to by the court in *Hardaker v. Idle District Council* (2), in which all the cases on the subject were reviewed. It is true that in that case the duty was owed to the public, but the principle seems to us to apply whether the duty is owed to the public or only to a section of the public. It was followed in *Penny v. Wimbledon Urban Council* (3), and in many other cases and, we think, it applies here.

Counsel for the first defendants relied much on the breach of the regulations being a criminal offence, and said that the result of holding the first defendants liable in this case would be that they could be prosecuted and fined when the fault was that of Keating, of which they might have no knowledge, and that, while a contractor can exact an indemnity from his sub-contractor for the damages in which he may be cast in a civil action, he could get no indemnity for the fine which might be imposed. Be it so. That only means that he must take care that the necessary precautions are taken by the sub-contractor if he does not take them himself. Both he and the sub-contractor may be liable both civilly and criminally. Here, the first defendants have agreed to perform the work in question, and in the course of performing it the precautions were omitted, so, in our opinion, they are liable.

With regard to damages, the amount awarded was £8,500, of which £892 10s. represented special damages. Substantially, therefore, the judge awarded general damages of £7,600. It was, no doubt, a most serious accident, resulting in grievous injury including the loss of a leg. The plaintiff must have suffered great pain. He still suffers and will in the future, though there is good hope that he will be able to earn a reasonable wage at his former occupation as a waterproofer. The loss of his leg is the most serious item, involving as it does loss of so much of the amenities of life, and all this was in the learned judge's mind when he made his award. We need not enlarge on the difficult

task that confronts a judge in these cases, and on how reluctant the Court of Appeal should be to interfere with his award. The principles on which this court acts in these matters are well known, and while we are not to disturb the finding unless what is awarded is inordinately high or excessively low, one still has no certain criterion by which to judge what is inordinate or excessive. It is, however, legitimate, in our opinion, for this court to endeavour, not to lay down some standard, for that is impossible, but to keep the awards at least to some extent in line so that they may not appear to be disproportionate for the same class of injury. The injuries in this case are, unfortunately, of a class that are all too common in motor car collisions as well as in industrial accidents, and, while no doubt damages are properly higher than they used to be, reflecting the decreased value of money, we feel obliged, even with some regret, to say that we think an award of £7,600 is a great deal higher than is usually awarded in comparable cases. We would reduce the general damages by £2,000, thus awarding the plaintiff, with his special damages, £6,492 10s.

We now have to deal with the costs of the action. The learned judge made what is commonly called a Bullock order, the effect of which is that the first defendants have to pay the costs which the plaintiff was ordered to pay to the second defendants direct to the latter. In making this order, the judge gave leave to appeal, presumably so that this court could consider whether, in the circumstances of this case, it was proper to exercise his discretion in this matter. It is to be noticed that the cause of action alleged by the plaintiff against the second defendants is entirely independent of his claim against the first defendants. As against the second defendants, his cause of action was based on the Factories Act, 1937, s. 26, alleging that those defendants had failed to provide and maintain safe means of access and failed to provide any or suitable means by fencing or otherwise to ensure the safety of the plaintiff at his place of work. That cause of action was based on the assumption that the second defendants were the occupiers of a factory and failed because the factory had not yet been completed. The cause of action against the first defendants was based entirely on a breach of the building regulations, and there it was quite immaterial whether the work was being done on a factory or any other building.

A Bullock order is appropriate where a plaintiff is in doubt as to which of two persons is responsible for the act or acts of negligence which caused his injury, the most common instance being, of course, where a third person is injured in a collision between two vehicles and where the accident is, therefore, caused by the negligence of one or the other, or both. It does not appear to us that it is an appropriate order to make where a plaintiff is alleging perfectly independent causes of action against two defendants where the breaches of duty alleged are in no way connected the one with the other. That the first defendants denied that they were responsible for the breach of reg. 31 was in effect putting the blame on Keating, but not on the second defendants, and we can see no ground on which the order should have been made, and we think, therefore, that the order that the first defendants should pay the second defendants' costs must be set aside, and the order must be that the plaintiff pay the second defendants' costs. The result is that the appeal is allowed and the order varied by reducing the damages to the sum of £6,492 10s., and the order that the first defendants pay the second defendants' costs is set aside, and the plaintiff is ordered to pay them.

Appeal allowed. Order varied by reducing damages to £6,492 10s. Order for first defendants to pay second defendants' costs of trial set aside and plaintiff ordered to pay such costs.

Solicitors: *Manches & Co.*, agents for *David Blank, Alexander & Co.*, Manchester (for the plaintiff); *Carpenters*, agents for *Laces & Co.*, Liverpool (for the first defendants); *William Charles Crocker* (for the second defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

**Re MALTBY MARRIAGE SETTLEMENT. AYLEN AND
ANOTHER v. GAUD AND OTHERS.**

[CHANCERY DIVISION (Harman, J.), May 12, 1953.]

Settlement—After-acquired property—“Property to which the wife may become entitled in possession or reversion”—Property vested in reversion before marriage falling into possession during marriage—Property appointed to wife during marriage.

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By a marriage settlement dated Apr. 14, 1937, the wife settled certain securities, her absolute property, and covenanted with the trustees “that there shall be duly vested in the trustees . . . all real and personal property exceeding in value from the same source £200 to which the wife may afterwards during the marriage become entitled in possession or reversion or have any power of beneficial disposition over except by will . . .”

HELD: property in which the wife was entitled to a vested interest in reversion at the date of the marriage was not, on its falling into possession during the marriage, caught by the covenant, but property in which, at the date of her marriage, she had an interest in default of appointment, and in which during her marriage she took an interest by virtue of the exercise in her favour of a power of appointment, was caught by the covenant.

Re Williams’ Settlement ([1911] 1 Ch. 441), applied.

AS TO COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 571, 572, paras. 833-835; and FOR CASES, see DIGEST, Vol. 40, pp. 499-506, 512-514, Nos. 471-524, 575-586.

Cases referred to:

- (1) *Re Bland’s Settlement*, [1905] 1 Ch. 4; 74 L.J.Ch. 28; 91 L.T. 681; 40 Digest 502, 490.
- (2) *Blythe v. Granville*, (1842), 13 Sim. 190; 12 L.J.Ch. 82; 60 E.R. 74; 40 Digest 501, 484.
- (3) *Re Clinton’s Trust, Holloway’s Fund, The Same, Weare’s Fund*, (1871), L.R. 13 Eq. 295; 41 L.J.Ch. 191; 26 L.T. 159; 40 Digest 518, 634.
- (4) *Re Williams’ Settlement*, [1911] 1 Ch. 441; 80 L.J.Ch. 249; 104 L.T. 310; 40 Digest 505, 518.
- (5) *Re Crook’s Settlement. Re Glasier’s Settlement*, [1923] 2 Ch. 339; 92 L.J.Ch. 495; 129 L.T. 284; 40 Digest 502, 489.

ADJOURNED SUMMONS to determine whether (i) the share of the plaintiff, Alice Brough Aylen, in a trust legacy of £10,000 bequeathed by the will of her grandfather, Brough Maltby, and (ii) the share of the said plaintiff in the funds settled on the marriage of the said plaintiff’s parents appointed to her by the will of her father ought, by reason of cl. 4 of her marriage settlement dated Apr. 14, 1937, to be assigned to the trustees of the said settlement.

By a marriage settlement dated Apr. 14, 1937, the wife, Alice Brough Aylen, settled certain securities then her own absolute property, and by cl. 4 of the settlement covenanted with the trustees “that there shall be duly vested in the trustees . . . all real and personal property exceeding in value from the same source £200 to which the wife may afterwards during the marriage become entitled in possession or reversion or have any power of beneficial disposition over except by will . . .” By his will dated Jan. 28, 1925, the wife’s grandfather, Brough Maltby, who died on Nov. 7, 1927, directed his trustees to stand possessed of a sum of £10,000 on trust to pay the income thereof to his son, Brough Maltby (the younger), the wife’s father (hereinafter called “the father”), during his life, and after his death to the wife’s mother, Isabel Armstrong Maltby (hereinafter called “the mother”), during her life, and after the death of the survivor of them in trust for all his grandchildren (including

the wife) who being males should attain the age of twenty-five years or being females should attain that age or marry under that age, with a proviso that if any such grandchild should have died in the lifetime of his or her parents or either of them leaving a child or children that child or those children should take the share of the deceased parent.

A By a settlement dated Feb. 7, 1907, made on the marriage of the father and the mother, it was declared inter alia that the trustees thereof should stand possessed of both the "wife's fund" and "the husband's fund" (as therein defined) and the income thereof on trust subject to the life interests therein of the father and the mother and the survivor of them for all or any such one or more of the issue of the said marriage in such manner as the father and the mother should by deed jointly appoint, and in default of and subject to any such appointment as the survivor of the father and the mother should by deed B or will or codicil appoint and in default of and subject to any such appointment in trust for all the children or any the child of the then intended marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry if more than one in equal shares.

C The joint power of appointment given to the father and the mother by the settlement of 1907 was never exercised. On May 24, 1935, the mother died. By his will dated Mar. 18, 1949, the father, who died on Jan. 21, 1951, appointed that the trustees of the settlement of 1907 should from and after his death stand possessed of the wife's fund and the husband's fund on trust for his three children (including the wife, Alice Brough Aylen) in equal shares absolutely.

D *Wigan* for the plaintiffs, Alice Brough Aylen, and her husband, Ian Gerald Aylen.

J. V. Nesbitt for the first and second defendants, the trustees of the settlement of 1937.

Tonge for the infant defendants, beneficially interested in remainder under the settlement of 1937.

E **HARMAN, J.:** The plaintiffs in this suit are husband and wife. On the occasion of their marriage in 1937, a settlement was made whereby the wife settled certain securities, then her own absolute property. The settlement also contained words which are common form, although only one of the common forms used in that frequently dangerous clause known as an after-acquired property clause. The wife covenanted with the trustees

F "that there shall be duly vested in the trustees . . . all real and personal property exceeding in value from the same source £200 to which the wife may afterwards during the marriage become entitled in possession or reversion or have any power of beneficial disposition over except by will . . ."

G Then follow some immaterial exceptions. This clause may be read in two ways, either as catching only interests (whether in possession or reversion) in property which came to the wife during the marriage or as including also interests which were reversionary before the marriage but vest in the wife in possession during the marriage. In the absence of authority, I should incline to the narrower view. If before the marriage the wife already has a vested reversionary interest H in some property which is intended to be brought into settlement, it is natural to settle it there and then as can easily be done. It may, however, well be desired to settle benefactions to or other acquisitions by the wife occurring during the marriage but unknown or uncertain by reason of their contingent nature at the date of the settlement, and a covenant is the convenient way of effecting this.

The facts here are that at the time this settlement was made, the wife was entitled, under the will of her grandfather, who died in 1927, to a vested interest

in a trust legacy of £10,000, liable to be divested if she predeceased either of her parents. Her father was then living, but her mother was dead. I should have thought, unaided by authority, that that was not property to which she "may afterwards become entitled", but was property to which she was already entitled and which could have been settled at the time. It is said, however, that I am constrained by authority to hold that it is the vesting in possession to which I must look, and that the fact that her reversion was not caught did not prevent the property being caught when it fell into possession on the death of the surviving parent, her father. A

The matter is not without authority, and I have been referred to three cases which cover the ground. KEKEWICH, J., had a similar question before him in *Re Bland's Settlement* (1), where the words were "shall become entitled". Those words, in my view, are the same as "shall become entitled in possession or reversion", because SIR LANCELOT SHADWELL, V.-C., in an older case, *Blythe v. Granville* (2), said (13 Sim. 195) that the words "become entitled" mean "become entitled either in possession or in reversion". KEKEWICH, J. ([1905] 1 Ch. 9), cites a decision of SIR JOHN WICKENS, V.-C., in *Re Clinton's Trusts* (3) (L.R. 13 Eq. 305). The citation is this: B

"The expression 'become entitled to' in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife, and this may mean an acquisition of property in which the wife had no interest at the time of marriage, and which vests in her absolutely during the coverture—or an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture—or an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant; the difficulty arises with regard to the other two classes. Both of them cannot be included in such a covenant, and the question is, which of them is, *prima facie*, to be considered as so included." C

That, I think, is a point on which, like KEKEWICH, J., I must follow SIR JOHN WICKENS, V.-C. Either the property caught must be property in which there was no vested interest at the time of the marriage, but in which a vested interest was acquired during the marriage, or it must be property which, though vested in interest before, only falls into possession during the marriage. As I say, I feel no doubt how I should decide the question. KEKEWICH, J., in *Re Bland's Settlement* (1), came to the conclusion that the property in which the wife had a vested interest in reversion when she married was not property which was caught by the settlement. D

The judgment of EVE, J., in *Re Williams' Settlement* (4), is to a similar effect, as I understand it. The lady in question had a contingent interest when she married, the fund falling in on the death of her brother under twenty-one, and, that being so, when it vested in her, as it did on his death, that was a share which was caught by the covenant. It seems, however, although it is not very clear, that if that had been a vested interest before marriage, merely liable to be divested by the brother's surviving over a certain date, the result would have been different. The other view is taken by LAWRENCE, J., in *Re Crook's Settlement. Re Glasier's Settlement* (5). There he held ([1923] 2 Ch. 339) that, notwithstanding that at the date of her marriage the wife was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture she might become entitled in possession, and was therefore caught. The learned judge took the wider view by looking only at the words "entitled in possession" and saying that the vested interest, when it falls into possession, is exactly within the terms of the covenant, but E

if the words be looked at the other way, "entitled to the property" will not apply except to an interest coming into existence after the date of the coverture, whether it be a title in possession or in reversion. On the latter view previously vested interests in reversion are not caught. LAWRENCE, J., after hearing all the arguments, said that the cases were not easy to reconcile, and he felt himself free to follow his own view. If he was free then, so, I think, am I, and the view I follow is that, having been a vested interest before coverture, this interest was not caught by the after-acquired property clause.

A further question is raised by reason of the fact that the wife, at the time of her marriage, had another interest. That was an interest in a fund in default of appointment, but, in the event, that interest has never fructified. She has inherited a share in the fund by virtue of an appointment made after the marriage under the same settlement. It seems to me that that is an interest which has been created in her since the marriage, and, therefore, it is plainly caught by the after-acquired property clause.

Order accordingly.

Solicitors: *Bischoff & Co.* (for the plaintiffs and infant defendants); *Park Nelson & Co.*, agents for *Seldon Ward & Nuttall*, Bideford (for the first and second defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

GETREIDE-IMPORT-GESELLSCHAFT m.b.H. v. CONTIMAR S.A. COMPANIA INDUSTRIAL COMERCIAL Y-MARITIMA.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), May 6, 7, 8, 1953.]

Arbitration—Ouster of jurisdiction of court—Term of contract that award condition precedent to proceedings—Dispute as to right of appeal against award—Action to enforce award—Competency—Service of notice of appeal—London Corn Trade Association contract.

A contract for the sale of goods incorporated the terms of a London Corn Trade Association, Ltd., standard form of contract, which required all the disputes arising out of the contract to be referred to arbitration, prohibited the bringing of any action in respect of any such dispute until it had been settled by arbitrators, or, on appeal, by the committee of appeal, and made the obtaining of an award "a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract". Notice of appeal against an award was required to be given to the secretary of the association and to the other party to the dispute within fourteen consecutive days from the date of the award. By cl. (D) of the contract notices were required "to be given in writing, and sent by post to, or left at, the place where the person, firm, or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, and shall be deemed to have been received not later than twenty-four hours after the same are so sent or left". Clause (A), under which for the purpose of proceedings the making and performance of the contract were deemed to be in England (except as to the enforcement of an award), provided that any party "residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd."

On Aug. 11, 1952, the sellers, against whom an award on an arbitration under the contract had been made on July 30, 1952, sent notice claiming an appeal against the award to the secretary of the association, who notified the buyers at their head office at Duisburg, Germany, by a letter

which was received by the buyers on Aug. 13. On Aug. 12 the sellers posted notice that the appeal had been claimed to the buyers at their branch office at Frankfurt-am-Main, but in error addressed it to "Friedrich-Ebert-Strasse 27, Frankfurt A.M." instead of to "Niedenu 59, Frankfurt A.M." This notice was not received until after Aug. 13. In an action by the buyers for a declaration that the award was valid and final and conclusive and that the sellers had no right of appeal,

Held: (i) the sellers' notice of appeal was invalid because (a) being wrongly addressed, it did not comply with the requirements of cl. (D) as to serving notice of appeal, and the words providing that the notice was to be deemed to have been received within twenty-four hours was designed to validate only a notice that was correctly addressed; (b) in sending notification of the appeal to the buyers, the secretary of the association was not acting as agent for the sellers.

(ii) the question of the validity of the notice of appeal was a dispute arising, not out of the contract, but out of the award and, being a question which went to the jurisdiction, was not within the sphere of the arbitrators' jurisdiction, and, therefore, the obtaining of an award on the issue of the sellers' right of appeal was not a condition precedent to the bringing of the action, and the court was not precluded from granting a declaration that there was no right of appeal.

Decision of SELLERS, J. ([1953] 1 All E.R. 257), affirmed.

Cases referred to:

- (1) *A.-G. for Manitoba v. Kelly*, [1922] 1 A.C. 268; 91 L.J.P.C. 101; 126 L.T. 711; Digest Supp.
- (2) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 2 Digest 350, 263.
- (3) *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 2 Digest 475, 1187.

APPEAL by the defendants (the sellers) from an order of SELLERS, J., dated Dec. 12, 1952, and reported [1953] 1 All E.R. 257.

The plaintiffs carried on business at Duisburg, Germany, with a branch at Frankfurt-am-Main, and the defendants carried on business at Buenos Aires. On Nov. 17, 1950, through the agency of one Franz Hagen, in Hamburg, acting for the two parties, the plaintiffs, as buyers, and the defendants, as sellers, entered into a contract for the sale of a quantity of River Plate wheat. The contract was made subject to the London Corn Trade Association, Ltd., contract No. 41, rye terms, London arbitration, which contained the following terms:

(A) "Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England whatever the domicile, residence, or place of business of the parties to this contract may be or become. Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd., and if in Scotland, he shall be held to have prorogated jurisdiction against himself to the English courts, or if in Northern Ireland to have submitted

to the jurisdiction, and to be bound by the decision of the English courts."

A " (B) All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto and the trustee in bankruptcy of the other party, shall be referred to arbitration, according to the arbitration rule indorsed hereon, and this stipulation may be a rule of any of the Divisions of His Majesty's High Court of Justice in Northern Ireland, on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Northern Ireland. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract . . . The arbitration to be held in London."

B
C " (C) In case any party to an award shall be dissatisfied with the award a right of appeal shall lie to the committee of appeal elected for that purpose in accordance with the rules and regulations of the London Corn Trade Association, Ltd., in force at the date of the contract, provided the following conditions are complied with:—(a) The costs of the award intended to be appealed from have been paid by one of the parties thereto, (b) Notice claiming appeal is given to the secretary of the association within fourteen consecutive days from the date of the award . . . (c) Within the said fourteen consecutive days, notice that the appeal has been claimed is given by the appellant direct to his seller or buyer, as the case may be."

D
E " (D) Notices under this rule to be given in writing, and sent by post to, or left at, the place where the person, firm, or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, and shall be deemed to have been received not later than twenty-four hours after the same are so sent or left."

F A claim made by the buyers against the sellers in respect of the performance of the contract was submitted to arbitration. The arbitrators disagreed and appointed an umpire, and on July 30, 1952, the umpire made his award, finding the sellers in default under the contract and granting the buyers a substantial sum by way of damages. On Aug. 11, in pursuance of their right of appeal under the contract, the sellers, through their agents, Joseph Pyke & Sons (Liverpool), Ltd., notified the secretary of the London Corn Trade Association, Ltd., by letter that they claimed an appeal against the award and enclosed the appropriate amount for the fees of the award. On Aug. 12 the secretary of the association sent a letter to the buyers at Duisburg notifying them and giving them particulars of the appeal. The buyers received that letter on Aug. 13. On Aug. 12 the sellers sent from Buenos Aires to the buyers at Frankfurt-am-Main a letter notifying them that on Aug. 11 they (the sellers) had given notice of appeal against the award to the association. Owing to confusion of the name of the buyers with that of another company, the letter was addressed to the buyers at "Friedrich-Ebert-Strasse 27, Frankfurt A.M." instead of "Niedenuau 59, Frankfurt A.M.", and in consequence, it did not reach them at their Frankfurt or Duisburg office until after the time had expired for giving notice of appeal under the contract.

H The buyers claimed a declaration that the award was valid and final and conclusive as between the parties, that the sellers had no right to prosecute an appeal from the award, and that the appeal committee had no power to

hear or entertain any such appeal or to vary or reverse the award. SELLERS, J., held that the sellers had failed to comply with a condition as to serving notice of appeal and were not entitled to prosecute the appeal, and he granted the declaration asked for. The sellers appealed.

Eustace Roskill, Q.C., and Bateson for the sellers.

T. G. Roche for the buyers.

SINGLETON, L.J., stated the facts and continued: The fourteen days stipulated by cl. (C) (c) expired at midnight on Aug. 13-14, so that the letter of Aug. 12, which was wrongly addressed, would have been in time and a good notice within cl. (C) (c) had it been correctly addressed. Counsel for the sellers submits that it ought to be so regarded. He says it was sent direct to the buyers. It was sent by post, and he submitted that it was sent to the place where the company to whom it was addressed carried on business by reason of the fact that "Frankfurt" appeared on the envelope and on the letter. The question which arises is: Can it be said that that document was sent by post to the place where the buyers were carrying on business? It seems to me the answer to that problem must be "No". It was sent—and it was addressed—to a place in Frankfurt at which another company altogether carried on business. SELLERS, J., in considering this point, was inclined to think that, if the letter had been addressed to "Frankfurt" merely, without stating any address, it would have been sufficient compliance with the rule. That may be so. The learned judge did not express any final opinion on that. A number of circumstances would have to be considered: (a) the size of the buyers' business at Frankfurt, and (b) the size of Frankfurt. In many cases it might be quite sufficient to send a letter to a well-known business house addressed to the town in which it carried on business, but it would not be so in every case. This letter was addressed to the wrong address, and, although I regret to have to say it, the point raised by counsel that it was a good notice of appeal under the rule fails.

It is submitted that if that letter dated Aug. 12, was not a good notice, it is still open to the sellers to say that the letter of Aug. 11 addressed by the secretary of the association to the buyers was a good notice. The letter of Aug. 11 from the secretary of the association informs the buyers that the secretary had received from the sellers notice of appeal, and it is said that that is a sufficient communication for all practical purposes, for the buyers knew as from Aug. 12 that there was to be an appeal. The submission made by counsel is that that letter was written by the secretary of the association as agent for the sellers, and that, therefore, it is a good notice under the rule. In my view, the secretary of the association was not the agent of the sellers. He was not purporting to act as such, nor did anyone ever consider that he was acting in that capacity. I cannot see that the sellers can be heard to say that for the purpose of giving notice under the contract the secretary of the association must be treated as their agent. The passing on of the information was an act of courtesy on the part of the association and of its secretary, and that point fails.

There arises on this part of the case another point of some interest. Clause (A) provides, *inter alia*:

"Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall, for the purposes of proceedings at law or in arbitration, be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd., and if in Scotland, he shall be held to have prorogated jurisdiction against himself to the English courts, or if in Northern Ireland to have submitted to the jurisdiction, and to be bound by the decision of the English courts."

The buyers are a German company residing or carrying on business elsewhere than in England or Wales, so, by that clause, they are to be considered, for the purposes of proceedings at law or in arbitration, as ordinarily resident or carrying on business at the office of the London Corn Trade Association, Ltd. Clause (D) provides:

A "Notices under this rule to be given in writing, and sent by post to, or left at, the place where the person, firm, or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business, and shall be deemed to have been received not later than twenty-four hours after the same are so sent or left."

B Counsel on behalf of the buyers submitted that, as the buyers were a company carrying on business elsewhere than in England, they must be considered as carrying on business at the office of the London Corn Trade Association, and, therefore, they fell within the words of cl. (D) "by reason of the provisions of the contract", and the only place at which service could be made on them was the office of the association. That was considered by SELLERS, J., who reached the view that under the provisions I have read there was an alternative
C so that service could be either at the place at which the foreign company was in fact carrying on business or at the office of the London Corn Trade Association. I am bound to say I consider that to be the sensible way of looking at the matter. I am not wholly satisfied that it is the right way, but I do not think it is necessary for the court to resolve that question.

D Counsel for the sellers raised a further point which is more complicated than those with which I have dealt so far. It was under the provisions of cl. (A) and cl. (B) that the dispute arising out of the contract was referred to arbitration and the umpire made an award in favour of the buyers. The sellers desired to appeal against that award. When the question as to their notice or notices arose, the buyers issued the writ in this action to enforce the award. The submission of counsel for the sellers is that the dispute was a dispute arising
E under and out of the contract, and, therefore, must be referred to arbitration. He submitted that this action must fail by reason of the words that an award "shall be a condition precedent to the right of either party to sue the other in respect of any claim arising out of this contract." On the other hand, it is submitted that the question whether there was a good notice of appeal is not a question arising out of the contract, but is a question arising out of the
F award. It might be said that that point should have been raised at an earlier stage by an application to stay this action. It would then have been the duty of the court to consider whether or not the dispute which has arisen was a dispute arising out of the contract, for before the action could have been stayed it would have been necessary to show that the dispute was one which the parties had agreed should be referred to arbitration. Indeed, that is the point which
G arises now. The answer put forward by counsel on behalf of the buyers is that it is not a matter for arbitration at all, but is a matter which goes to jurisdiction. At first SELLERS, J., thought that the point made by counsel for the sellers was that the appeal tribunal should consider this question of jurisdiction. His judgment deals with that submission, and he pointed out that the appeal tribunal could not give itself jurisdiction, but that that question was one for
H the court. Counsel made it clear that what he was saying was that the dispute as to the notice was a dispute to be referred to arbitration by a fresh notice, and that new arbitrators should be appointed. Those arbitrators would probably not agree, another umpire would be appointed, and, perhaps, there would be another notice of appeal. In the meantime the first appeal would be awaiting the determination of that question. So that on the final submission of counsel for the sellers on this part of the case—the question of law whether or not either of the notices was good—would have to be decided by arbitration

first, an appeal would lie to the appeal tribunal, and then there might be an application for a Case to be stated, and the issue might come to this court indirectly. In my view, that reduces the whole thing to absurdity and I feel that the court ought to avoid coming to such a conclusion unless by the terms of the contract we are forced to do so.

I think a useful passage is to be found in *A.-G. for Manitoba v. Kelly* (1), where LORD PARMOOR said ([1922] 1 A.C. 276):

"It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than CURRAN, J., and CAMERON, J.A."

Apart from that, it seems to me that when one looks at the words of the document this dispute on the question of notice of appeal is not, and ought not to be regarded as, a dispute arising out of the contract. I think it should be regarded as being a dispute which goes to jurisdiction, for it is a dispute arising on the award and not out of the contract. For those reasons I feel that that point fails. In the result, the buyers are entitled to say that on the contract between the parties the umpire's award is final and conclusive, for I do not think it would be right to order that another arbitration should determine whether this award is final and conclusive. I agree with the judgment of SELLERS, J., and think that the appeal should be dismissed.

JENKINS, L.J.: I agree. It seems plain that the buyers in fact received notice of the sellers' intended appeal within the stipulated period of fourteen consecutive days from July 30, 1952, the date of the award. That being so, I would gladly have held, had I felt it open to us to do so, that, whatever deficiencies there may have been in the notice given to the buyers in point of form, nevertheless the appeal should be considered competent, because the real substance and intention of the provisions as to notice had been carried out. To my regret, I find it impossible to regard that attractive method of dealing with the matter as open to the court. The parties have chosen to contract by reference to the London Corn Trade Association, Ltd., contract No. 41. That form includes an arbitration clause and provides that

"the award in writing, on an official form, of the two arbitrators or their umpire (subject only to the right of appeal hereinafter mentioned) shall be conclusive and binding."

It then proceeds to give a right of appeal on certain conditions, and the award is final and binding subject only to a right of appeal the existence of which is made to depend on the fulfilment of the conditions stated. In those circumstances it seems to me that the conditions must be strictly complied with in order to secure the right of appeal. Counsel for the sellers, notwithstanding the many difficulties in his way, has sought to show that, by one road or another, cl. (C) (c) has been sufficiently complied with. He relies, first of all, on the letter of Aug. 12 addressed to the buyers at Frankfurt, but with a wrong street and number, and he says that this was a good service of the notice on the buyers. I cannot accept that argument. It seems to me that the requirement as to notices in cl. (D) plainly demands a notice properly addressed to the party concerned at what is in fact his place of business. This letter of Aug. 12, 1952, did not comply with that requirement. It was addressed to the address of an entirely different company, and in the result it did not reach the buyers until after the period of fourteen consecutive days had run out. It seems to

me impossible in those circumstances to hold that to have been a good notice. Nor, to my mind, is it necessary to consider what degree of particularity in an address is sufficient for this purpose. Each case must depend on its own particular facts, and, as the learned judge was inclined to think, and, as my Lord has said, might be possible in some cases, it may be that, if the party to be given notice was sufficiently well known in, for example, Frankfurt, a letter addressed to that party simply at Frankfurt, without further particularity, might on the facts be a sufficient description or designation of his business address to enable him to be found by the notice in the ordinary course of post. But instances of that sort must depend on the evidence in each particular case. There would have to be evidence to the effect that the party concerned was so well known in the town in question, that, barring accidents, he would certainly be found in the ordinary course of post merely by addressing to the town.

There is no evidence of that sort in the present case, and, if there were, it would carry the sellers no further, for in this case it was not a question of an address which might or might not be sufficient. It was a question of an address which was manifestly wrong.

I cannot accept the further argument of counsel based on the provision to the effect that notices sent by post to, or left at, the place where the person, firm or company to whom they are addressed is carrying on or (by reason of the provisions of the contract) is to be considered as carrying on business,

“shall be deemed to have been received not later than twenty-four hours after the same are so sent or left.”

If a letter is addressed to the wrong address when put in the post, in my view, it is impossible for the sender to contend that he has complied with the provisions as to notice because one of those provisions says that a notice sent by post shall be deemed to have been received not later than twenty-four hours after the same is posted. Provisions of that kind are not uncommon, and it is quite plain, to my mind, that they are designed to cover miscarriage in the post or delay in delivery of a letter properly addressed. They are not intended to make good deficiencies in the address. Accordingly, I agree with my Lord that the letter of Aug. 12, 1952, cannot be relied on as a sufficient compliance with cl. (C) (c).

Nor, in my view, can the letter sent by the secretary of the London Corn Trade Association be so regarded. As my Lord has pointed out, the secretary was not the agent of the sellers to send a notice to the buyers, and he did not purport to send the notice as their agent. It was sent by him of his own motion as an independent measure which he took in his capacity as secretary of the London Corn Trade Association. It is, no doubt, true that this notice did have the result of bringing to the knowledge of the buyers at Duisburg the fact that the sellers intended to appeal, but, in the face of the two distinct conditions of cl. (C) about notices, that is to say, (b) requiring notice of appeal to be given to the secretary of the association within fourteen consecutive days from the date of the award, and (c), requiring notice to be given by the appellant direct to his seller or buyer within the same period, I cannot hold that a notice indirectly given by the secretary, after receipt by the secretary of notice of appeal under condition (b), can be regarded as satisfying the separate requirements of condition (c) which in terms demands a notice sent by the appellant direct to his seller or buyer. Accordingly, in my opinion, on the true construction of these conditions and in the events which have happened, the conditions have not been fulfilled within the prescribed period of fourteen consecutive days, with the result that, the possibility of appeal having gone, the award has become conclusive and binding on all parties without qualification.

Counsel for the sellers also made a submission by way of objection to the jurisdiction on the strength of this provision in the arbitration clause [cl. (B)] on the face of the document:

"Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract . . ."

As to this submission I would say that I have grave doubt whether it ought to be entertained at all by this court, having regard to the course the argument has taken before us and in the court below. Counsel says that in a case of this sort, where there is what is known as a *Scott v. Avery* clause (2), the party relying on the submission by way of objection to the jurisdiction is entitled to take his objection at the hearing as a submission in bar and is not obliged to move, before taking any other step in the proceedings, under what is now s. 4 of the Arbitration Act, 1950. That may be so. Nevertheless, there is a time at which the submission in bar should be made, and, in my view, the submission should be made before the party making it engages on argument designed to obtain a decision of the court in his favour on the very point which he says the court has no jurisdiction to determine. The course the matter took here and before the learned judge was that counsel argued the point and he submitted and invited the court to hold that the right of appeal was still open because the conditions had been duly complied with. And then he said (in effect):—"If I am wrong in that, I say that there is no jurisdiction, because this very matter that I have been arguing before the court is not one for the court to entertain at all: it should be referred to a further arbitration." If there is to be a submission by way of objection to the jurisdiction, that method of taking it is fraught with the gravest inconvenience, for observe the result. The learned judge, having heard all the arguments, held that the right of appeal was not open because the conditions had not been complied with. This court, again after full argument, comes to the same conclusion and confirms his decision. In the face of these concurrent decisions of both courts, what useful purpose would be served by sending the matter back to arbitration for the arbitrators to decide whether the conditions have been fulfilled? The arbitrators at first instance and the arbitrators on appeal would be constrained to hold that the conditions had not been fulfilled, because they would be faced by a decision of the Court of Appeal to that effect. Moreover, the court on any Case Stated would be bound so to hold at first instance and higher until ultimately the dispute reached the House of Lords. To allow this objection at this stage in the proceedings would be a matter of great inconvenience to the buyers and embarrassment to the arbitrators, and would cause much unnecessary delay and expense. For my part, I would, on these grounds alone, be most reluctant to allow it.

As to the merits of the objection, the question whether the conditions precedent to the right of appeal have been fulfilled is not a dispute under or arising out of the contract within the meaning of the arbitration clause. In my view, the provisions imposing these conditions are provisions stating the conditions on which alone the parties are prepared to submit a matter already the subject of an award to further arbitration by way of appeal, and it is clear that the question whether conditions such as those which form the foundation of the arbitrators' jurisdiction have been fulfilled cannot itself be a question within the scope of the arbitrators' authority, for it is only if the conditions are in fact fulfilled that the arbitrators have any jurisdiction at all. I think that view of the matter is supported by the passage in the speech of LORD PARKER OF WADDINGTON in *Produce Brokers Co., Ltd. v. Olympia Oil & Cake Co., Ltd.* (3) ([1916] 1 A.C. 327), and also in the passage to which my Lord

has already referred in *A.-G. for Manitoba v. Kelly* (1). Indeed, I think counsel for the sellers conceded that he could not maintain that the appeal committee would have jurisdiction to determine whether the conditions had been fulfilled or not, but he said that this was, nevertheless, a dispute under the contract—within the original submission, if I may so describe it, to the arbitrators at first instance, and that, inasmuch as the matter went, not to their own jurisdiction, but to the jurisdiction of the appeal committee, those arbitrators could take it into consideration. In my opinion, that way of putting the case must also fail. The arbitrators at first instance have made an award. Unless the conditions giving the dissatisfied party a right of appeal have been fulfilled, that award is final and binding. If the award be final and binding because the conditions on which the right of appeal depends have not been fulfilled, it seems to me plain that no arbitrators at first instance can have any locus standi in the matter or any jurisdiction to say that an award which has become final and binding is still open to appeal. Nor does it seem to me possible to hold that arbitrators at first instance would have jurisdiction to make an appeal competent by holding that the conditions had been fulfilled when in fact they had not. To put the matter in another way, these provisions for arbitration, as I view them, have two stages. There is a stage at first instance and there is an appeal stage. The arbitrators at first instance to whom the dispute is referred decide the dispute and make their award. They then, as it seems to me, are *functi officio* so far as that award is concerned, and any question arising thereafter as to the competence of any appeal from that award is outside their sphere of jurisdiction. The question whether the dissatisfied party has complied with the conditions entitling him to appeal arises at the second, or appellate, stage of arbitration. The provisions as to appeal are in the nature of a further or supplementary submission, and the parties have agreed to it on certain conditions, those conditions being the ones to which I have referred in regard to notices and so on. It was agreed by the parties that, if those conditions were fulfilled, but not otherwise, there was to be a further reference to arbitration by way of appeal from the original arbitration. That submission was only made on condition that the requirements I have mentioned should have been fulfilled. The question whether the conditions have been fulfilled is a matter wholly outside the scope of either submission, that is to say, wholly outside the scope of the submission to the arbitration at first instance and wholly outside the scope of the submission to arbitration by way of appeal. I agree that this appeal fails and should be dismissed.

MORRIS, L.J.: I am in agreement with the judgments which have been delivered by my Lords. I add a few words because of the importance of the case to the parties. They are foreign companies and have agreed that their disputes should be subject to the arbitrament of the British courts. I regret the result at which we feel compelled to arrive. But the parties have contracted in the terms of the contract which is before us and it is our duty to give effect to what is, in our view, the proper construction of the terms of the contract.

In regard to the first part of the argument of counsel for the sellers, it does not seem to me that the letter of Aug. 12 meets the requirements of the words of cl. (D):

“Notices . . . to be given in writing, and sent by post to . . . the place where the . . . company to whom they are addressed is carrying on . . . business . . .”

The buyers were not carrying on business at the place to which the letter was addressed. Nor, in my judgment, do the concluding words:—“and shall be deemed to have been received not later than twenty-four hours after the same are so sent . . .”—avail the sellers. Those words have reference to notices complying with the terms of the early part of the clause, and the word “so”

gives point to this view. In spite of counsel's valiant effort, I do not feel that he succeeds either on his first and main contention, or on his contention based on the letter written by the secretary of the London Corn Trade Association. I cannot regard that letter as having been written by the secretary as agent for the sellers. The letter does not purport to have been written by the secretary as an agent of or on behalf of the sellers, and, furthermore, there was nothing that I can find by way of ratification.

The further point taken by counsel is that he has a complete answer to the action because of the provisions of the contract which includes a *Scott v. Avery* clause (2). The position was that there was an award, and, after the notices to which consideration has been given, were sent, a date was fixed for the hearing of the appeal, namely, Oct. 14. The buyers wrote and asked if that date would be vacated, but the sellers were unwilling to agree. The result was that this action was commenced by writ dated Sept. 22. After the issue of the writ the appeal committee agreed that, pending the decision of the court, no hearing of the appeal would take place. I find myself in full agreement with the observations which JENKINS, L.J., has made as to the curious position which now arises. If counsel were right on this point, this action would fail. There would then have to be an arbitration to determine matters which were argued fully before SELLERS, J., on which he gave his decision, and which have now been fully argued on appeal in this court and on which all the members of this court have given their opinions concurring with those reached by SELLERS, J. The result would be strange indeed, for there would have to be an arbitration, the result of which would be a foregone conclusion, for the arbitrators and umpire would be obliged to follow the decisions given by the courts. I do not find myself able to agree with counsel's argument.

The important words in this connection are these of cl. B:

"All disputes from time to time arising out of this contract, including any question of law appearing in the proceedings . . . shall be referred to arbitration . . . Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be . . ."

I think there the words "such dispute" must refer to the words which have gone earlier "disputes from time to time arising out of the contract". Then the words continue:

"and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of this contract . . ."

Thus, the question arises, whether the buyers are suing in respect of a claim arising out of the contract. In my judgment, they are not. They did have a claim arising out of a contract, and an award was made in their favour. Now, the sellers seek to upset that award by an appeal without complying with the conditions for an appeal. In my judgment, the matters now raised are not matters properly to be described as a claim arising out of the contract, nor as a dispute arising out of the contract. The dispute would never have arisen but for the contract, but the real dispute between the parties was determined and an award was made. The present dispute is once removed from the contract, for it is a dispute in respect of facts arising subsequent to the award. It is true that the contract must be looked at because it is necessary to see what were the provisions as to appeal, but the buyers are taking steps to prevent an appeal which is not in order. They are preserving or defending an award which they have and which was made in respect of a dispute arising out of the contract.

In so doing they are not suing in respect of a claim arising out of the contract. They are taking steps to repel an unauthorised attack on their award. I consider that this appeal must fail.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.* (for the buyers); *Thomas Cooper & Co.* (for the sellers).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

BADDELEY AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

B [COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), March 24, 25, 26, May 18, 1953.]

Charity—Benefit to community—Religious, moral, social and physical well-being—Sufficient section of public—Uncertainty—Members or likely to become members of Methodist Church in two boroughs—Persons benefiting depending on opinion of mission leaders—Poverty—Insufficiency of means—Advancement of education—Finance Act, 1947 (c. 35), s. 54 (1).

C *Stamp Duty—Charity—Moral, social and physical well-being—Whether object charitable—Finance Act, 1947 (c. 35), s. 54 (1).*

Land on which stood a mission church, lecture room and store, was conveyed to trustees on trust to permit the land to be appropriated and used by the leaders of a mission "for the promotion of the religious social and physical well-being of persons resident in the county boroughs of West Ham and Leyton . . . by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents and . . . by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons". Other land, which was laid out as a playing field, and on which a pavilion and groundsman's bungalow had been erected, was conveyed to the same trustees on similar trusts except that "moral well-being" was substituted for "religious well-being" throughout and the residents benefiting were required, in the opinion of the mission leaders, to be, or to be likely to become, members of the Methodist Church.

F HELD: (i) the sole object of each trust was the promotion of the religious (in the second case moral), social, and physical well-being of the residents, the remainder of the trusts being concerned with means to attain those ends and not being ends in themselves and the object being a single one with three aspects and not three objects.

G (ii) promotion of well-being denoted improvement and social and physical well-being meant in both cases, not mere social enjoyment or skill or fitness for sport, but the attainment of the standards of secular conduct and behaviour of a good neighbour and a good citizen and improvement of general bodily health, and moral well-being included religious improvement and the inculcation of a desirable code of secular ethics, these interpretations being reinforced by the inclusion of training as a means of attaining these objects and by the limitation of benefit to persons of insufficient means otherwise to enjoy the benefits provided.

H (iii) the trusts were not established for the relief of poverty, insufficiency of means otherwise to enjoy the advantages provided under the two conveyances not amounting to poverty for this purpose, although giving

the trusts an affinity to charities for the relief of poverty; and they were not established for the advancement of education or, exclusively, of religion.

(iv) charitable purposes beneficial to the community not falling under the heads of relief of poverty and advancement of education and religion included purposes analogous to purposes falling under those heads, and, therefore, religious, moral, physical and social well-being as interpreted were charitable purposes.

(v) persons resident in the two county boroughs who in the opinion of the mission leaders were or were likely to become members of the Methodist Church, notwithstanding that power of selection were a sufficient section of the public for the purpose of establishing a charitable trust and the religious qualification did not render the trust void for uncertainty (especially as the admission to participation was made dependent on the opinion of the leaders).

(vi) given the requisite element of public benefit, the question in any given case was whether the trust claimed to be charitable was within the spirit and intendment of the statute of Elizabeth I, and that question was to be answered by reference to the preamble as a whole, and in the light of the decided cases; the trusts were charitable trusts and the stamp duty on the conveyances must be determined accordingly.

Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs. (1946) (27 Tax Cas. 431), *Williams' Trustees v. Inland Revenue Comrs.* ([1947] 1 All E.R. 513), *Dunne v. Byrne* ([1912] A.C. 407) and *Farley v. Westminster Bank, Ltd.* ([1939] 3 All E.R. 491), distinguished.

Re Spence ([1937] 3 All E.R. 684) and *Re Mann* ([1903] 1 Ch. 232), doubted.

Decision of HARMAN, J. ([1953] 1 All E.R. 63), reversed.

Per JENKINS, L.J.: In view of the comments made in *Williams' Trustees v. Inland Revenue Comrs.* ([1947] 1 All E.R. 521), it would seem that the line of cases typified by *Goodman v. Saltash Corpn.* (1882) (7 App. Cas. 633) should not now be regarded as authoritative save in so far as they can be explained on the ground that the particular purpose was regarded as falling within the spirit and intendment of the preamble to the statute of Elizabeth I (43 Eliz. 1, c. 4).

AS TO THE MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-314, paras. 617-621; and FOR CASES, see DIGEST, Vol. 28, pp. 10, 11, Nos. 51-54.

FOR THE FINANCE ACT, 1947, s. 54 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1345.

Cases referred to:

- (1) *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.*, [1946] N.I. 178; 27 Tax Cas. 431; 2nd Digest Supp.
- (2) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.
- (3) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (4) *Re Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.
- (5) *A.-G. v. National Provincial & Union Bank of England*, [1924] A.C. 262; sub nom. *Re Tetley*, 93 L.J.Ch. 231; 131 L.T. 34; Digest Supp.
- (6) *Re Nottage*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 8 Digest 265, 266.

- (7) *Inland Revenue Comrs. v. City of Glasgow Police Athletic Assocn.*, [1953] 1 All E.R. 747; 117 J.P. 201.
- (8) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest 294, 718.
- (9) *Farley v. Westminster Bank, Ltd. Re Ashton's Estate, Westminster Bank, Ltd. v. Farley*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.Ch. 307; 161 L.T. 103; Digest Supp.
- A (10) *Re Strakosch*, [1949] 2 All E.R. 6; [1949] Ch. 529; [1949] L.J.R. 1477; 2nd Digest Supp.
- (11) *Verge v. Somerville*, [1924] A.C. 496; 131 L.T. 107; *sub nom. Verge v. Somerville. A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173; Digest Supp.
- B (12) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest 293, 705.
- (13) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.
- (14) *Goodman v. Saltash Corpn.*, (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 8 Digest 327, 1099.
- C (15) *Re De Carteret*, [1933] Ch. 103; 102 L.J.Ch. 52; 148 L.T. 188; Digest Supp.
- (16) *Re Wedgwood*, [1915] 1 Ch. 113; 84 L.J.Ch. 107; 112 L.T. 66; 8 Digest 259, 208.
- (17) *Inland Revenue Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 13 Tax Cas. 58; Digest Supp.
- D (18) *Re Foveaux*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 8 Digest 259, 206.
- (19) *Shillington v. Portadown Urban Council*, [1911] 1 I.R. 247; 8 Digest 260 a.
- (20) *Re Mariette*, [1915] 2 Ch. 284; 84 L.J.Ch. 825; 113 L.T. 920; 8 Digest 246, 57.
- (21) *Re Gray*, [1925] Ch. 362; 94 L.J.Ch. 430; 133 L.T. 630; Digest Supp.
- E (22) *Re Good*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 8 Digest 258, 197.
- (23) *Re Hadden*, [1932] 1 Ch. 133; 101 L.J.Ch. 52; 146 L.T. 190; Digest Supp.
- (24) *Re Scowcroft*, [1898] 2 Ch. 638; 67 L.J.Ch. 697; 79 L.T. 342; 8 Digest 247, 68.
- (25) *Re Mann*, [1903] 1 Ch. 232; 72 L.J.Ch. 150; 87 L.T. 734; 8 Digest 257, 182.
- F (26) *Re Spence*, [1937] 3 All E.R. 684; [1938] Ch. 96; 107 L.J.Ch. 1; Digest Supp.
- (27) *Crystal Palace Trustees v. Minister of Town & Country Planning*, [1950] 2 All E.R. 857, n.; [1951] Ch. 132; 114 J.P. 553; 2nd Digest Supp.
- (28) *Re Mylne*, [1941] 1 All E.R. 405; [1941] Ch. 204; 110 L.J.Ch. 87; 165 L.T. 96; 2nd Digest Supp.
- G (29) *Re Gott*, [1944] 1 All E.R. 293; [1944] Ch. 193; 113 L.J.Ch. 124; 170 L.T. 210; 2nd Digest Supp.

APPEALS from orders of HARMAN, J., dated Dec. 18, 1952, and reported [1953] 1 All E.R. 63, dismissing appeals by Cases Stated under the Stamp Act, 1891, s. 13, from decisions of the Inland Revenue Commissioners.

H The appellants, who were the trustees of the Newtown Trust, presented two instruments to the Inland Revenue Commissioners for their opinion as to the stamp duty with which they were chargeable. The two instruments were both dated Aug. 21, 1951, and were: (1) A conveyance between the British Transport Commission, Mr. Bernard Baddeley, and the trustees, whereby, in consideration of the payment of £1,000 by Mr. Baddeley to the commission, the commission granted and conveyed and Mr. Baddeley conveyed and confirmed to the trustees the fee simple in certain land and buildings at Stratford, Essex, on,

inter alia, the following trusts: for the promotion of the religious, social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex by the provision of facilities for religious services and instruction and the social and physical training and recreation of such persons who, for the time being, were in the opinion of the leaders for the time being of the Stratford Newtown Methodist Mission of insufficient means otherwise to enjoy the advantages provided by the trusts. (2) A conveyance of the fee simple of land at Ilford, Essex, laid out as a playing field, on part of which a pavilion and a groundsman's bungalow had been erected, accompanied by a payment of £10,000 to be held as capital money arising under the Settled Land Act, 1925, by Mr. Bernard Baddeley to the trustees, on, inter alia, the following trusts: for the promotion of the moral, social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex by the provision of facilities for moral, social and physical training and recreation of such persons who, for the time being, were in the opinion of the leaders of the Stratford Newtown Methodist Mission of insufficient means otherwise to enjoy the advantages provided by the trust. The commissioners were of opinion that the conveyances were liable to ad valorem duty at the rate of £1 for every £50 of the £1,000 in the first case, and of the £5,650 at which they assessed the value of the property in the second case. The trustees contended that the conveyances were made to a body of persons established for charitable purposes or to the trustees of a trust so established within the meaning of the Finance Act, 1947, s. 54 (1), and that the duty should be at the rate of 10s. for every £50 of the amount and value. HARMAN, J., held that the purposes of the trusts were not exclusively charitable. The trustees appealed.

S. Pascoe Hayward, Q.C., and *W. F. Waite* for the trustees.

Cross, Q.C., and *J. H. Stamp* for the Crown.

The Attorney-General (Sir Lionel Heald, Q.C.) and *Denys B. Buckley* as amici curiae.

Cur. adv. vult.

May 18. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: I have had the pleasure and advantage of reading the judgment about to be delivered by JENKINS, L.J., who, after a close analysis of the language of the two relevant conveyances of Aug. 21, 1951 (which in this as in every case it is first of all necessary to construe), and after reference to the numerous authorities to which our attention was directed, has reached the conclusion that the two deeds ought to be regarded as

"made to a body of persons established for charitable purposes only or to the trustees of a trust so established"

within the meaning of the Finance Act, 1947, s. 54 (1). I find myself in entire agreement with JENKINS, L.J., and with the reasons for his judgment, and, were it not for the importance of the arguments to which the case has given rise and to the fact that we are differing from HARMAN, J., in the court below, I should have been content to do no more than express my concurrence with JENKINS, L.J. In the circumstances, however, I hope that it may be useful for me, without repeating his reasoning, to add some few considerations of my own.

On the question of construction of the deeds, I agree with JENKINS, L.J., that the overriding purpose of the trusts therein respectively contained are the promotion of the religious, social and physical well-being (in the one case) and of the moral, social and physical well-being (in the other) of the class of persons therein identified, and that the other relevant provisions of the two deeds serve only to indicate the means ancillary to those objects. In this respect, therefore, the present case is, in my judgment, essentially distinct from *Londonderry*

Presbyterian Church House Trustees v. Inland Revenue Comrs. (1). In the deed which was in that case under consideration, the main object of the disposition was that it should be used

“ as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian churches in . . . Londonderry . . . or as a hostel or boarding house or as a library or for such other . . . purposes as the board of governors . . . shall . . . think fit, it being the true intention . . . that the said premises shall be used for . . . assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian church in . . . Londonderry . . . in such manner as the said board of governors . . . shall . . . think right.”

A The language I have quoted (and in quoting it I have emphasised the repeated use of the disjunctive “ or ”) contemplates on the face of it the use of the property conveyed exclusively for “ social purposes ”, “ recreation purposes ”, or, e.g., for a boarding house, objects which, according to the authorities, would be outside the scope of exclusively charitable trusts unless the final words in the quotation could be so construed as to confine, and, as it were, rescue, what had gone before. The Irish Court of Appeal held that the final words could not have that effect. In the present case, JENKINS, L.J.’s analysis of very different language shows that no such rescue operation is here demanded, and that the vital general words appear, not by way of an expository limitation, but as the opening and primary expression of the objects of the trusts. Although the *Londonderry* case (1) is not binding on this court, I agree with HARMAN, J., that it must be treated with the greatest respect, and not the least so because, the law in regard to charities being the same in Northern Ireland as in England, it is plainly desirable that the decisions of the courts in the two countries should be in conformity. It is, however, unnecessary for me to say more about the *Londonderry* case (1) since, for the reasons I have indicated, it cannot, in my judgment, be said to cover the present case, or provide the clue for its decision.

E The most important and the most difficult question raised in the present appeal is whether, assuming that the class of persons to be benefited can properly be said to be a section of the public, the second essential requirement for satisfying the test of a trust claiming to be charitable is satisfied, i.e., whether the purposes of the deed fall within the spirit and intendment of the preamble to the statute of Elizabeth I (43 Eliz. 1, c. 4). I take as my guide the language of LORD SIMONDS in *Williams’ Trustees v. Inland Revenue Comrs.* (2) ([1947] 1 All E.R. 518):

G “ My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz. c. 4, which is expressly preserved by s. 13 (2) of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by LORD MACNAGHTEN in *Pemsel’s* case (3) ([1891] A.C. 583) must always be read subject to the qualification appearing in the judgment of LINDLEY, L.J., in *Re Macduff* (4) ([1896] 2 Ch. 466): ‘ Now SIR SAMUEL ROMILLY did not mean, and I am certain that LORD MACNAGHTEN did not mean, to say that every object of public general utility must necessarily be a charity. Some may be and some may not be ’. This observation has been expanded by VISCOUNT CAVE, L.C., in this House in *A.-G. v. National Provincial Bank* (5) ([1924] A.C. 265), in these words: ‘ LORD MACNAGHTEN did not mean that all trusts beneficial to the community are charitable, but that there were certain beneficial trusts

which fall within that category: and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare; you must also show it to be a charitable trust."

I agree with JENKINS, L.J., that the trusts in the present case cannot be regarded as being for the advancement of religion, though, at any rate in one instance, they have a religious element in them. I agree also with him that they cannot be regarded as for relief of poverty, though the "means test" which they comprehend endows them with a certain flavour of poor relief, and I accept the argument that to show that the trusts are trusts for the advancement of religion or for the relief of poverty or both, but comprehend also other objects, will not (at least if the latter are not merely incidental in character) qualify the whole for the enjoyment of the privileges of a charity unless those other objects are also themselves charitable.

In the course of his judgment HARMAN, J., was impressed by the emphasis which he discerned on recreation as an essential purpose of the trusts, and he indicated his view (though I do not think it was essential to his conclusion) that trusts for promoting or providing recreation are not charitable. Thus, he said ([1953] 1 All E.R. 67):

"If I were free to do so, I should hold that recreation is not a charitable object . . ."

and he thus concluded his judgment (*ibid.*, 69):

"Accordingly, if I had held that recreation was a charitable object, I should have held that the purpose here was public recreation."

These expressions of opinion by the learned judge have served to afford to us at the hearing in this court the benefit of the argument of the Attorney-General, who appeared before us as *amicus curiae*, being anxious lest the learned judge's expressions might be regarded as casting doubt on the qualification as charitable trusts of many activities like those, for example, of the National Playing Fields Association. With all respect to him, I think that the opinion of HARMAN, J., on trusts for recreation was too broadly stated. It is not now in doubt that trusts which may be described as being for "the encouragement of mere sport" (which may be the same thing as "the mere encouragement of sport") would not be charitable: *Re Nottage* (6). On the other hand, apart from the inference which must be drawn from the many statutes to which we were referred by the Attorney-General, beginning with the Recreation Grounds Act, 1859, it is, in my judgment, clear that trusts for the provision or promotion of recreation, even though comprehending organised games, may well qualify as charitable trusts if, for example, they can in their context be regarded as educative in their main purpose. And in the most recent case of *Inland Revenue Comrs. v. City of Glasgow Police Athletic Asscn.* (7), it was clearly indicated by LORD NORMAND ([1953] 1 All E.R. 752, 753) that the activities there under review, which were in the event held to amount in effect to those of a recreational club, would have qualified for the privileges of a charity had they been but incidental to the purpose of improving the efficiency of the police force and of the encouragement of recruiting thereto.

Counsel for the Crown did not, indeed, in this court seek to argue the contrary, or to support the broad inference to which HARMAN, J.'s expressions tended. In this court the argument for the Crown went rather on the significance of the social purposes contemplated in the trusts. It was said that the present case was, accordingly, covered by the decision in *Williams'* case (2) as authorising, as an end in itself, the establishment and conduct of an ordinary social club. As a matter of the construction of the deeds, I do not think such

a result is justified or in accordance with the true purpose of the trusts which I have above stated by reference to the judgment of JENKINS, L.J. Nor do I accept the view, much pressed on us on behalf of the Crown, that the present case on its facts is in pari materia with *Dunne v. Byrne* (8), and *Farley v. Westminster Bank, Ltd.* (9). No doubt, wide discretions are vested by the two conveyances in the "leaders" therein referred to, but the discretions, in my judgment, relate, not to the choice of objects, but only to the means whereby the objects are attained. It was, I think, of the essence of the decision in *Dunne v. Byrne* (8) that the purposes of the disposition there under review covered objects which could not fairly be regarded as being for the advancement of religion, even though the Archbishop of Brisbane might think them conducive to that end, thereby exposing its language to

"such latitude of construction as to raise no trust which a court of equity could carry into execution . . . "*.

and the same vice was fatal to the appeal of the vicars and churchwardens in the *Farley* case (9).

But the contentions of the Crown proceeded also from a somewhat broader premise, involving, as will be seen, the greatest refinement of argument which they based on the final paragraph in LORD SIMONDS' opinion in the *Williams'* case (2) ([1947] 1 All E.R. 520, 521). For it was said that, although trusts of premises "for the purposes of a village hall" would be good charitable trusts on the ground that thereby something was added to the common stock, and that in the absence of express language the purposes would be deemed by the court to be exclusively charitable, nevertheless a trust of a building to be used for such purposes as those for which village halls are commonly held would not be charitable on the ground that there was thereby comprehended the possibility of its use for non-charitable purposes, e.g., solely for social or recreational purposes. It is not necessary in the present case to express a view on the justification for this suggested refinement. The Crown, however, proceeded to contend that the true test to be applied for determining whether a trust fell within the fourth class in LORD MACNAGHTEN'S classification involved, first, the process of striking out from the Elizabethan preamble all the language to which the first three claims were attributable. This process, if adopted, would leave for present purposes little or nothing but the references to bridges, causeways and highways, and so counsel for the Crown, carrying the argument to a reductio ad absurdum, rhetorically asked: "Who has ever heard of a bridge to be crossed only by impecunious Methodists?"

I agree with JENKINS, L.J., in rejecting this contention and also with his opinion that no support can properly be found for it in the judgment of LORD GREENE, M.R., in *Re Strakosch* (10) ([1949] 2 All E.R. 7). For myself, I make bold to call the argument a heresy without any warrant in authority. It would involve a complete re-casting of both the language and the sense of the preamble, and would turn it into an exhaustive definition of charities (a task never yet attempted by Parliament) by way of a catalogue of mutually exclusive activities. The preamble has always, in my understanding, been treated by the courts as containing a number of instances from which, and from the fair analogies to which, the overriding but unexpressed conception of charity may be deduced or discerned, and I think that the fallacy of the argument may be seen from the circumstance that, for example, the words "relief of aged, impotent and poor people" must plainly be relevant to some institutions which are admittedly charitable, but which are none the less outside the scope of LORD MACNAGHTEN'S first class. If those, or any other, words, having done duty, as it were, in providing the justification for one or other of the first three classes, are to be treated as thenceforward eliminated for all other purposes

* Per LORD LANGDALE, M.R., in *Baker v. Sutton* (1836) (1 Keen 233), quoted by LORD MACNAGHTEN in *Dunne v. Byrne* ([1912] A.C. 411).

from the preamble, the words that remain, even when full allowance for analogies is made, must inevitably have a scope much more restricted and too confined to admit many activities, of the kind illustrated in my brother's judgment and long since regarded as charitable, into the fair limits of the fourth class.

For the reasons which I have given, I have not been persuaded by any of the arguments put forward in support of the judgment under appeal, and I return, accordingly, to re-state the main purpose of the trusts of the present deeds, viz., the promotion of religious (or moral) social and physical well-being—in other words, for the attainment of the improved performance by those for whom the trust is established of their duties to God (or their consciences), their neighbours, and themselves. It is, in my judgment, legitimate also on the special language in the present case to rely on the conjunctive “and”. I do not say that all the means adopted must serve to promote at one and the same time all three aspects of the general purpose, but each aspect must be read in the context of the other two, so that, in my view, the trusts do not contemplate the use of the property conveyed exclusively for the promotion of one branch of the triple object in isolation from the other two, e.g., the promotion exclusively of social activities as a distinct end in itself, so as to justify no more than the establishment and maintenance of a social club. For these reasons, I think that the main purpose in each case is within the spirit and intendment of the statute of Elizabeth I.

On the second question, whether the class of persons intended to be benefited can properly be treated as a section of the public, I wish to add but three sentences, for on this matter I agree with the conclusion of the judge below. It is, no doubt, true that a power of selection is vested in the leaders referred to in the conveyances, but it does not seem to me that such a power affects the main characteristics of the class defined any more than would a power of selection of the most suitable candidates vitiate the charitable quality of an otherwise good educational trust. In my view, such a power of selection does not have the effect of making the objects of the trust a number of private persons whose essential quality or character for the purposes under review can properly be stated as relationship by the fact of blood, employment, or otherwise to some specified person or persons. The essential quality or characteristic of the intended beneficiaries in the present case remains that of being inhabitants of West Ham or Leyton, albeit that they are but a class of such inhabitants, and they fall, accordingly, within the language of LORD WRENBURY in *Verge v. Somerville* (11) ([1924] A.C. 499):

“The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.”

For these reasons, these appeals, in my judgment, should be allowed.

JENKINS, L.J.: Each of these two cases raises the question whether a conveyance of property to the appellant trustees on certain trusts was a conveyance to a body of persons established for charitable purposes only, or to the trustees of a trust so established, within the meaning of the Finance Act, 1947, s. 54 (1), so as to attract ad valorem stamp duty at the rate of 10s. per £50 and not at the increased rate of £1 per £50 imposed by s. 52 of that Act. The commissioners have held that stamp duty at the increased rate is exigible on both conveyances, and **HARMAN, J.**, on appeals by Cases Stated, has in each instance affirmed their decision, on the ground that neither conveyance was made to a body of persons, or to the trustees of a trust, established for charitable purposes only, within the legal definition of “charity”. The trustees now appeal to this court with respect to both conveyances, and the issue in the two appeals, easier to state than to determine, is whether the trusts

declared by those documents or either of them are, in the eye of the law, exclusively charitable trusts.

The two conveyances are both dated Aug. 21, 1951, and the property conveyed was in both cases provided by a Mr. Bernard Baddeley (therein referred to as "the donor") and conveyed by him, or, in the first case, at his direction by a vendor to him, to himself and the same six other persons as trustees. The conveyance in the first case (which I will call "the first conveyance")
A comprised property described in the schedule thereto as a piece of land

"situate at Stratford in the county of Essex and containing six hundred and eighty square yards or thereabouts . . . together with all those premises including a mission church lecture room and store erected on the said piece of land or on some part thereof",

B and is referred to in a recital as the property from which "the Stratford Newtown Methodist Mission is at present conducted."

The trusts declared by the first conveyance (so far as material for the present purpose) are set out in cl. 2 thereof, which is in these terms:

"The trustees shall hold the property hereby conveyed (hereinafter called 'the said property') upon the trusts following that is to say: (a)
C The trustees shall permit the said property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of 'the Newtown Trust' (hereinafter called 'the Foundation') for the promotion of the religious social and physical well-being of persons resident in the county boroughs of West Ham and Leyton
D in the county of Essex by the provision of facilities for religious services and instruction and for the social and physical training and recreation of such aforementioned persons who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents and by the provision of facilities for religious
E social and physical training and recreation and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons Provided always that the trustees shall not at any time hereafter and so long as the trusts hereby declared shall not have totally failed use or permit the said property to be used
F either for physical training or physical recreation or any kind of games on Sundays Christmas Days or Good Fridays or for the sale or consumption of intoxicating drink. (b) The trustees may from time to time:—(i) maintain the said property or any part thereof as a centre for religious services and instruction and for social and physical training and recreation; (ii)
G maintain the buildings now standing on the said property and erect and maintain such other buildings and works as they consider appropriate for the purposes aforesaid; (iii) accept from such leaders such annual payments as the trustees in their absolute discretion shall consider reasonable for the use of the buildings standing on the said property Provided always that such annual payments shall not exceed £50 in any year so long as such leaders shall pay the cost of heating lighting and cleaning the said premises and the insurance thereof against loss or damage by fire and the
H outgoings in respect thereof."

The conveyance in the second case (which I will call "the second conveyance") comprised properties at Ilford in the county of Essex described in a recital as

"the properties described in the first parts of the first second third and fourth schedules hereto, which said properties are now laid out as a playing field and upon parts of which a pavilion and a groundsman's bungalow have been erected."

The trusts declared by the second conveyance concerning these properties, so far as material for the present purpose, are set out in cl. 2 thereof, which is in these terms:

"The trustees shall hold the properties hereby conveyed (hereinafter called 'the said property') upon the trusts following that is to say:—(a) The trustees shall permit the said property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission under the name of 'the Newtown Trust' (hereinafter called 'the Foundation') for the promotion of the moral social and physical well-being of persons resident in the county boroughs of West Ham and Leyton in the county of Essex who for the time being are in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by these presents by the provision of facilities for moral social and physical training and recreation and by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons Provided always that the trustees shall not at any time hereafter and so long as the trusts hereby declared shall not have totally failed use or permit the said property to be used either for physical training or physical recreation or any kind of game on Sundays Christmas Days or Good Fridays or for the sale or consumption of intoxicating drink. (b) The trustees may from time to time:—(i) maintain the said property or any part thereof as a ground for moral social and physical training and recreation; (ii) maintain the buildings now standing on the said property and erect and maintain such other buildings and works as they consider appropriate for the purposes aforesaid; (iii) maintain a house for the accommodation of the groundsman and his family upon the said property or purchase or take on lease any adjoining or neighbouring land houses or buildings for that purpose."

By cl. 3 of the second conveyance, trusts were declared of a sum of £10,000 paid to the trustees by Mr. Baddeley, cl. 3 (so far as material for the present purpose) being in these terms:

"The trustees shall hold the said sum of £10,000 this day paid to them by the donor (the receipt of which sum the trustees hereby acknowledge) and all donations subscriptions legacies and other moneys which may at any time hereafter be paid to them for that purpose and all real and personal property which may at any time hereafter be conveyed transferred devised or bequeathed to them for that purpose Upon trust to use and apply the same for the general purposes of the Foundation as if the same were capital money arising under the Settled Land Act, 1925, from land settled by this deed in such manner as the trustees shall think most beneficial for promoting the objects of the charity hereby constituted."

These being the relevant provisions of the two conveyances, I should next proceed to construe the trusts in order to ascertain the true nature of the purposes to which the yardstick of legal charity has to be applied. It is agreed that in cl. 2 (a) of the first conveyance the words

"and by the provision of facilities for religious social and physical training and recreation"

are tautologous and make no intelligible addition to the content of the clause. Omitting them, I find cl. 2 (a) of the first conveyance susceptible of the following analysis:—The trustees are to permit the property conveyed to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission for the promotion of the religious, social and physical well-being of persons resident in the county boroughs of West Ham and Leyton, (i) by the provision of facilities (a) for religious services and instruction, and (b) for the

social and physical training and recreation of persons so resident who for the time being are, in the opinion of such leaders, members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by (which I take to mean advantages of the nature provided by) the first conveyance, and (ii) by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons (which I take to mean persons answering the description given in (i) (b) above), but subject to the proviso that the trustees are not to permit the property to be used for physical training or physical recreation or for any kind of game on Sundays, Christmas Days or Good Fridays, or (at any time) for the sale or consumption of intoxicating drink.

From this analysis, the following points emerge: First, the one and only object of the trust is the promotion of the religious, social and physical well-being of persons resident in the two county boroughs referred to. The rest of the trust is concerned with the means by which that end is to be achieved. It is impossible, without doing violence to the language of the clause, to construe it as prescribing three separate and distinct objects, viz., (a) the promotion of religious well-being, (b) the promotion of social well-being, and (c) the promotion of physical well-being. One state of complete well-being is set as the goal of the Foundation, and it is defined as having three aspects, religious, social, and physical. The trust will not be satisfied by the pursuit of any one aspect of this threefold state of well-being to the exclusion of the rest. It demands the pursuit of all three. Secondly, the promotion of well-being, to my mind, denotes improvement. The object of the trust can thus be re-stated as the religious, social and physical improvement of persons resident in the two county boroughs. In other words, the object may be said to be to make persons resident in the two county boroughs better people than they were before in their religious beliefs and observances, in their social relations, and in their bodily health.

Thirdly, social and physical well-being cannot, in my opinion, in this context connote mere social enjoyment or mere indulgence in sport, nor, in my view, can the former connote mere material advancement in "society" or "the social scale" in the popular sense of those expressions. Just as "religious well-being" demands the attainment of those standards in faith and in works which are expected of a good Christian, so does social well-being in this context, to my mind, demand the attainment of those standards of secular conduct and behaviour, and one might say of "manners", in the old-fashioned sense, expected of a good neighbour and a good citizen. Again, "physical well-being", though it may be in some measure attained by healthy varieties of sport, cannot, to my mind, here mean mere skill in or fitness for sporting pursuits. In the context, I think it should be regarded as denoting that bodily health without which the other two aspects of the threefold state of well-being aimed at by the trust cannot well be attained. A succinct and, I think, not unwarranted paraphrase of the object of the trust is to describe it as the promotion of the performance by persons resident in the two boroughs of their duty towards God, their duty towards their neighbour, and their duty towards their own bodies as instruments on the healthy condition of which the proper performance of the other two duties in great measure depends.

Fourthly, the remaining provisions of cl. 2 are directed to the means whereby the object of the trust, as already defined, is to be attained. The means prescribed consist, first, of the provision of facilities of two kinds, i.e., facilities for religious services and instruction and facilities for social and physical training and recreation, the latter kind of facilities, but, according to the grammatical structure of the clause, not the former, being limited to such of the persons resident in the two county boroughs as are, in the opinion of the "leaders", members or likely to become members of the Methodist Church,

and of insufficient means otherwise to enjoy advantages of the nature provided by the trust, and consist, secondly, of the promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons, which, as I have already indicated, must, I think, mean persons of the same description as those for whom facilities of the second kind mentioned above are to be provided. It should be noted that the last-mentioned facilities are to extend to social training as well as to social recreation and to physical training as well as to physical recreation. And, so far as the means of attaining the object of the trust consist of the promotion and encouragement of "activities calculated to contribute to the health and well-being of such persons", I think the previous use of the expression "well-being" in the definition of the object of the trust suffices to indicate that the same expression is used in a similar sense in the phrase "health and well-being", so that the activities to be promoted are to be such as are calculated to contribute to the religious and social well-being as well as the health, that is to say, the physical well-being, of the persons referred to, or, in other words, calculated to further, in relation to such persons, the object of the trust as previously defined.

The corresponding provisions of the second conveyance differ from the first in the following respects. First, the object of the trust is defined in cl. 2 (a) as "the promotion of the moral, social and physical well-being" of the class of beneficiaries therein described, "moral" thus taking the place occupied by "religious" well-being in the first conveyance. This change of language is presumably due to the fact that, whereas the property comprised in the first conveyance included a mission church and lecture room, where religious services and instruction could conveniently and appropriately be carried on, the property comprised in the second conveyance consisted of a playing field, pavilion and groundsman's bungalow, and was thus hardly suitable for formal religious instruction or observances. But, whatever the reason for the change of language, the claim to charitable status of the trust declared by the second conveyance must be judged on the footing that its object is the promotion of "moral social and physical well-being" and not the promotion of "religious social and physical well-being" as in the case of the trust declared by the first conveyance. As I have said before, I think the "promotion of well-being" is equivalent to "improvement". This makes the trust declared by the second conveyance a trust for moral, social and physical improvement. Moral improvement, I think, would, undoubtedly, include religious improvement, but it is a wider term, and would also extend to the inculcation of a desirable code of secular ethics, e.g., the secular (though also Christian) virtues of honesty, fair play, unselfishness and so on. Moral improvement, in its wider significance, to some extent overlaps with social improvement in the sense I have attributed to "social improvement" in my analysis of the corresponding provisions of the first conveyance. But I think the two conceptions are sufficiently distinct to warrant the attribution to "social well-being" in the second conveyance of the same meaning as I have assigned to it in the first. My observations in relation to the first conveyance to the effect that it prescribes one object with three aspects apply equally to the second, the only difference being that, in the case of the latter, one of the three aspects is "moral" instead of "religious" well-being.

Secondly, the class of beneficiaries prescribed by cl. 2 (a) of the second conveyance is defined for all purposes as consisting not simply of persons resident in the county boroughs of West Ham and Leyton, but of persons so resident who for the time being are, in the opinion of the leaders of the Stratford Newtown Methodist Mission, members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided

by the second conveyance, whereas under the first conveyance these qualifications in regard to church membership or likelihood of church membership and insufficiency of means are, as pointed out above, only applicable to certain of the means prescribed for the attainment of the object of the trust (i.e., the provision of facilities for social and physical training and recreation and the promotion and encouragement of activities calculated to contribute to health and well-being) and do not apply to the provision of facilities for religious services and instruction.

Thirdly, in conformity with the substitution of "moral" for "religious" well-being in the object of the trust, the means prescribed by cl. 2 (a) of the second conveyance take the form of (a) the provision of facilities for moral, social and physical training and recreation, and (b) the promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons. It should be noted that, as in the case of the first conveyance, these are not in themselves substantive objects, but merely means prescribed for the attainment of the sole tripartite object already declared, and further that, with the substitution of "moral" for "religious" well-being, the observations made above as to the meaning of "health and well-being" in the second conveyance apply equally here.

Such being, in my opinion, the true construction of the trust declared by each of the two conveyances, and the true character of the object of such trust ascertained with due regard to the distinction between object and means, I pass to the question whether in both or either of the two cases the object of the trust falls wholly within the ambit of legal charity. In view of the form taken by one of the arguments presented on behalf of the Crown, I find it necessary to begin my consideration of this question by attempting a return to first principles. The starting point for this purpose is the preamble to the statute of Elizabeth I (43 Eliz. I, c. 4). Of that enactment, LORD MACNAGHTEN said in *Pemsel's* case (3) ([1891] A.C. 581):

"The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the 'objects there enumerated', as LORD CRANWORTH, L.C., observes, 'are not to be taken as the only objects of charity but are given as instances'."

In the same speech (*ibid.*, 583) comes the celebrated classification of charitable purposes which, as pointed out by LINDLEY, L.J., in *Re Macduff* (4) ([1896] 2 Ch. 467), is a paraphrase of SIR SAMUEL ROMILLY's argument in *Morice v. Bishop of Durham* (12) (10 Ves. 532):

" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

It is, of course, well settled that, although this classification only mentions benefit to the community under its fourth head, no trust, to whichever head it is sought to be assigned, is charitable unless it is directed to the public benefit: see *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (13). On the other hand, it is equally well settled that a trust is not to be held charitable merely because it is directed to the public benefit, and that to be so held a trust must be not only directed to the public benefit but also within the spirit and intendment of the statute of Elizabeth I. In other words, it must be both (a) beneficial

to the community and (b) beneficial in a way the law regards as charitable: see *Williams' Trustees v. Inland Revenue Comrs.* (2) ([1947] 1 All E.R. 519). There is, however, a class of cases typified by *Goodman v. Saltash Corpn.* (14), which are by no means easy to reconcile with the general proposition I have just stated, because they appear to proceed on the ground thus formulated by LORD SELBORNE, L.C., in that case (7 App. Cas. 642):

"A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust . . ."

In view of the comments made on this line of cases in *Williams' Trustees v. Inland Revenue Comrs.* (2) ([1947] 1 All E.R. 521) it would seem that they should not now be regarded as authoritative save in so far as they can be explained on the ground that the particular purpose was regarded as falling within the spirit and intendment of the preamble to the statute of Elizabeth I.

For reasons which will hereafter appear, I propose in the first instance to assume that the persons to whose benefit the trust in each of the two cases now before the court is directed constitute a sufficient section of the community to provide that element of public benefit which is essential to all legal charity. On this assumption, how does the trust in each case stand in relation to LORD MACNAGHTEN'S classification. To pursue that inquiry head by head: First, is either trust for the relief of poverty? This was affirmatively argued by counsel for the trustees in both cases on the strength of the references in both conveyances to

"persons . . . in the opinion of such leaders . . . of insufficient means otherwise to enjoy the advantages provided by these presents."

He submitted, in my view rightly, that "poverty" in relation to charity is a relative term not confined to destitution, and referred to *Re De Carteret* (15) as typical of the authorities on this point. He contended, therefore, that insufficiency of means otherwise to enjoy the advantages provided by the two conveyances amounted to "poverty" in the charitable sense, and that the provision of those advantages for persons labouring under such insufficiency of means accordingly amounted to relief of poverty. I cannot accept this argument, which, to my mind, involves an unwarrantable extension of the charitable conception of relief of poverty. It should be noted, however, that the trust in each case has a certain affinity to trusts for the relief of poverty, in that it is designed to provide benefits for persons who cannot afford to provide similar benefits for themselves. Secondly, is either trust for the advancement of education? The answer here must, I think, be "No", though the object in each case is akin to the advancement of education in the sense that "religious social and physical improvement" or "moral social and physical improvement" may be said to form part of any liberal scheme of education and, indeed, to comprise some of the essential purposes of any education worthy of the name. Thirdly, is either trust for the advancement of religion? The answer here, as regards the first conveyance, must be: "Partly, but not exclusively", for religious improvement is only one of the three ingredients in the tripartite object. As regards the second conveyance, the answer must be: "At best no more than partly so, and only partly so in the sense that moral improvement may be said to include religious improvement". Fourthly and finally, is either trust for some exclusively charitable purpose beneficial to the community not falling under any of the preceding heads? The elimination of the first three heads means that if either trust is to qualify for charitable status at all, it must do so under this fourth head.

On this part of the case there was presented on behalf of the Crown an argument which, I confess, was new to me. It is of this nature: In order to determine whether a given trust is charitable, one must set LORD MACNAGHTEN'S

- classification alongside the preamble to the statute of Elizabeth I, and ask oneself with respect to each of the first three heads *seriatim* whether the trust is charitable under that head. As each head is eliminated as inapplicable to the particular case, one must strike out of the preamble all instances of charity referable to that head. If the trust under consideration cannot be brought strictly within any of the first three heads, or a combination of any two or more of them, then it can only be charitable under the fourth head if it strictly corresponds to, or bears a sufficiently close analogy to, one of the few remaining instances of charity which are left in the preamble after those referable to the first three heads have been struck out. In other words, according to this argument, a trust in order to be charitable must be either (i) strictly for the relief of poverty, or (ii) strictly for the advancement of education, or (iii) strictly for the advancement of religion; or else, failing these three, it must be (iv) for some purpose mentioned in, or analogous to some purpose mentioned in, the preamble, exclusive of those purposes mentioned in the preamble which have been eliminated as referable to any of the first three heads. I find it difficult to say exactly what instances of charity are to be taken as remaining in the preamble after the process of elimination above described has been carried out. But, for the purposes of the argument I am now stating, they can, I think, be regarded as comprising such purposes as "the repair of bridges ports havens causeways . . . sea banks and highways". I omit churches from this enumeration as referable to, and, indeed, providing the whole basis for, the third head of the classification. Thus, according to this argument, if a trust cannot be brought strictly within any of the first three heads of poverty, education and religion, it can only be brought under the fourth head if it has for its object the repair of such things as bridges, highways and the like, or the provision of some benefit analogous to the benefit conferred by such repair. According to the argument I am now stating, the analogy extends, but is confined, to purposes which add to the common stock of the community in the shape of lands, works, buildings and so forth dedicated to general use or enjoyment by the public or a section of the public. Such purposes are said to constitute in themselves a separate and distinct head of charity, so that the provision simpliciter of a village green or village hall for the use of the inhabitants of the village of X, without any definition of the purposes for which such green or hall is to be used, is charitable in its own right, even if the purposes for which it is in fact used (and for which it is obviously intended) are not in themselves of an exclusively charitable nature. On the other hand, it is said that if the trust declared concerning the village green or the village hall defines the purposes for which it is to be used, albeit the very purposes for which premises of that description are invariably used and intended, then the trust is not charitable unless the declared purposes fall strictly within one or other of the first three heads of the classification. It is said further that, for the purposes of the fourth head of charity as delimited by this argument, the public or section of the public to be benefited must be the public at large without any restriction otherwise than by reference to residence in some specified area, and that a class restricted to such members of the public resident in a specified area as are members of some particular religious sect or denomination does not, at all events for the purposes of this head, constitute a sufficient section of the public.
- H The bearing of this argument on the two cases now before the court may be thus stated: (a) The object of the trust in the first conveyance being "the promotion of religious social and physical well-being", and the object of the trust in the second conveyance being the promotion of "moral social and physical well-being", such object does not in either case fall strictly or exclusively within any of the first three heads of the classification. Those three heads and all instances of charity in the preamble which are referable

thereto must, therefore, be eliminated from further consideration, and neither trust can claim charitable status by analogy to anything contained in those three heads or those instances. (b) There remains only the fourth head. But this is not available here because, first, the fourth head only includes such things as the repair of bridges and highways and matters analogous thereto, and no such analogy is to be found in the object of either trust. Secondly, the declared object in each case not being strictly or exclusively within any of the first three heads of the classification, and a claim to charitable status by analogy to those three heads being inadmissible where none of them is strictly applicable to the trust in question, the trust is not in either of the two cases charitable at all, and a trust for purposes not in themselves of a charitable nature is not to be held charitable merely because it is directed to the benefit of the public or a section of the public (see *Williams' Trustees v. Inland Revenue Comrs.* (2)). (c) At all events for the purposes of the fourth head, the trust is not in either case directed to a class of beneficiaries which amounts to a section of the public, because in the case of the first conveyance all the means prescribed for carrying out the object (other than the provision of facilities for religious services and instruction), and in the case of the second conveyance both the object and the means of carrying it out, are limited to persons resident in the two county boroughs named who, in the opinion of the leaders referred to, are members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by the conveyance.

I have stated this argument at some length on account of its novel, and, to my mind, subversive, character. I am not concerned to dispute the charitable character of a trust to provide a village green or a village hall for the use of the inhabitants of the village of X, or that the charitable character of such a trust is referable to the fourth head of the classification. But I am concerned to dispute the proposition that the fourth head of the classification does not admit of the inclusion within the ambit of legal charity of purposes analogous to the relief of poverty, the advancement of education, and the advancement of religion although not strictly comprised in any of those three heads. *Re Strakosch* (10) was referred to, and it was suggested that support was to be found for the argument in the judgment of LORD GREENE, M.R., where he said ([1949] 2 All E.R. 8):

“LORD MACNAGHTEN’S fourth class is represented in the preamble by the repair of bridges, etc., and possibly by the maintenance of houses of correction.”

But if the passage in which this sentence occurs is read as a whole I think it really tells the other way (*ibid.*):

“In *Williams' Trustees v. Inland Revenue Comrs.* (2), the House of Lords has laid down very clearly that in order to come within LORD MACNAGHTEN’S fourth class the gift must be not only for the benefit of the community but beneficial in a way which the law regards as charitable. In order to satisfy the latter it must be within the ‘spirit and intendment’ of the preamble of the statute of Elizabeth. That preamble set out what were then regarded as purposes which should be treated as charitable in law. It is obvious that as time passed and conditions changed common opinion as to what was properly covered by the word charitable also changed. This has been recognised by the courts as the most cursory examination of the cases shows. In order to be within the spirit and intendment of the preamble we take it that one must find something charitable in the same sense as the recited purposes are charitable. LORD MACNAGHTEN’S fourth class is represented in the preamble by the repair of bridges, etc., and possibly by the maintenance of houses of correction. This negatives any

suggestion that 'charitable' must be confined to the poor (*Verge v. Somerville* (11) [1924] A.C. 502). We have come to the conclusion that, though undoubtedly of benefit to the community, the purpose under consideration is not 'charitable' in the sense in which the benefits to the community instanced in the preamble are charitable. The benefit, as we understand it, does not have to be in any way ejusdem generis with the recited purposes, but it has to be charitable in the same sense."

A There are many cases in the books in which purposes not falling within any of the first three heads have been held to be charitable when they could not possibly have been held such according to the method of applying the classification contended for on behalf of the Crown. I need only refer to *Re Wedgwood* (16), where a trust for the protection and benefit of animals was (to quote the headnote) ([1915] 1 Ch. 113):

B "Held, a good and valid charitable trust, on the ground that it was calculated to promote public morality by checking the innate tendency to cruelty",

and *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (17) where a society whose substantial object was the promotion of agriculture was also held charitable.

C I think this well-known passage in the judgment of CHITTY, J., in *Re Foveaux* (18), still holds good ([1895] 2 Ch. 504):

D "Cases arise, such as the present, in which it is not easy to ascertain whether a particular institution is or is not a charity. Charity in law is a highly technical term. The method employed by the court is to consider the enumeration of charities in the statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances."

E In my view, given the requisite element of public benefit, the question in any given case is simply whether the trust claimed to be charitable is within the spirit and intendment of the statute of Elizabeth I, and that question is to be answered by reference to the preamble as a whole, and in the light of the decided cases.

F I need not repeat what I have already said about the construction of the two conveyances. My view as to the object of the trust in the first conveyance may be summed up by saying that the object is to make the people to whose benefit it is directed better Christians, better citizens, and better physical specimens, and as to the second conveyance by saying that the object is to make such people morally better, or, in other words, more virtuous persons, better citizens, and better physical specimens. Nor need I repeat what I have already said about the means prescribed for attaining the object of the trust in either case. The salient points here are, first, that they are mere means for attaining the object, and not ends in themselves, and, secondly, that the references which they contain to "training and recreation", not recreation alone, bear out my view as to the improving character of the object itself. A third important consideration is the limitation, partial in the first conveyance and total in the second, of the benefit of the trust to persons resident in the two county boroughs who, in the opinion of the leaders referred to, are "of insufficient means otherwise to enjoy the advantages provided by these presents". I omit at this stage the religious qualification as relevant to the question of sufficiency of public benefit, to which I will in due course return.

Given the requisite element of public benefit, and if I am right in the view I have formed as to the true nature of the object of each of these two trusts, is that object charitable within the spirit and intendment of the preamble? In the first case, so far as the object is directed to religious improvement, it falls, of course, fairly within the third specific head of the classification, viz., the advancement of religion. In the second case, so far as the object is directed to moral improvement, there is undoubted authority for the proposition that a trust for the moral improvement of the public in general or of a section of the public is charitable within the spirit and intendment of the preamble although it is not one of the specific instances of charity therein enumerated (see, e.g., *Re Wedgwood* (16)). I have no difficulty, therefore, so far in according charitable status to both trusts. To deal next with the third aspect of the object of the trust in each case, viz., physical improvement, this aspect is, perhaps, more controversial, but I think that, in principle, a trust for the physical improvement of the public generally or of a section of the public should be held to be within the spirit and intendment of the preamble. I think it would be irrational to exclude physical improvement while including moral improvement. Both objects are in their respective ways equally desirable, and equally in the public interest. Moreover, if it be charitable to relieve sickness, it should by parity of reasoning be charitable to promote physical health. There is at all events some authority in favour of this view and none which, properly understood, can, in my opinion, fairly be held to be against it. But the validity of my conclusion on this point, of course, depends on the correctness of the meaning I have assigned to "the promotion of physical well-being" in the context afforded by the two conveyances. If, contrary to my opinion, it meant what has been termed "the encouragement of mere sport", then there is binding authority for the view that it would not be charitable. Finally, as to the second aspect of the tripartite object, "the promotion of social well-being", or, to use the paraphrase I have ventured to adopt, "social improvement", this aspect of the object, undoubtedly, presents the greatest difficulty. If what is meant is the mere provision of facilities for social enjoyment, then this aspect of the object could not, I think, fairly be brought within the spirit and intendment of the preamble. But if I am right in my view that it bears the meaning I have endeavoured to describe above, then it means in effect the inculcation of socially acceptable standards of conduct and behaviour in relation to other people—standards of conduct and behaviour such as are to be expected of a good neighbour or good citizen—and does, in my opinion, fairly fall within the spirit and intendment of the preamble, for, so viewed, its aim is to promote amongst the persons to whose benefit the trust is directed the practical application of sound ethical principles in their relations with other people, and it is, accordingly, in the nature of a trust for the moral improvement of a section of the public. I am fortified in my conclusion with respect to the second and third aspects of the trust in the first conveyance, and all three aspects of the trust in the second conveyance, not only by the references to training in the prescription of the means by which the object is to be attained, but also by the limitation of the benefit of the trust to persons of insufficient means to enjoy the advantages provided. This imbues the trust with one of the distinctive characteristics of charity. As LORD HALDANE said in *A.-G. v. National Provincial & Union Bank of England* (5) ([1924] A.C. 267):

"In the case of a gift for charitable purposes there is a desire to profit people who would not be profited without your gift—that is the dominant motive."

If I am right so far, it matters not that the means prescribed in both cases include "recreation" as well as "training". Any scheme of moral, social and physical improvement must, as, indeed, must any scheme of education in the conventional sense, include a greater or less degree of recreation. Training

and recreation go hand in hand, and the former is often best achieved through the latter. This is particularly, but not exclusively, true with respect to physical improvement. I would, moreover, repeat that the means prescribed must be viewed as means to an end, not as ends in themselves.

- As seems inevitable in these charity cases, we were referred to a plethora of authorities, to some of which I should next allude. *Re Nottage* (6) was cited for the proposition that the encouragement of mere sport is not a charitable purpose. With regard to this authority I need only say that, in my view, neither of the trusts here in question is a trust for the encouragement of mere sport. Somewhat nearer in point is the Irish case of *Shillington v. Portadown Urban Council* (19), where a trust for providing the means of healthy recreation for the residents of a named town and surrounding districts was held charitable. Reference was also made to *Re Mariette* (20) and *Re Gray* (21), as bearing on the charitable character of trusts for the promotion of physical efficiency. In the former case the provision of facilities for games and a prize for athletic sports at a school, were held charitable on the ground that bodily development was just as much a part of education as mental development, and, accordingly, that these gifts were charitable as being for the advancement of education. In the latter case, the provision of the nucleus of a fund for the promotion of certain outdoor sports in a particular regiment was held charitable as being for the promotion of the physical efficiency of the army, following *Re Good* (22), where a trust to provide a library for an officers' mess was held charitable as tending to promote the mental efficiency of the army. These cases are, of course, far removed in subject-matter from the two cases now before the court, but I think they are of some assistance as showing that a trust for physical, no less than mental or moral, improvement may be charitable.

- We were also referred to *Re Hadden* (23), where a trust, inter alia, to provide playing fields, parks and gymnasiums in, in effect, centres of working-class population, was held on construction to have for its object the health and welfare of the working classes by the supply of healthy recreation mainly in the open air, and, in particular, by providing playing fields, parks and gymnasiums, and as such to be a valid charitable gift, the learned judge founding himself primarily on the recognition contained in the Mortmain and Charitable Uses Act, 1888, s. 6, of the dedication of land to the recreation of the public as a charitable use. In *Re Scowcroft* (24) a gift to the vicar for the time being of a parish or a building used as a village club and reading room

- “to be maintained for the furtherance of conservative principles and religious and mental improvement”

- was held charitable, notwithstanding the inclusion of the reference to conservative principles, as being in effect a gift for the furtherance of religious and mental improvement amongst a section of the public. *Re Mann* (25) was a case of a gift to an institute established for the general benefit of the inhabitants of a named village, and this was held charitable as being for the benefit of the inhabitants. The authority of this case is, perhaps, open to question in view of what was said in *Williams' Trustees v. Inland Revenue Comrs.* (2) about the class of cases headed by *Goodman v. Saltash Corpn.*^a (14). In *Re Spence* (26) a gift to a local authority for the erection of a hall for public purposes was held charitable. This is, perhaps, open to the same comment. In *Crystal Palace Trustees v. Minister of Town and Country Planning* (27) the objects of the Crystal Palace, which was to be held, inter alia, as a place of public resort and recreation, were held to be charitable.

Nearer the mark for present purposes is the Irish case of *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (1). The objects of the trust there in question are thus set out (27 Tax Cas. 435):

“The appellants are the present trustees of a deed of trust dated Nov. 21, 1922, whereby the trusts affecting the property concerned are declared in

the following terms: 'Upon trust to permit the same or any part thereof to be used as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian churches in the city of Londonderry and the surrounding district or as a hostel or boarding house or as a library or for such other purpose or purposes as the board of governors hereinafter defined or any board of governors or committee to be substituted therefor in manner hereinafter appearing shall from time to time think fit it being the true intention and meaning of these presents that said premises shall be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian Church in the city of Londonderry and surrounding district in such manner as the said board of governors or substituted board of governors or committee shall from time to time think right'."

MACDERMOTT, J., in a closely reasoned judgment, held these trusts to be charitable. His decision was reversed in the Court of Appeal. SIR JAMES ANDREWS, C.J., said (*ibid.*, 446):

"The authorities, whose number is legion, upon whether particular trusts fall within or without LORD MACNAGHTEN's fourth category, baffle all efforts on my part to reconcile them with one another, and no useful purpose would be served in the circumstances by reviewing them. Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic. I shall simply content myself with saying that I find nothing in the statutes referred to which would assist me in holding that the trusts in the present case for religious, moral, social and recreative purposes, excluded as I have held them to be from LORD MACNAGHTEN's third class, fall within the fourth class as a valid charitable trust. The test is not whether the objects or purposes aimed at are beneficial to or receive the general acceptance of the community. It is simply whether they conform or not to the requirements and essentials of a legal charity."

The case is also relevant on the question whether persons of a particular religious denomination resident in a specified area are or are not a sufficient section of the public for the purposes of a charitable gift. MACDERMOTT, J., and SIR JAMES ANDREWS, C.J., held that they did, BABINGTON, L.J., held that they did not, while BLACK, J., expressed no opinion on the point.

Comparison of the trusts in the *Londonderry* case (1) with those in the two conveyances with which we are here concerned seems to me to show that case to be clearly distinguishable. The trusts in the *Londonderry* case (1) begin by enumerating a wide range of purposes by no means all of which would necessarily be charitable, and end by saying (*ibid.*, 435):

"... the true intention and meaning of these presents that said premises shall be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian Church in the city of Londonderry and surrounding district in such manner as the said board of governors or substituted board of governors or committee shall from time to time think right."

Trusts in such a form are, I think, well capable of being held to range beyond the ambit of legal charity without involving a similar conclusion in the two present cases.

The case of *Williams' Trustees v. Inland Revenue Comrs.* (2) is a decision of the House of Lords and as such, of course, binding on this court. But there, again, the objects were different from and wider than those in the present two cases. It is further to be observed that the basis of LORD SIMONDS' opinion is contained in this passage ([1947] 1 All E.R. 519):

"But it is just because the purpose of the trust deed in this case is

said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail."

It should be added that in summarising his view as to the quality of the trusts there in question LORD NORMAND said (*ibid.*, 521):

A "In the present case the decision of the commissioners was that, while certain features of the institute conformed to the idea of charity, they were not so dominating nor was the general character of the institute such as effectively to distinguish it from an ordinary social club. In my opinion, this conclusion is amply supported by the facts and is well founded in law."

B If, on the true construction of the two conveyances here in question, the purposes of the trusts were those of a social club, then, of course, they would not be charitable. If, on the other hand, the construction I have placed on the two conveyances is right, then, in my view, the trusts are charitable. In the end, all turns on the construction of the two conveyances.

C Much reliance was placed for the Crown on *Dunne v. Byrne* (8), where, to quote the headnote ([1912] A.C. 407), it was held that a residuary bequest "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in his diocese" was not a good charitable bequest and was void. The expression used by the testator is not identical with the expression "for religious purposes". But as to the argument D founded on this case and *Farley v. Westminster Bank, Ltd.* (9), where a gift "for parish work" was held not to be charitable, I would observe that they proceeded on the ground that the objects authorised extended to purposes other than religious purposes in the strictly charitable sense, and that, once it was found that the purposes prescribed were not strictly religious purposes, there was no other head of charity to which they could be assigned. E But, if the view I have formed as to the true construction of these two conveyances is right, then the object prescribed in each of the two cases is an exclusively charitable object.

We were also referred to *Inland Revenue Comrs. v. City of Glasgow Police Athletic Asscn.* (7), but I do not think it has any bearing here, the decision of the House of Lords being simply to the effect that the association there in question had two objects, one of which, viz., the increasing of the efficiency of the police force, was charitable, while the other, viz., the benefit of its own members as individuals, was not, and, accordingly, that the association was not established for charitable purposes only. I should, however, observe that with respect to *Re Good* (22) and *Re Gray* (21), LORD NORMAND said ([1953] 1 All E.R. 749):

G "... so far as they are founded on the principle that gifts exclusively for the purpose of promoting the efficiency of the armed forces are good charitable gifts, they are, in my opinion, unassailable, but that the decision that the actual gifts were of that nature is more doubtful";

H and that LORD MORTON (*ibid.*, 755) expressed his concurrence in this comment on those two cases. Finally, on this part of the case, I should mention, that in the course of the argument, we were referred to a large number of Acts of Parliament as giving, in effect, statutory recognition to the charitable status of public open spaces, parks, recreation grounds and the like. I will not burden this already over-long judgment by referring to them in detail. Suffice it to say that, so far as they go, they, perhaps, afford some degree of support to the trustees' case (*cf. Re Hadden* (23)), but, as I have said before, I think the issue

really turns on the true construction of the two particular conveyances now before us, and I prefer to found my decision on that.

It remains to consider the question of public benefit. Are persons resident in the county boroughs of West Ham and Leyton who are, in the opinion of the leaders referred to, members or likely to become members of the Methodist Church a sufficient section of the public for the purposes of a charitable trust? Speaking for myself, I have no doubt that they are. The nexus provided by membership of a particular religious sect or persuasion has, so far as I know, never (except by BABINGTON, L.J., in the *Londonderry* case (1)) been held to be a private or personal one so as to make its members for the purposes of this branch of the law a mere aggregate of private individuals as the employees or former employees of a particular company, though numerous, were held to be in *Oppenheim v. Tobacco Securities Trust, Ltd.* (13). Certainly this view has never been suggested in the case of educational trusts, although there must be very many educational trusts which are by their terms confined to persons of particular religious sects or persuasions. In particular, large numbers of educational trusts may have been set up since the Reformation for the exclusive benefit of members of the Church of England. All such trusts would be bad as not being for the public benefit if the members of a particular sect or persuasion were held not to constitute a section of the public. Again, trusts for the advancement of religion are commonly confined to members of some particular religious sect or denomination, but have never been held on that account to lack the necessary element of public benefit. If the members of a particular religious sect or denomination resident in a particular area are a section of the public for the purposes of educational or religious charities, I fail to see why they should not also be such for the purposes of any other form of charity, and, accordingly (notwithstanding the contrary views expressed by BABINGTON, L.J., in the *Londonderry* case (1) (27 Tax Cas. 451), and submitted in argument on behalf of the Crown) I hold them to be such for the purposes of the present case. Plainly the inclusion of prospective or potential members of the particular denomination cannot make the class any the less a section of the public.

It remains only to deal with the submission made for the Crown to the effect that the religious qualification in this case has the effect of making the trusts void for uncertainty. So far as I know, this doctrine has never been applied to religious qualifications prescribed in charitable trusts, and *Re Mylne* (28) and *Re Gott* (29) provide some authority for the view that it is inapplicable. It is to be observed, moreover, that here the admission of persons to participation in the benefit of the trust under each conveyance (apart from the exception already noted as regards the first) is made to depend on the leaders' opinion as to their membership of or the likelihood of their becoming members of the Methodist Church. The leaders must form an honest opinion on the matter to the best of their ability, and persons claiming to be eligible must be admitted or rejected in accordance with such opinion. Therefore, so far as I can see, no question of uncertainty arises in the matter of religion, or, I should add, in the matter of insufficiency of means which is also referred to the opinion of the leaders.

Finally, I would say that, in reaching a conclusion favourable to the trustees on the question of public benefit, I have not overlooked what was said in *Williams' Trustees v. Inland Revenue Comrs.* (2) as to the difficulty of finding the community to be benefited in that case in view of the extraordinarily wide definition of "Welsh people" contained in the trust deed, but I regard that case as clearly distinguishable, as there seems to me to be no similar difficulty in ascertaining the very differently constituted community to whose benefit the trusts of the two conveyances now before the court are directed. For these reasons, I would allow both appeals.

HODSON, L.J. (read by **SIR RAYMOND EVERSHED, M.R.**): The first contention of the trustees is that these trusts can be supported as trusts for the relief of poverty. They argued that, in considering the relief of poverty, it was not necessary to confine oneself to cases of destitution. They relied in particular on the judgment of **MAUGHAM, J.**, in *Re De Carteret* (15), where he declared to be the objects of charity widows with young children whose income was not more than £120 a year. They contended that, since the bare necessities of

- A** life are now available to all, the courts must move with the times and the donor of a charitable gift is now bound to provide for a different range of objects. If this last premise is true, which is at least doubtful, it is, I think, not open to the courts to extend the range of poverty in the light of the activities of the welfare State. This must be achieved, if at all, by legislation. When one considers the class of persons described in the trusts, they are not, in my opinion,
- B** to be regarded as persons in need. As **HARMAN, J.**, said, the word "relief" in the phrase "relief of aged, impotent and poor people", contained in the preamble to the statute of Elizabeth I, seems to connote need of some sort, need either of a home or of the means to provide for some necessity or quasi-necessity. There is here no suggestion of the relief of poverty in the operative part of the documents, and the donor has sought merely to restrict the benefits given
- C** to persons who could not afford certain amenities. The class is not, in my opinion, a class of poor persons within the language of the preamble, nor would the benefits provided have the effect of making them less poor. I am in full agreement with the learned judge in rejecting the contention that this is a poverty case.

- D** The main argument of the trustees, however, was directed to showing that the trusts were a good charitable class within the fourth class of *Pemsel's* case (3) ([1891] A.C. 583) as

"trusts for other purposes beneficial to the community, not falling under . . . the preceding heads,"

- i.e., the heads of poverty, education or religion. Under this head, the authorities are, no doubt, difficult, but the qualification to the fourth class, referred to by
- E** **LORD SIMONDS** in *Williams' Trustees v. Inland Revenue Comrs.* (2) and set out in **HARMAN, J.**'s judgment, must be remembered. The effect is shortly stated thus:

"No trust can be charitable unless it is beneficial to the community in a way which the law regards as charitable."

- F** As **LORD SIMONDS** said ([1947] 1 All E.R. 518):

"... a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz., c. 4 . . ."

- Turning to the deeds in question here, the governing words in one case are
- G** "for the promotion of the religious social and physical well-being", and in the other case

"the promotion of the moral, social and physical^{*} well-being."

- There follows in each case a description of the class of persons to be benefited by the trusts, being a class of persons resident in the county boroughs of West
- H** Ham and Leyton. I agree with the other members of the court that the other relevant provisions of the two deeds only indicate the means to be used to attain the ends prescribed by the governing words. The main difficulty which I have felt is in reading the governing words conjunctively, notwithstanding the link provided by the word "and", particularly having regard to the judgment of **SIR JAMES ANDREWS, C.J.**, in *Londonderry Presbyterian Church House Trustees v. Inland Revenue Comrs.* (1). In that case, the Northern Ireland Court

of Appeal reversed a decision of MACDERMOTT, J., who had to consider the following disposition of certain properties (27 Tax Cas. 435):

"Upon trust to permit the same or any part thereof to be used as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian churches in the city of Londonderry and the surrounding district or as a hostel or boarding house or as a library or for such other purpose or purposes as the board of governors hereinafter defined or any board of governors or committee to be substituted therefor in manner hereinafter appearing shall from time to time think fit, it being the true intention and meaning of these presents that said premises shall be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian church in the city of Londonderry and surrounding district in such manner as the said board of governors or substituted board of governors or committee shall from time to time think right."

MACDERMOTT, J., considered the various different uses to which the hall might be put as pointing to user for purposes which might be either religious or social or recreative in nature without being anything else, but came to the conclusion that, notwithstanding the words of disjunctive user, the words descriptive of the purposes of the trust could properly be read conjunctively in obedience to the guide provided by the word "and". On appeal, SIR JAMES ANDREWS, C.J., took a different view on the construction of the words "religious moral social and recreative life" in their context and found difficulty in holding that every use to which the premises could legitimately be put must assist and help all the four purposes specified. He felt that the proper construction to place on the terms of the trust taken as a whole was that the use of the hall for meetings might assist and help the religious and moral life of those intended to benefit, whilst its use for social and recreative purposes should satisfy their requirements in regard to social and recreative life. He added that both would be within the terms of the trust. He added, further, that he did not regard the question of construction as vital.

A similar question of construction arises in this case, and counsel for the Crown has pressed on us the difficulty of applying the adjectives contained in the governing words of these trusts conjunctively to the various activities which may legitimately take place on the trust property. While I agree with HARMAN, J., that the *Londonderry* case (1) is a tax case of high persuasive authority, I have finally come to the conclusion that, on the question of construction of the governing words of the deeds now under consideration, it is legitimate to give those words their ordinary grammatical interpretation and to read them conjunctively. In so far, therefore, as this opinion on construction is inconsistent with the reading of similar words in the *Londonderry* case (1), I would respectfully prefer the construction adopted by MACDERMOTT, J., to that adopted by SIR JAMES ANDREWS, C.J., bearing in mind that on this matter the opinion of the latter was not vital to his decision. Once the difficulty of construction is out of the way, I am content to follow and adopt the reasoning of JENKINS, L.J., throughout, and I feel free from any shackles which might appear to be imposed by the decision of the *Londonderry* case (1). The objects first stated there were very wide, including, for example, "a hostel or a boarding house", objects which, *prima facie*, would not be charitable, and the words

"it being the true intention and meaning of these presents that the said premises shall be used for the purposes of assisting and helping in the religious moral social and recreative life of those connected with the Presbyterian Church in the city of Londonderry"

can fairly be regarded as insufficient to make charitable what was not charitable

before. In this connection, the words "assisting and helping" in the religious, moral and social life are less direct than the words "for the promotion of the religious social and physical well-being" in the one deed and the words "for the promotion of the moral social and physical well-being" in the other. This distinction, though a fine one, is, I think, in line with that adopted by the Privy Council in *Dunne v. Byrne* (8), where it was held ([1912] A.C. 407) that a bequest

- A "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in his diocese"

was not a good charitable bequest, the language of the testator not being equivalent to "for religious purposes".

- B Accepting, therefore, the construction placed upon the deeds in question by JENKINS, L.J., I have nothing further to add except to say that I agree with his judgment and that of the Master of the Rolls. Accordingly, I would allow the appeals.

Appeals allowed. Order for excess duty paid to be repaid.

Solicitors: *Kenneth Brown, Baker, Baker* (for the trustees); *Solicitor of Inland Revenue; Treasury Solicitor.*

- C [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LONDON CEMETERY CO. v. CUNDEY AND ANOTHER.

[QUEEN'S BENCH DIVISION (McNair, J.), May 12, 13, 1953.]

- D Burial—Burial rights in perpetuity—Duty to maintain plot—Tree falling and causing damage—Liability of grave owner.

- E The plaintiff company, incorporated under a private Act of Parliament (6 & 7 Will. 4, c. cxxxvi) were owners of a cemetery in Highgate, and the defendants were the successors in title to the exclusive right of burial in perpetuity in a plot and vault in the cemetery granted by the plaintiffs to the defendants' predecessors. The plot contained an elm tree expressly mentioned in the grant of burial rights therein, but there was no term in the grant as to who was responsible to keep the tree safe. The tree had been lopped by the plaintiffs in 1924 and 1935 on the instructions and at the expense of the defendants' predecessors. In 1949 the elm tree died, and notice was given to the defendants of that fact, they being asked to
- F arrange for its removal in case of damage to the defendants' and neighbouring memorials, but no action was taken. On Nov. 3, 1950, the tree fell, causing damage to neighbouring memorials, but leaving the defendants' memorials undamaged. In an action by the plaintiffs to recover the cost incurred or to be incurred by them in repairing the damaged memorials,

- G HELD: under the private Act the plaintiffs had no power to sell or dispose of any of the land consecrated or set apart for the burial of the dead, but could only grant limited rights of burial; the only terms which could be implied in that transaction were those implied in other contracts, namely, such terms as were necessary to give it business efficacy; it was not necessary for that purpose to imply a term that the grave owners for the time being should maintain the safety of the tree; and, therefore, the
- H plaintiffs were not entitled to succeed.

Per curiam: Even if in the original grant there had been an express covenant by the grave owner that he would maintain the tree, the burden would not pass to the defendants as assignees of the original grantee as it was a mere personal covenant and not a covenant running with land.

AS TO EXCLUSIVE RIGHTS OF BURIAL, see HALSBURY, Hailsham Edn., Vol. 3, pp. 579-581, paras. 1109-1118.

Cases referred to:

- (1) *R. v. St. Mary Abbott's, Kensington*, (1840), 12 Ad. & El. 824; 10 L.J.M.C. 25; 113 E.R. 1026; *sub nom. R. v. General Cemetery Co.*, 5 J.P. 178; 7 Digest 564, 387.
- (2) *Ingram v. Morecraft*, (1863), 33 Beav. 49; 55 E.R. 284; 19 Digest 116, 769.
- (3) *Taylor v. Whitehead*, (1781), 2 Doug. K.B. 745; 99 E.R. 475; 19 Digest 116, 765.
- (4) *McGough v. Lancaster Burial Board*, (1888), 21 Q.B.D. 323; 57 L.J.Q.B. 568; 52 J.P. 740; 7 Digest 543, 231.
- (5) *Hoskins-Abrahall v. Paignton Urban Council*, [1929] 1 Ch. 375; 98 L.J.Ch. 103; 140 L.T. 397; 93 J.P. 93; Digest Supp.
- (6) *Re Comptoir Commercial Anversois & Power, Son & Co.*, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 39 Digest 463, 893.

ACTION for an indemnity from the defendants for expenses incurred or to be incurred by the plaintiffs in repairing certain gravestones and monuments.

The plaintiffs were a cemetery company incorporated under a private Act of Parliament (6 & 7 Will. 4, c. cxxxvi) by virtue of which they were the owners of St. James' Cemetery in Highgate. The defendants were the executors and residuary devisees and legatees under the will of their mother, Mabel Cundey, and successors in title to certain rights in the Cundey family vault in the Highgate cemetery. On June 13, 1882, the plaintiffs granted to Samuel Cundey, his heirs, and assigns the exclusive right of burial in a plot 347 square feet in area and containing a "reserve brick vault". The plot was numbered 25,067 and this was entered in the plaintiffs' graves register. In 1883 Samuel Cundey died and was buried in the vault. His widow, Eliza Cundey, assigned to herself and her three children Annie, Howard and Oliver

"the exclusive right of burial or interment in all that brick vault and its appurtenances situated and being in the consecrated part of the Highgate cemetery of St. James in the parish of St. Pancras, Highgate, in the county of Middlesex distinguished by the number 25,067, which was granted to the late Samuel Cundey in perpetuity by the London Cemetery Co., by an entry bearing the date June 13, 1882, and all my estate, title and interest therein or thereto, to hold the same unto [herself and the three named children] their executors, administrators and assigns, subject to the same conditions as I held the same immediately before the execution hereof."

On Mar. 27, 1885, the plaintiffs granted to the assignees a further plot of 126 square feet contiguous with the old plot. This new plot contained an elm tree which was expressly mentioned in the grant, and this new grant was entered in the register as being "extra ground" to the original vault. HIS LORDSHIP found as a fact that the reason the extra ground was acquired was largely to enjoy the amenity of the tree.

In 1907 Eliza Cundey died, having been predeceased by Annie and Oliver, and thus leaving Howard Cundey as the sole survivor. On May 27, 1909, Howard Cundey executed an assignment of the burial rights in the grave to himself and his wife Mabel, in terms similar to those of the original assignment. In March, 1924, the elm tree on the burial plot was well lopped by the plaintiffs on the instructions of Howard Cundey and at his expense. No evidence was given whether this lopping was done as a matter of legal obligation or as one of filial piety. In 1927 Howard Cundey died, followed in 1931 by his wife Mabel, and probate was granted to the two defendants, her sons, who were the executors, residuary devisees, and legatees of their mother's will, no particular mention being made in the will to the burial rights in the family vault. In 1935 the elm tree was lopped on the instructions and at the expense of the first defendant. On Mar. 28, 1949, it was noticed that the elm tree had died and the secretary of the plaintiffs informed the first defendant of this fact by letter, indicating

that the first defendant might call to see him "or arrange with a firm for its [the tree's] removal in case of damage to yours and other memorials". No action was taken on this letter. On Nov. 3, 1950, the elm tree fell, causing damage to the memorials on neighbouring plots, but not damaging the Cundey grave. One of the memorials damaged was repaired at a cost of £177 by the plaintiffs who spent £31 7s. 11d. in having the tree removed, and an estimate for the repair of the remaining memorials damaged by the falling of the tree amounted to £236.

A On behalf of the plaintiffs it was contended that there was an obligation on the defendants to maintain the elm tree in good order and to take care that it should not cause damage to the cemetery or graves or monuments therein, it being argued that this obligation arose either (i) as a result of an implied term in the original grant and the fact that the elm tree was expressly mentioned in the amending grant of 1885 and also because the tree had been lopped in 1924 and 1935 at the request and at the expense of the defendants, or one of them, or their predecessors in title, or (ii) as a matter of duty apart from contract. On behalf of the defendants it was contended (i) that there was no such implied term, and (ii) the plaintiffs were debarred from granting under the terms of their statute any right or title to the land from which such a duty could arise, being limited to conferring merely a right of burial in perpetuity.

H. A. P. Fisher for the plaintiffs.

J. C. B. W. Leonard for the defendants.

McNAIR, J.: First, I should refer to certain sections of the private Act under which the Highgate cemetery was established. By cl. 10 of the private Act it is provided:

D "That it shall be lawful for the said company, and they are hereby authorised and empowered, from time to time and at all times from and after the passing of this Act, to sell and dispose of to any person or persons who may be willing or desire to purchase or acquire the same, and at or for such price or prices or sum or sums of money, and under such regulations and restrictions, and subject to such conditions, as the said company shall think proper to require, the exclusive right of burial or interment, either in perpetuity or for a limited period as may be agreed upon, in all and every or any of the vaults, catacombs . . . and places of burial which may be from time to time or at any time erected, made, or built by the said company . . . "

F By cl. 11 provision is made in the statute for the form of grant which the statute requires the company to use when conveying the rights referred to in cl. 10. By cl. 12 it is further provided:

G "That the exclusive right of burial or interment in any vault, catacomb, and burial place which shall be so purchased as aforesaid, and after such purchase shall have been conveyed to the purchaser or purchasers thereof in the manner hereinbefore directed, shall, if in perpetuity, be considered as a personal inheritance, and shall and may, whether granted in perpetuity or for a limited period, be sold and disposed of and assigned in his or their lifetime, or bequeathed by his or their last will and testament . . . "

H That refers to the purchaser or purchasers referred to earlier in the clause. There is set out in the statute the form of what is called "the derivative assignment", and it is provided that

"every such conveyance so made shall be good, valid, and effectual, both at law and in equity, without words of inheritance . . . "

By cl. 14 provision is made for securing, in effect, that no person shall be buried in the private vault which has been assigned to a particular owner or family without the consent of the person for the time being entitled as

owner to the exclusive right of burial. Under cl. 16 the company is empowered to take down and remove any monuments, gravestones and such objects as

"shall have been erected or built contrary to the terms and conditions upon which permission to erect or construct the same was granted, or in case such terms and conditions shall not have been complied with, and also to enter upon and resume possession of any grave or vault or other burial place in which the interest of the purchaser of the exclusive right of sepulture therein shall have ceased or determined . . . "

That last clause, on the first reading, rather suggests that, by granting this exclusive right of sepulture to another, the company have parted with possession or occupation of the plot, but it has been conceded—and I think rightly conceded—by counsel for the company, on the authority of *R. v. St. Mary Abbott's, Kensington* (1), that neither possession in law nor occupation passes from the company to the beneficiary of the grant. Clause 17 requires the company to

"keep the said cemeteries . . . chapel or chapels . . . and the several buildings . . . and the external walls and fences thereof, and all other parts of the same, in thorough and complete repair."

Clause 19 requires the company to keep a register of all burials in the consecrated part of the cemetery. Under cl. 43 power is given to the company

"to sell and dispose of, either by public auction or private contract [or in other ways] any part or parts of any lands or hereditaments purchased by the said company which shall not be wanted for the purposes of this Act."

But by cl. 44 it is provided:

"That it shall not be lawful for the said company, under the authority of the provisions hereinbefore contained, to sell or dispose of any land which shall have been consecrated or set apart or used for the burial of the dead."

Under cl. 89 provision is made by which the company can make bye-laws generally for the cemetery and for maintaining good order therein. It was under that provision that the regulations which were in force at the time of the grant (to which I will refer in a moment) were made, namely, the regulations of March, 1881. Of those regulations, I think at this stage, it is only necessary for me to refer to reg. 11 and reg. 12, which are in these terms:

"11. A monument or gravestone, first approved by the directors, shall be erected within twelve months from the date of the first interment in any grave in which the exclusive right of burial has been purchased, otherwise the right shall be forfeited. 12. Every monument, gravestone, or other erection, shall be maintained in good order and condition by the owner thereof, otherwise the right of burial shall be forfeited."

[HIS LORDSHIP stated the facts and continued:] In these circumstances this claim is made by the plaintiff company against the two defendants claiming reimbursement. Counsel for the plaintiffs, in the course of his argument, was constrained, as I think quite rightly, to admit that it was impossible for him to succeed under the heading of duty inasmuch as the decision to which I have referred—*R. v. St. Mary Abbott's, Kensington* (1)—precluded him from arguing that any property in the land or right or possession in the land comprised in the plot had passed to the grave owners or their successors so as to impose on them the duties of possessors or occupiers of land, but he submitted that the relationship of the parties to the original transaction in 1885 was such that there must necessarily be implied an obligation on the beneficiaries of the right to burial (whom I will refer to as "the grave owners") to maintain the

tree. The argument, as I understood it, ran thus. It was the common intention of the parties, as evidenced by the receipt given in 1885 and the entry in the register at that date, that the grave owners should continue to have the benefit of this tree, which seems to have provided the real reason for the payment of the money for rights over this extra piece of ground. The argument continues that it would be unreasonable to hold that the liability for the maintenance of this tree rested on neither party, and, therefore, it must have been intended to be transferred to the grave owners, who were to get the benefit from the continued existence of that tree. Counsel, while admitting that no true easement was created in favour of the grave owners, there being no servient tenement, argued, on the analogy of the cases relating to easements, that the obligation contended for must rest on the grantee. In support of that was cited, first, *Ingram v. Morecraft* (2), in which the view was expressed—I think obiter—that where a right of way is granted it is for the dominant tenement to do all that is necessary for making the right of way available. SIR JOHN ROMILLY, M.R., in his judgment, says (33 Beav. 51):

“If I grant a man a right to lay pipes over my land, it follows that he must keep them watertight, for otherwise the escape of water is a trespass.”

There is the rather similar case of *Taylor v. Whitehead* (3), where LORD MANSFIELD, in dealing with a similar right of way, expresses the principle in this way (2 Doug. K.B. 750):

“I entirely agree with my brother Walker [i.e., Serjeant Walker, who was arguing for the plaintiff] that, by common law, he who has the use of a thing ought to repair it.”

From those two cases it is argued that, seeing that the grave owners have the use of this plot and that it is for their benefit, the obligation is on them to repair it. I myself do not find those authorities particularly helpful, first, because I think any argument by analogy from such a technical branch of law as the law relating to easements is unreliable, and, secondly, because I do not find that those authorities establish that the owner of the servient tenement would have a right of action against the owner of the easement. They merely say that the owner of the easement has not got a right of action against the owner of the servient tenement.

I think that at this stage it is right that I should express my view of what is the nature of the right conveyed by these documents for the transactions which they evidence. It is quite clear, I think, that in equity (there being no legal conveyance) the main right, if not, indeed, the only right, conveyed is a right of burial in perpetuity. The company, as I have indicated, have not power under cl. 44 to part with any estate or interest in the land. They can only grant under the other provisions of this statute quite limited rights of burial in perpetuity. How limited is this right is shown by cases such as *McGough v. Lancaster Burial Board* (4), where the Court of Appeal held, under a different, but not dissimilar, statute relating to a burial board, that the grantee only acquired the exclusive right of burial and such a right did not include a right to place a glass shade and wire covering on the grave. Similarly, in *Hoskins-Abraham v. Paignton Urban Council* (5), where the Court of Appeal had to consider whether the holder of an exclusive right of burial in a cemetery under an Act incorporating the Cemeteries Clauses Act, 1847, had a right to enter the vault there used for the purpose of performing certain ceremonial rights, the court held that the grantee has no freehold interest in the space or the vault and no right to use them for such purposes or to open or enter the vault to deposit articles therein without the consent of the local authority, which, in that case, was the burial authority. GREER, L.J., says ([1929] 1 Ch. 387):

“For my part I cannot find in the statute any power to grant any other

right except those which are included in the grant, an exclusive right of burial and a right to erect a tombstone including therein a right from time to time to see to the repair of the tombstone."

In the judgment in *McGough's* case (4) it is stated by BOWEN, L.J., that the right of the owner of the grave to go on to the land to inspect the grave to see whether it is in a good state of repair was only a licence and was not an interest in the land.

As it seems to me, the question what terms should be implied in a transaction such as this has to be tested by the same tests as according to ordinary common law principles are applicable to other contractual relationships, such as the sale of goods or the charter of a ship, viz.: Is the term, i.e., that the grave owner should maintain the tree, necessary to give such business efficacy to the transaction as both parties must have intended? The test is stated in the very familiar passage in the judgment of SCRUTTON, L.J., in *Re Comptoir Commercial Anversois & Power, Son & Co.* (6), where the learned lord justice says ([1920] 1 K.B. 899):

"The court . . . ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted."

I see no reason why the enjoyment by the grave owner of the amenity provided by this tree might not equally well have been achieved by leaving the obligation to maintain the tree in good order and condition on the company, where it is laid by statute. I am in no way satisfied that, if, in 1885, the officious bystander had raised the question: "Who is to be responsible in law for the safety of this tree?", both parties, the plaintiffs and Mrs. Eliza Cundey, would immediately have said: "Of course, clearly that is Mrs. Eliza Cundey's liability". If one speculates, I think it is extremely likely that, if they had had the matter in mind, they would have said: "That liability will rest where it rests under statute". Under cl. 17 of the statute the liability of keeping the cemetery in proper repair falls on the company and I see nothing in these circumstances which of necessity requires that that position should be altered.

The argument, as I understood it, in favour of transferring the liability from the company to the grave owner was that, whereas under reg. 12 of the regulations the liability for maintaining the monuments and gravestones and other erections in good order and condition is in terms imposed on the owner, it would be reasonable or necessary that the same provision should be made as regards the maintenance of the trees. That submission does not appeal to me. Indeed, I feel that that argument rather cuts the other way, because here you have an express provision placing on the owner certain obligations for maintenance in good order and condition in terms which are not wide enough to cover the maintenance in good order and condition of an object like a tree. Furthermore, I think it is relevant, in considering whether this term is to be implied, to consider whether a term to the like effect provided for by express terms in the contract would have been effective to bind the defendants in this action. Once it is admitted or established that what passed to the grantee under the statute was not an interest in the land or any estate in the land, it would seem to me, on well-settled principles, that no covenant of this nature imposing the positive burden on the grantee could pass in law to the assignees of the grantee, because it would not be a covenant in any way running with the land, but would be a mere personal covenant, the burden of which can only be passed to subsequent assignees in invitum within very narrow limits. That is an additional reason for excluding this implied term. Again, it seems

to me that, if the plaintiffs are right, and, against their will, obligations of this nature may be imposed on the heirs at law and successors in title of the original grantee of such a right, the grant may be in the true sense a *hereditas damnosa*, and an executor or a residuary legatee may find himself burdened with liabilities of a quite indefinite nature, of which, so far as I can see, he is unable under the statute to disembarass himself.

A For those reasons I am satisfied in my own mind that it would be wrong for the court to imply into this transaction the term for which the plaintiffs contend. That conclusion makes it unnecessary for me to express any view on the defences raised under s. 40 and s. 52 of the Law of Property Act, 1925, or s. 4 of the Statute of Frauds. Both these points will be open to the defendants if the case should go elsewhere. I think, however, I should say, as regards damages, that, if liability had been established, I should have found that
B that the damages were as claimed in the statement of claim, either on the ground that the ownership in the neighbouring graves which were damaged rests under the statute in the cemetery company, or, if not, on the ground that the cemetery company, as persons in possession or occupation, have sufficient proprietary interest to maintain an action against the defendants for damage to those gravestones and memorials. In those circumstances there will be
C judgment for the defendants.

Judgment for defendants.

Solicitors: *Baker, Dodsworth & Co.* (for the plaintiffs); *Hyman Isaacs, Lewis & Mills* (for the defendants).

[*Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.*]

D ARAB BANK, LTD. v. BARCLAYS BANK (DOMINION, COLONIAL AND OVERSEAS).

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), April 27, 28, 29, 30, May 1, 2, 21, 1953.]

E *Bank—War—Effect on credit balance—Payment to Custodian of “Absentee” Property—Right of customer to recover from bank.*

F The plaintiffs, the A. Bank, Ltd., were a company incorporated in Palestine in 1930, their head office being in Jerusalem until July 1, 1948, when it was moved to Amman, Jordan, where the plaintiffs became registered on Nov. 7, 1949. The defendants, B. Bank, were a company incorporated in England with branches overseas. In 1939, pursuant to an application by
F the plaintiffs to the defendants which included a declaration by the plaintiffs that they submitted themselves irrevocably to the jurisdiction of the courts of Jerusalem, the plaintiffs opened a current account with the defendants' Jerusalem branch. On the termination of the British mandate in Palestine at midnight on May 14/15, 1948, war broke out between the Jews and the Arabs, and a state of war still existed notwithstanding that an armistice was concluded in 1949. The defendants' branch in Jerusalem was
G situated in that part of the city controlled by the Jews, while the plaintiffs' head office, until it was moved from Jerusalem on July 1, 1948, was in that part of the city controlled by the Arabs, and after the termination of the mandate the plaintiffs did not have a branch in Israeli territory. By an ordinance enacted by the State of Israel on May 19, 1948, the law which
H existed in Palestine on May 14, 1948 (and which included the common law of England as regards trading with the enemy) was to remain in force in so far as there was nothing repugnant therein to the ordinance or to other laws which might be enacted by the State. By existing regulations, as amended by the State of Israel, it was illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel. By the Emergency Regulations on the Property of Absentees, made by the State of

Israel in December, 1948, and replaced in March, 1950, by the Absentee Property Law, any property of an absentee vested in the Custodian of Absentee Property; it was the duty of any person having in his possession any property of an absentee to deliver such property to the Custodian, and, where the property was in the form of a debt or indebtedness to the absentee, to pay the same to the Custodian; and it was an offence, punishable by fine or imprisonment, to pay the debt or indebtedness to anyone other than the Custodian without his written consent. "Absentee" was defined as including any person who owned property in Israel and who was at any time after Nov. 29, 1947, in a part of Palestine to which the law of the State of Israel did not then apply. A company was an absentee, within the regulations, if it was the lawful owner of property in Israel and if at least half of its capital was at the disposition of an absentee or if half of its members or directors were absentees. On Oct. 9, 1950, the plaintiffs commenced an action in the High Court in England for payment of a sum of £582,931, being the sterling equivalent of the balance standing to the credit of their account with the defendants at the time of the termination of the mandate. On Jan. 24, 1951, the Israeli Custodian of Absentee Property requested the defendants' Jerusalem branch to deliver to him all the moneys which they held to the credit of the plaintiffs' account, and on Feb. 8, 1951, the defendants paid to him the amount of the plaintiffs' credit balance. It was contended by the plaintiffs that their contract with the defendants was wholly abrogated by the outbreak of war, that the abrogation extended even to the credit balance, and that the cancellation of the credit balance gave rise to a right in the plaintiffs to recover from the defendants in London, the defendants' chief place of residence, a sum equal to the credit balance, as money had and received or under the doctrine of unjust enrichment.

HELD: the plaintiffs' right to the payment on demand of the balance standing to the credit of their current account immediately before the outbreak of war between the Jews and the Arabs was an accrued right despite the need of a demand before action could be taken to enforce the payment of the balance; the legal effect of the war was not to abrogate that right, but was merely to suspend its enforcement, in which case the credit balance remained in being after the outbreak of war as a debt owing in the State of Israel from the defendants to the plaintiffs, and, by virtue of Israeli law, vested in the Israeli Custodian, and the payment of the balance to him operated as an effective discharge to the defendants for the amount paid; and, therefore, the plaintiffs' claim failed.

Observations of LORD DUNEDIN and LORD SUMNER in *Ertel Bieber & Co. v. Rio Tinto Co.* ([1918] A.C. 269, 289), and of LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD PORTER, and LORD GODDARD in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* ([1946] 1 All E.R. 39, 41, 45, 48, 57), applied.

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. ([1942] 2 All E.R. 122), distinguished.

Per curiam: assuming that all rights and obligations under the contract were frustrated under Israeli law by reason of the war between the Arabs and the Jews, there could not arise, in place of them, an obligation on the defendants to pay to the plaintiffs, in another place, a sum equal to the amount of the credit balance as money had and received, as such an obligation would enrich those who were the enemies of Israel in the same way as if the money was paid to them under the contract.

AS TO SUPERVENING ILLEGALITY DUE TO WAR, see HALSBURY, Hailsham Edn., Vol. 7, p. 218, para. 297; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 440, 441, Nos. 3351-3356.

Cases referred to:

- (1) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.K.J.B. 973; 125 L.T. 338; 21 Digest 639, 2188.
- (2) *Walker v. Bradford Old Bank, Ltd.*, (1884), 12 Q.B.D. 511; 53 L.J.Q.B. 280; 3 Digest 176, 312.
- (3) *Holroyd v. Marshall*, (1862), 10 H.L. Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 11 E.R. 999; 7 Digest 121, 695.
- A (4) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 2nd Digest Supp.
- (5) *Jackson v. Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; *affg.*, (1873), L.R. 8 C.P. 572; 12 Digest, Replacement, 438, 3339.
- B (6) *Geipel v. Smith*, (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 12 Digest, Replacement, 418, 3245.
- (7) *Krell v. Henry*, [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 12 Digest, Replacement, 435, 3327.
- (8) *Jones (R. E.), Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 35 Digest 149, 470.
- C (9) *Kelly v. Solari*, (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 152 E.R. 24; 35 Digest 151, 487.
- (10) *Holmes v. Hall*, (1704), 6 Mod. Rep. 161 (87 E.R. 919); Holt K.B. 36 (90 E.R. 917); 12 Digest, Replacement, 257, 1989.
- (11) *Moses v. Macferlan*, (1760), 2 Burr. 1005; 97 E.R. 676; 12 Digest, Replacement, 257, 1987.
- D (12) *Royal Bank of Canada v. Regem*, [1913] A.C. 283; 82 L.J.C.P. 33; 108 L.T. 129; 12 Digest, Replacement, 258, 1995.
- (13) *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; [1946] A.C. 219; 115 L.J.Ch. 58; 174 L.T. 49; 12 Digest, Replacement, 436, 3334.
- (14) *Ertel Bieber & Co. v. Rio Tinto Co. Dynamit Act. v. Rio Tinto Co. Vereinigte Koenigs & Laurahuette Act. v. Rio Tinto Co.*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 12 Digest, Replacement, 447, 3380.
- E (15) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 12 Digest, Replacement, 271, 2084.
- (16) *Esposito v. Bowden*, (1857), 7 E. & B. 763; 27 L.J.Q.B. 17; 29 L.T.O.S. 295; 119 E.R. 1430; 12 Digest, Replacement, 440, 3352.
- F (17) *Halsey v. Lowenfeld*, [1916] 2 K.B. 707; 85 L.J.K.B. 1498; 115 L.T. 617; 2 Digest 157, 272.
- (18) *Ottoman Bank v. Jebara*, [1928] A.C. 269; 97 L.J.K.B. 502; 139 L.T. 194; 43 Digest 481, 188.
- (19) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest, Replacement, 436, 3333.
- G (20) *Bagley v. Winsome (National Provincial Bank, Ltd., Garnishee)*, [1952] 1 All E.R. 637; [1952] 2 Q.B. 236.
- (21) *Robson v. Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 2 Digest 169, 379.
- H (22) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.

APPEAL by the plaintiffs from an order of PARKER, J., dated Nov. 11, 1952, whereby he dismissed their action against the defendants for payment of a sum of £582,931.146, being the sterling equivalent at par of a like sum in Palestine pounds which was the balance standing to the credit of a current account kept by the plaintiffs with the defendants' branch at Allenby Square,

Jerusalem, at the time of the termination of the British mandate in Palestine, i.e., at midnight on May 14/15, 1948.

The plaintiffs were a company incorporated in 1930 under the Palestine Companies Ordinance, 1929. At all material times until May 14, 1948, their registered office and head office was at the Anboussie Building just outside the walls of the Old City of Jerusalem and near the Jaffa Gate. The defendants were a company incorporated in England with a number of branches overseas, including a branch in Allenby Square, Jerusalem, situated outside the walls of the Old City, but only a short distance from them and from the Anboussie Building. The plaintiffs' current account with the defendants' Allenby Square branch was opened in 1939 pursuant to an application made by the plaintiffs to the defendants in a form which included inter alia a declaration by the plaintiffs to the effect that they submitted themselves irrevocably to the jurisdiction of the courts at Jerusalem.

For some time before the termination of the mandate there had been disturbances between the Jews and Arabs in Palestine. The situation deteriorated with the announcement of the United Nations' plan for the partition of Palestine between Jews and Arabs, and it deteriorated yet further with the announcement of His Majesty's government that the mandate was to end at midnight on May 14/15, 1948. Simultaneously with the termination of the mandate the Provisional Council of State and Provisional Government of the State of Israel were constituted by a declaration of independence and a proclamation made thereunder, and, without any formal declaration of war, open war at once broke out between the State of Israel and the Arabs in Palestine supported by the Arab States of Transjordan, Lebanon, Syria, Egypt, Saudi Arabia and the Yemen. An armistice was concluded on Apr. 3, 1949, but, technically, a state of war still existed. On the morning of May 14, 1948, the plaintiffs moved their Jerusalem office to the Morcos Building just inside the walls of the Old City, and ceased business at the Anboussie Building. The defendants' Allenby Square branch was situated in a part of Palestine controlled by the Jews, i.e., by the government of the State of Israel. On May 14, 1948, before the mandate ended, the Allenby Square building was occupied by irregular Jewish forces, who forced an entry into it, and on May 15 it was taken over by the regular Jewish forces. The defendants' branch there was closed from May 13 or 14 until July, 1948. The Anboussie and Morcos Buildings, at which the head office of the plaintiffs was successively situated, were in a part of Palestine controlled by the Arabs, the line of war being drawn between Allenby Square on the one side and the Anboussie and Morcos Buildings on the other. The plaintiffs did not at any time after the termination of the mandate have any branches operating in Israeli territory. On July 1, 1948, they moved their head office to Amman in Jordan and became registered there on Nov. 7, 1949.

On May 19, 1948, the State of Israel enacted a Law and Administration Ordinance (No. 1 of 1948), taking effect from May 14, 1948, which provided, by art. 11, that the law which existed in Palestine on May 14, 1948, should remain in force, in so far as there was nothing therein repugnant to the ordinance or to other laws which might be enacted by the State. The law which existed in Palestine on May 14, 1948, included the common law of England as regards trading with the enemy. By the same ordinance the Defence (Finance) Regulations, 1941, which were in force in Jerusalem prior to the cessation of the mandate, were continued, subject to the provisions that the power of the High Commissioner thereunder was vested in the provisional government and that the word "Israel" should be substituted for "Palestine" wherever it appeared in the regulations. By reg. 40 of the regulations it was provided:

"Subject to any exemptions which may be granted by order of the High Commissioner, no person shall, except with permission granted by, or on behalf of the High Commissioner (a) draw, issue or negotiate any bill of

exchange or promissory note, acknowledge any debt, or make any payment, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of a person who is resident outside Palestine and Transjordan; or (b) make any payment to, or place any sum to the credit of, any such person."

The effect of those regulations, as so continued and amended, in conjunction with a further amendment published by the State of Israel on July 14, 1948, with retrospective effect from July 4, 1948, was to make it illegal to make any payment to, or place any sum to the credit of, any person resident outside Israel. By regulations published with the authority of the Israeli government on Dec. 12, 1948, and entitled Emergency Regulations on the Property of Absentees, it was enacted that a Custodian of Absentee Property be appointed; that any property of an absentee be vested in the Custodian on his appointment together with any rights of the absentee in such property; that it should be the duty of any person having in his possession any property of an absentee to deliver such property to the Custodian, and, where such property was in the form of a debt or indebtedness to the absentee, to pay the same to the Custodian, or otherwise comply with his obligation thereunder as by him directed; and that no person should pay to anyone other than the Custodian any such debt or indebtedness without the prior written consent of the Custodian on pain of fine or imprisonment as therein mentioned. By the regulations "absentee" was defined as meaning any owner or beneficiary of property situate within the area to which the law of Israel applied who was on Nov. 29, 1947, or at any time thereafter, in either the Lebanon, Egypt, Saudi Arabia, Syria, Iraq, Transjordan, the Yemen or in the part of Palestine to which the law of the State of Israel did not then apply, and it was provided that a company was such an absentee if it was the lawful owner of property within the area to which the law of Israel applied and if either at least one half of its capital was at the disposition of an absentee or one half of its members, partners, shareholders, directors or managing directors, were absentees. Pursuant to these regulations a Custodian of Absentee Property was appointed on Dec. 12, 1948. The regulations were replaced as from Mar. 31, 1950, by a law known as the Absentee Property Law, 1950, passed by the Israeli government on Mar. 14, 1950. On Apr. 27, 1950, de jure recognition was accorded by His Majesty's government to Israel with a reservation to the effect that no more than de facto recognition was accorded in respect of Israeli sovereignty over the part of Jerusalem occupied by Israel. In April, 1951, His Majesty's government accorded de jure recognition to the Hashemite Kingdom of Jordan (which included the part of Palestine occupied and controlled by the Arabs), with a similar reservation in respect of the part of Jerusalem occupied and controlled by them. The reason for the reservation thus made in respect of Jerusalem was that under the partition plan it was to be international territory.

On Oct. 9, 1950, the plaintiffs issued the writ in the present action. On Jan. 24, 1951, the Israeli Custodian of Absentee Property requested the defendants' Jerusalem branch to deliver to him by cheque all the moneys which they held in the plaintiffs' account, and on Feb. 8, 1951, the defendants' Jerusalem branch handed over to him their cheque for the amount of the plaintiffs' credit balance, namely, the sum of £P582,931.146. Before PARKER, J., the plaintiffs sought, inter alia, to establish a breach of contract by the defendants before the termination of the mandate on the ground that, before the termination, they had made a demand to the defendants' Allenby Square branch for payment of the amount of their credit balance and that demand was not complied with. The learned judge held on this part of the plaintiffs' case

" . . . that no demand was ever made on the defendants for the balance of the plaintiffs' account, or for any sum, the non-compliance with which could be said to be a breach."

For the purposes of the appeal counsel for the plaintiffs accepted the learned judge's conclusion on this point. The plaintiffs then contended that the contract was an executory contract which was wholly abrogated by the outbreak of war, that the abrogation extended to the credit balance, and that the cancellation of the credit balance gave rise to the right in the plaintiffs to recover a like amount from the defendants, at their head office in London, as money had and received, or, alternatively, on the ground that the defendants were unjustly enriched to that extent by the cancellation of their contractual indebtedness. PARKER, J., held that the plaintiffs' credit on current account with the defendants was a liquidated sum of money, the right to payment of which was not wiped out by the outbreak of war, but was merely suspended, and, accordingly, he gave judgment for the defendants.

Sir Andrew Clark, Q.C., Maurice Lyell and Nasir for the plaintiffs.

Sir Hartley Shawcross, Q.C., Winn and I. S. Warren for the defendants.

Cur. adv. vult.

May 21. The following judgments were read.

SINGLETON, L.J., stated the facts, and said: The case which was put to this court was that until the British mandate expired there was open at the defendants' Allenby Square branch a current account in the name of the plaintiffs, and the question to be determined was in respect of the amount standing to the credit of the plaintiffs on the date of the expiration of the mandate. As counsel for the plaintiffs pointed out, it would not have been possible for the plaintiffs to make a demand at the defendants' branch on or after May 15, 1948, nor would it have been possible for the defendants in Israel to pay the plaintiffs on the other side of the line, for Israel was at war with the Arabs across the line, and, moreover, the government of Israel passed a law making it illegal for any person in Israel to make a payment outside without government permission. There was correspondence between the head offices of the respective banks, and on Nov. 24, 1948, the general manager of the defendants wrote to the general manager of the plaintiffs at Cairo saying that it was regretted that they were advised that the position was:

"An account at our Allenby Square branch constitutes a debt due from our Allenby Square branch which is legally payable only at or by transfer from that branch. The Jewish authorities who are in de facto control of the area in which our branch is situated will not permit transfer or payment of balances outside territory occupied by them, without their prior authority. Being therefore constrained by reason of force majeure we are unable without such prior authority to pay your balance as requested by you."

An offer was made to approach the Jewish authorities, but nothing came of this, and the writ was issued on Oct. 9, 1950. In February, 1951, the defendants paid to the Israeli Custodian of Enemy Property, at his request, a sum purporting to represent the balance at the branch on the expiration of the mandate. The plaintiffs did not know of this until some considerable time later. I do not know why the defendants did not tell the plaintiffs except that counsel for the defendants said they were advised not to do so. The case put forward by counsel for the plaintiffs is that the contract was frustrated, that the contract of current account went, and that there arose an obligation imposed by law on the defendants to pay to the plaintiffs the amount standing to the plaintiffs' credit.

It is necessary to consider what are the implications which arise from the relationship of banker and customer on a current account. In *Joachimson v. Swiss Bank Corpn.* (1) it was held that, where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause

of action against the banker for money lent. ROCHE, J., had held in the court of first instance ([1921] 3 K.B. 111) that

“ . . . the debt owing by a banker to his customer was in the same position in this respect as a debt owing by any other debtor, and could be sued for without any previous demand; that the evidence given by bankers to show a custom differentiating the case of bankers from that of other debtors failed to prove any such custom . . . ”

A and he gave judgment for the plaintiffs for the amount claimed. It was held by this court, all the lords justices agreeing, that a demand was necessary. BANKES, L.J., and WARRINGTON, L.J., were inclined to the view that a writ was sufficient demand, but the case should not be regarded as an authority for that proposition. The judgment of ATKIN, L.J., sets out the position as
B of it. ATKIN, L.J., said (ibid. 126):

“ This case raises the question whether the customer of a bank may sue the banker for the balance standing to the credit of his current account without making a previous demand upon the banker for payment. It is unnecessary to recapitulate the circumstances which raise this issue in this case. It is sufficient to state that upon the hearing of a summons for particulars on Mar. 16, 1920, the defendants undertook to limit their causes of action to those arising on or before Aug. 1, 1914, and that at that date no demand for the balance had been made to the bank. The question seems to turn upon the terms of the contract made between banker and customer
C in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money
D and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds
E and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of
F business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he
G demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence in this case that
H bankers never do make a payment to a customer in respect of a current

account except upon demand . . . The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention the nature of the contract may be material. In the case of such a contract as this, if I have correctly stated the manifold terms of it, it appears to me that the parties must have intended that the money handed to the banker is only payable after a demand. The nature of the contract negatives the duty of the debtor to find out his creditor and pay him his debt. If such a duty existed and were performed, the creditor might be ruined by reason of outstanding cheques being dishonoured. Moreover, payment can only be due, as it appears to me, at the branch where the account is kept, and where the precise liabilities are known. And if this is so, I apprehend that demand at the place where alone the money is payable must be necessary. A decision to the contrary would subvert banking business. I am glad to think that, so far as I can ascertain, the decisions in the American courts are uniformly to the same effect as our present judgment."

In *Walker v. Bradford Old Bank, Ltd.* (2) the court had to consider, on a Case Stated, the position which arose after the death of a customer who had assigned all moneys then or thereafter standing to his credit at the bank. It was held that the balance at the time of death was a debt or legal chose in action within the meaning of s. 25 (6) of the Supreme Court of Judicature Act, 1873, and A. L. SMITH, J., who gave the judgment of the court, said (12 Q.B.D. 516):

"In the present case what has been assigned, to use the words of the indenture of assignment, is 'All moneys now or hereafter to be standing to the credit of the said Robert Vincent Reynolds' (the assignor) 'in the books of or at the said bank at Bradford, aforesaid, called the Bradford Old Bank, Ltd.' It was conceded in argument by the defendants that the moneys thereafter paid into the bank to the credit of the assignor were capable of being the subject-matter of contract: *Holroyd v. Marshall* (3), and I am of opinion that before and at the date of the assignment, and as long as the relation of customer and banker continued between the assignor and the bank, the ordinary relation of debtor and creditor existed between them (with the super-added obligation on the bank's part to honour the assignor's cheques, which is immaterial to the point under consideration), and that consequently there existed a contract on the bank's part to pay over on demand to the assignor all moneys then or thereafter standing to his credit. It seems to me, therefore, in this case, that at the date of the assignment there was an accruing debt arising out of contract, and consequently that this point also fails the defendants."

Clearly, the relationship of debtor and creditor exists between banker and customer on a current account though the right to sue does not arise in the ordinary case unless there has been a demand, and a demand at the branch at which the current account is situate. The relationship, so long as it exists, involves duties and obligations on both sides, and, consequently, intercourse between the customer and someone at the branch at which the account is kept. The case put forward by the plaintiffs on the appeal is that the contract was an executory contract and that it was frustrated by war, the defendants' Allenby Square branch being on one side of what was spoken of as the line of war and the plaintiffs being on the other side. It was said that as from May 15, 1948, there ceased to be any contract of current account between the plaintiffs and the defendants at the Allenby Square branch, and there was, therefore, no longer any money owing on current account, but by operation of law a new obligation arose, namely, an obligation on the defendants to refund the amount by which they had been unjustly enriched by frustration.

That obligation, it was said, was in the nature of a simple debt, situate at the place of residence of the debtor, i.e., at their head office in London. It was common ground that there is no difference between English, Palestinian, or Israeli law for the purposes of this appeal.

In support of their claim the plaintiffs relied on the speeches of their Lordships in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (4). It is desirable that I should refer to some of those speeches. VISCOUNT SIMON,

A L.C., said ([1942] 2 All E.R. 125):

B “The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption. As MACKINNON, L.J., points out, the unsoundness of the contrary view is implicit in *Jackson v. Union Marine Insurance Co., Ltd.* (5), for the charterparty in that case contained an exception of perils of the sea (see L.R. 8 C.P. 584), but none the less the contract was held to have been terminated and the adventure to have been frustrated by the long delay due to the stranding of the ship. The situation arising from the outbreak of the present war, so far as this country, Germany and Poland are concerned, makes applicable the well-known observation of LUSH, J., in *Geipel v. Smith* (6) (L.R. 7 Q.B. 414): ‘... a state of war [in that case the Franco-German war of 1870] must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.’ There is a further reason for saying that this subsidiary contention of the appellants must fail, viz., that, while this country is at war with Germany and Germany is occupying Gdynia, a British subject such as the respondents could not lawfully make arrangements to deliver c.i.f. Gdynia and, therefore, the contract could not be further performed because of supervening illegality.”

E LORD ATKIN said (*ibid.*, 130):

F “My Lords, for the reasons given by VISCOUNT SIMON, L.C., I agree that the appellant fails on all his points except that arising out of the frustration of the contract. I have no doubt that the contract in this case came to an end before the time for complete performance had arrived by reason of the arising of a state of war which caused an indefinite delay not contemplated by the parties, and eventually on account of the legal impossibility of delivering the goods at a port occupied by the enemy. In other words, to use a short phrase of frequent occurrence since the beginning of the last war, the commercial adventure was frustrated. The legal effects of ‘frustration’ are not in dispute. They were not determined for the first time either by the cases which arose on the postponement of the coronation of Edward VII, or by reason of the last war. It is very necessary to remember that, as pointed out by VAUGHAN WILLIAMS, L.J., in *Krell v. Henry* (7) ([1903] 2 K.B. 748), the principle of law is the same whether the performance of the contract becomes impossible by the cessation of the existence of a thing which is the subject of the contract (an obligation *de certo corpore*) or by the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. It is well-settled that, when a contract which is still executory on one or both sides is subject to frustration, the law is that, when the event happens, the parties are excused from further performance, but have to give effect to rights under the contract already accrued before the happening of the event.”

LORD MACMILLAN said (*ibid.*, 135):

"Owing to circumstances arising out of the present hostilities the contract has become impossible of fulfilment according to its terms. Neither party is to blame."

LORD WRIGHT said (*ibid.*):

"The claim in the action was to recover a prepayment of £1,000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution. The root idea was stated by three Lords of Appeal, LORD SHAW, LORD SUMNER and LORD CARSON, in *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.* (8), which dealt with a particular species of the category, namely, money paid under a mistake of fact. LORD SUMNER, referring to *Kelly v. Solari* (9), where money had been paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled, said ([1926] A.C. 696): 'There was no real intention on the company's part to enrich her.' Payment under a mistake of fact is only one head of this category of the law. Another class is where, as in this case, there is prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in such circumstances no intention to enrich the payee. This is the class of claims for the recovery of money paid for a consideration which has failed. Such causes of action have long been familiar and were assumed to be commonplace by HOLT, C.J., in *Holmes v. Hall* (10) [in 1704]. HOLT, C.J., was there concerned only about the proper form of action and took the cause of action as beyond question. He says (Holt K.B. 36): 'If A give money to B to pay to C upon C's giving writings, etc., and C will not do it, indebit will lie for A against B for so much money received to his use. And many such actions have been maintained for earnest in bargains, when the bargainer would not perform, and for premiums for insurance, when the ship, etc., did not go the voyage.' HOLT, C.J., is there using earnest as meaning a prepayment on account of the price, not in the modern sense of an irrevocable payment to bind the bargain; and he is recognising that the indebitatus assumpsit had by that time been accepted as the appropriate form of action in place of the procedure which had been used in earlier times to enforce these claims such as debt, account or case. By 1760 actions for money had and received had increased in number and variety. LORD MANSFIELD, in a familiar passage in *Moses v. Macferlan* (11), sought to rationalise the action for money had and received, and illustrates it by some typical instances. He said (2 Burr. 1012): 'It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' LORD MANSFIELD pre-faced this pronouncement by observations (*ibid.*, 1008) which are to be noted: 'If the defendant be under an obligation, from the ties of natural

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justice, to refund; the law implies a debt, and gives this action [sc. *indebitatus assumpsit*] founded in the equity of the plaintiff's case, as it were, upon a contract ("quasi ex contractu" as the Roman law expresses it).' LORD MANSFIELD does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact he denies that there is a contract. The obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort . . . The gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost."

LORD WRIGHT cited ([1942] 2 All E.R. 138) the views of VISCOUNT HALDANE, L.C., in *Royal Bank of Canada v. Regem* (12), where the Lord Chancellor said ([1913] A.C. 296):

"It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use."

In the *Fibrosa* case (4) LORD ROCHE used these words ([1942] 2 All E.R. 142):

"I have no doubt that this case is one of frustration of the contract and falls within the doctrine applicable to such cases. An alternative case made by the appellants that the contract was merely suspended and whilst suspended was repudiated by the respondents is, I think, without foundation."

LORD PORTER said (*ibid.*, 144):

"What has been said is that the doctrine of frustration depends upon the implication of an implied term. Reasonable persons, it is said, would not have had in mind the event which befell, but, if they had, they would have unhesitatingly said, 'In that event all further obligation of performance on either side is at an end.' So far and no further it is acknowledged the law of this country has gone. It is, however, urged that a system of jurisprudence which is astute enough to devise such a term is capable of adding to it the proviso that in such a case some equitable proportion of any sum paid in advance shall be recoverable when the contract becomes impossible of performance."

In *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (13), a German company having incurred a debt to a Swedish bank the payment of which was suspended for eight years, an English company, which was a subsidiary of the German company, entered into a contract with the bank whereby the English company undertook to pay the debt by half-yearly instalments over a period of eight years, at the same time acquiring the right to an assignment of the bank's rights against the German company. The chief question was whether the contract was to be regarded as an executory or as an executed contract, and the House of Lords by a majority decided that, on the true construction of the documents, the respondent bank, having fully performed its obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments, and, accordingly, since war did not abrogate or discharge a debt incurred before the declaration, the obligation to pay and the right to recover were only suspended. LORD THANKERTON said ([1946] 1 All E.R. 39):

" . . . we had a very full citation of authorities and the able arguments

of counsel on both sides have been very helpful, but I find little need to go beyond the speeches of LORD DUNEDIN and LORD SUMNER in *Ertel Bieber & Co. v. Rio Tinto Co.* (14), in which the earlier authorities are reviewed. LORD DUNEDIN ([1918] A.C. 274) says: 'From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.' In his judgment LORD GREENE, M.R., appears to draw a distinction, on matter of principle, between contracts between a British subject and an alien enemy, and a contract between a British subject and a neutral. In my opinion, the paramount consideration of public policy in either case is the unhampered carrying on of the war, without harmful intercourse with the enemy, or economic benefit to the enemy or economic disadvantage to this country. But the applicability of the principle is likely to be rare in the case of contracts between a British subject and a neutral, or not so obvious as in the case of a contract between a British subject and an enemy. As regards the consequence of this contravention of public policy, I am of opinion that the courts have no choice between the abrogation and suspension of the contract, abrogation being the necessary consequence. I agree with LORD SUMNER's statement on this point in *Ertel Bieber & Co. v. Rio Tinto Co.* (14) ([1918] A.C. 286): 'My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision.' After reference, by way of illustration, to the language of LORD HALSBURY ([1902] A.C. 493), in *Janson v. Driefontein Consolidated Mines, Ltd.* (15), LORD SUMNER proceeded ([1918] A.C. 287): 'There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of WILLES, J., in *Esposito v. Bowden* (16) (7 E. & B. 792): "In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence." To his

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A mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.' The contracts which fall under this principle of public policy are clearly contracts the performance or further performance of which after the outbreak of war may involve the consequences which the principle, by its application, seeks to avoid, but it is equally clear that there are certain well established exceptions to the contracts thus broadly defined. I may quote the speech of LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (14) ([1918] A.C. 269): 'Now *Esposito v. Bowden* (16) has been cited by learned judges in many cases, and no doubt has ever been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it has been held as dealing with contracts in general. So far as *Janson's* case (15) is concerned, the only matter there decided was that there must be an actual state of war to determine a contract; a mere imminence of war is not enough. It is true that LORD HALSBURY'S dictum, if applied as an universal proposition, would be counter to the doctrine of *Esposito v. Bowden* (16). But I am satisfied not only that the dictum was obiter and not binding, but that LORD HALSBURY was not dealing with or thinking of executory contracts, but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Lowenfeld* (17). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some way against public policy as that has been laid down in decided cases.' In the case of the established exceptions to which LORD DUNEDIN refers the necessity for intercourse with an enemy is obviated by the postponement of the right of action, and non-forfeiture of an existing right supersedes any question of an immediate or future benefit to the enemy."

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LORD THANKERTON approved words of SIR ARNOLD MCNAIR which appear to me to be of great importance and to be helpful in the solution of this case. The learned Law Lord said ([1946] 1 All E.R. 41):

G "I am inclined to agree with SIR ARNOLD MCNAIR'S suggestion (*LEGAL EFFECTS OF WAR* (1944), 2nd ed., at p. 93) that the distinction between 'executed' and 'executory contracts' may not be very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

H Later in his speech LORD THANKERTON said (*ibid.*):

"It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract, as from the outbreak of war; or, as LORD DUNEDIN expresses it in the passage already quoted, the continued existence of the contractual relationship is prohibited."

I draw attention to the fact that the citation from LORD DUNEDIN is not quite accurate.

In the same case (the *Schering* case (13)), LORD PORTER said (*ibid.*, 48):

"My Lords, I have found the solution of this case a matter of difficulty, primarily, I think, because of the complexity of the arrangements between the parties and the necessity of safeguarding the rights of neutrals whilst not diminishing the ability of this country to preserve its interests in time of war. It is, no doubt, generally true that the further performance of contracts made before the outbreak of war and not fully performed on either side is prohibited as contrary to public policy provided that such performance involves intercourse with an enemy or benefits him. For the sake of brevity I speak of this result as abrogation of the contract though the contract itself is not abrogated, but further performance alone forbidden. There are, however, exceptions and limitations upon this doctrine. So far, at any rate, as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment by the other are suspended, not dissolved, and in the same category are to be placed certain contracts, particularly those which are really concomitants of the rights of property though still executory: see per LORD DUNEDIN in *Ertel Bieber & Co. v. Rio Tinto Co.* (14) ([1918] A.C. 269). In each case, therefore, before deciding whether a contract is abrogated or merely suspended on the outbreak of war it is essential to determine its exact construction and effect."

In his speech (*ibid.*, 56), LORD GODDARD cited the words of LORD DUNEDIN ([1928] A.C. 276) in *Ottoman Bank v. Jebara* (18):

"... it is not every contract that is abrogated by . . . war; it is only a contract which is still executory and which for its execution requires [I emphasise that word] intercourse between the English subject and the enemy."

In *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.* (19), VISCOUNT SIMON, L.C., said ([1941] 2 All E.R. 171):

"In this connection, it is well to emphasise that, when 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically. The plaintiff sues for breach at a past date and the defendant pleads that at that date no contract existed. In this situation, the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendant's 'default', and it would be a strange result if the party alleging this were not the party required to prove it. The doctrine of discharge from liability by frustration has been explained in various ways, sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same. The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties."

The Lord Chancellor then drew attention to the difference between discharge by supervening impossibility and discharge by supervening illegality. *Ertel Bieber & Co. v. Rio Tinto Co.* (14) is of importance, and I refer, in particular, to passages from the speech of LORD SUMNER ([1918] A.C. 285, 287, 288 and 289). These authorities were relied on by the plaintiffs in support of their claim that the contract of current account was abrogated by war: it became illegal to perform it. And it was said that there was no debt due at the time, no accrued liability, for there had been no demand, and no demand could be made at the

Allenby Square branch after the expiration of the mandate, and thus it was claimed that there arose on the defendants an obligation to pay the amount then standing to the credit of the plaintiffs on the principle stated by LORD WRIGHT ([1942] 2 All E.R. 135, 136) in the *Fibrosa* case (4). The defendants had not sought at the trial to establish any custom or called any evidence as to banking practice, but our attention was drawn to the way in which the money of an enemy in a current account was dealt with in this country.

A Under the powers given by the Trading with the Enemy Act, 1939, s. 7, the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198, as amended) was made, and art. 1 of that order is in these terms:

"(i) Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the Custodian. (ii) Without prejudice to the generality of the foregoing paragraph, there shall be paid to the Custodian in particular any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, by way of . . . (e) debt, including money in the possession of any bankers, whether on deposit or current account or whether held in trust or in custody for or for the benefit of an enemy."

It was illegal to make payments to an enemy, and specific provision was made that any balance on the current account of an enemy should be paid to the Custodian.

D Counsel for the defendants submitted that the true doctrine as to the effect of war is not that it abrogates and destroys the contract itself, but that, subject to certain exceptions, it prohibits the further performance of a contract other than the right to a liquidated sum of money which will, whether strictly already a debt or not, be treated as a debt, the right to payment being suspended. I am not sure that this is completely in accord with the view expressed by LORD SUMNER in the *Ertel Bieber* case (14). In *Bagley v. Winsome (National Provincial Bank, Ltd., Garnishee)* (20), SIR RAYMOND EVERSHERD, M.R., referred ([1952] 1 All E.R. 639) to the fact that it has for a long time been well established (and it is common practice) that garnishee proceedings are available in the case of a current account with a banker, and that that was recognised by all three lords justices in *Joachimson's* case (1). Under R.S.C., F Ord. 45, r. 1, this form of attachment applies in the case of "debts owing or accruing". In the case of the current account with which we are immediately concerned, the debt was not "accruing". It was a debt "owing", though so long as the account was "current" it could not be recovered by action until there had been a demand.

G The conclusion at which I have arrived on consideration of the authorities is that on the expiration of the mandate the contract of current account was abrogated. There remained a sum of money to the credit of the plaintiffs. With the abrogation of the contract there went the necessity for a demand. That was a necessary element in a current account, but no more. The relationship of debtor and creditor remained, but the super-added obligations which go with the relationship in regard to a current account had gone, and H the amount to the credit of the customer remained theoretically at the Allenby Square branch. By reason of the existence of war payment was suspended. That is how I regard the position. And in support of that view I refer again to the words of LORD THANKERTON ([1946] 1 All E.R. 41) in *Schering's* case (13). I have already read them, and I do so again. He said:

"I am inclined to agree with SIR ARNOLD McNAIR's suggestion (LEGAL EFFECTS OF WAR (1944), 2nd ed., at p. 93), that the distinction between 'executed' and 'executory contracts' may not be very helpful in this

connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

PARKER, J., based his decision on those words taken from the work of SIR ARNOLD MCNAIR, and, having regard to what I consider was the adoption of them by LORD THANKERTON, I think that he was right in so doing. The effect of the outbreak of war on this contract of current account was to

" . . . abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

The payment of the debt was suspended, and in due course under Israeli law the amount was collected by the Custodian appointed in accordance with the law of that country.

A further point taken on behalf of the defendants was that, if the contract was frustrated, one cannot substitute an obligation which will enrich the enemy in just the same way—and that is what would happen if it was held that the amount was payable to the plaintiffs in England. The submission was put in this way:

" If contrary to the [defendants'] submission the present contract and all rights and obligations under it are to be considered as abrogated it is only because the law of Israel treats the contract as illegal—but it is no part of the law of Israel, or of England, that a person who is by that law forbidden to perform a contract for the payment of money to an enemy alien is simultaneously placed under a present or any obligation of law to pay the money otherwise due on the contract as money had and received or as unjust enrichment. Any such rule would immediately defeat the purpose of the primary rule from which it was said to result and which had abrogated the obligation in favour of the enemy. Moreover, such new obligation would not have occurred before the war and would itself have been abrogated by the very principles on which the [plaintiffs] rely."

I do not see any answer to this point. If there was frustration, but, notwithstanding that, an obligation was created under which the defendants were bound to pay at another place those who were enemies of Israel, the result would, in effect, be the same as though the balance was paid direct. It is impossible to conceive that the law of any country would create such an obligation. For the reasons which I have given, I feel that the appeal must fail. I reach that conclusion with some regret, for this appears to be a hard case, but that is not the fault of the courts of this country. It is one of the results of war.

JENKINS, L.J., stated the facts, and said: The appeal falls to be determined on the footing that at the moment of the termination of the mandate the contract between the plaintiffs and the defendants under which the plaintiffs' current account was kept at the defendants' Allenby Square branch was a subsisting contract of which there had been no breach or repudiation by the defendants, and by virtue of which the plaintiffs were entitled to be paid by the defendants at their Allenby Square branch the amount of the balance there standing to the credit of the plaintiffs' current account on making a demand to that branch for such payment. On this footing it seems to me to be plain, and, indeed, it is not disputed, that, if the termination of the mandate had been followed by the constitution, without any war, of the State of Israel, and if the plaintiffs' current account had continued to be kept, as before, at the defendants' Allenby Square branch down to the passing of the Israeli regulations relating to the property of absentees, the plaintiffs' credit balance would have

vested in the Custodian and the payment of it to him by the defendants would have operated as an effective discharge to the defendants for the amount so paid. In this hypothetical state of facts the plaintiffs would, admittedly, have been absentees within the meaning of the regulations, and the credit balance on their current account with the defendants' Allenby Square branch, payable as it was at, and on demand made to, that branch, and, therefore, within the area to which the law of the State of Israel applied, would clearly have been property situated in that area in the form of a debt or an indebtedness to the "absentee" plaintiffs within the meaning of the regulations.

The plaintiffs, however, contend that the legal effect on the contract between the plaintiffs and defendants under which the plaintiffs' current account was kept at the defendants' Allenby Square branch, and on the balance standing to the credit of the plaintiffs in that account, of the war which, contemporaneously with the termination of the mandate, broke out between the Jews and the Arabs was such as to prevent this result. The argument begins with the proposition, which is not in dispute, that the contract, and the balance standing to the plaintiffs' credit under the contract, became on the outbreak of war subject to the law of Israel in regard to trading with the enemy inasmuch as the contract was a contract between persons, i.e., the defendants, carrying on business in Israeli territory and persons, i.e., the plaintiffs, residing and carrying on business in Arab territory (and, therefore, enemies of Israel) which involved payment of money by the former to the latter at a place in Israeli territory, i.e., the defendants' Allenby Square branch, on demand made by the latter to the former at that place. The next proposition, also undisputed, is that the law of Israel in regard to trading with the enemy (apart from any local legislation) is the same as the common law of England.

The common law of England in this regard is thus stated by LORD DUNEDIN ([1918] A.C. 267) in *Ertel Bieber & Co. v. Rio Tinto Co.* (14):

"My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial'. As to this I agree with the judgment of the Court of Appeal in the case of *Robson v. Premier Oil & Pipe Line Co., Ltd.* (21), where PICKFORD, L.J., delivering the judgment of the court, LORD COZENS-HARDY, M.R., himself and WARRINGTON, L.J., said ([1915] 2 Ch. 136): 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.' That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt."

There are, however, certain exceptions to the general rule. Thus, in the same speech, LORD DUNEDIN said (*ibid.*, 269):

"There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey*

v. *Lowenfeld* (17). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases."

LORD SUMNER, in the same case, in a passage directed against the contention that a clause providing for the suspension of a contract in the event of war could displace the absolute abrogation which the law requires, said (*ibid.*, 289):

"The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace, is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property."

The point in issue at this stage of the present case is whether the plaintiffs' right to payment on demand of the balance standing to the credit of their current account was within the exception from the general rule of abrogation accorded to accrued rights. Counsel for the plaintiffs admitted that, if the plaintiffs' right to the credit balance was an accrued right within the meaning of the exception, the appeal must fail, for on that view the legal effect of the war was not to abrogate it but merely to suspend its enforcement, in which case the credit balance remained in being after the outbreak of war as a debt owing in the State of Israel from the defendants to the plaintiffs, and, accordingly, vested in the Israeli Custodian and was properly paid to him by the defendants. Counsel for the plaintiffs, however, submitted that the credit balance was not such an accrued right. According to him it was merely an incident of a wholly executory contract between the defendants, as bankers, and the plaintiffs, as current-account customers, under which the defendants undertook to perform banking services for the plaintiffs, and to pay on demand to the plaintiffs, or as they should direct, the whole or any part of the balance from time to time standing to the credit of the account, in return for the use of such balance allowed to them by the plaintiffs. This contract, said counsel, necessarily involved intercourse between the defendants and the enemy plaintiffs and, therefore, was wholly abrogated by the outbreak of war, such abrogation extending to the credit balance itself. Further, he said that, as a demand was necessary before the plaintiffs could sue for the amount of the balance (see *Joachimson v. Swiss Bank Corpn.* (1)), the plaintiffs' right to it was not an accrued right within the meaning of the exception, which extended only to rights immediately enforceable by action either at or before the outbreak of war or on some then pre-determined future date, and not to rights in respect of which a step involving intercourse with the enemy (such as a demand by the enemy for payment) was a necessary preliminary to suit. His submission, as I understood it, even went so far as to say, in effect, that unless and until the plaintiffs made a demand for payment the credit balance was not a debt owing to, or in the nature of property owned by, the plaintiffs.

I cannot accept this argument. It seems to me to confound the further performance of the contract, which was clearly abrogated, with the indebtedness of the defendants to the plaintiffs on the current account which had in fact resulted from the operation of the contract down to the outbreak of war, and did not depend for its existence on any further performance of the contract after such outbreak. It seems to me impossible to dispute that, if a demand for payment had been made the instant before the outbreak of war, and if, while (so to speak) the manager of the defendants' Jerusalem branch was

turning towards the safe to get out the money, war had broken out and prevented the payment being made, the credit balance would have constituted an accrued right within the meaning of the exception. This part of the plaintiffs' case, therefore, resolves itself into the narrow question whether the necessity for a demand before action to enforce payment prevented the credit balance from being such an accrued right. I cannot think that it did. Clearly, no effective demand for payment could be made during the war, but, for that matter, nor could any effective action be brought to enforce payment during the war, nor could payment without action brought be lawfully made during the war. Of these three disabilities the second and third apply equally to a debt payable without any demand, which, clearly, would not be abrogated but only be suspended in point of enforcement for the duration of the war, and I fail to see why the presence of the first, i.e., inability to make an effective demand in the case of a debt payable on demand, should bring about cancellation as distinct from suspension. The making of a demand in respect of a debt payable on demand is a step which (war apart) the creditor is free to take when he chooses. It is an assertion of a title, or proprietary right, already perfected by the lending of the money on terms that it is to be repaid on demand, and not an act by virtue of which the debt is brought into being. In my view, it is not open to doubt that a debt payable on demand such as a credit balance on a current account is property assignable by the creditor and passing under his will or intestacy. It is property in the shape of a debt or chose in action of a particular kind, i.e., a debt payable on demand, which by the terms of the contract of loan has to be got in, or reduced into possession, in a particular way, i.e., by making a demand for payment. It may be asked how the necessity for a demand, imposed as it is by the contract, can survive the abrogation of the contract's further performance. For my part, I think the necessity for a demand should probably be regarded as surviving the abrogation of the further performance of the contract, not by virtue of the contract itself, which has gone, but as a characteristic, in the nature of a restriction on its recovery, inherent in the debt contracted as a result of the past operation of the contract. An alternative view, expressed by SINGLETON, L.J., is to the effect that the abrogation of the further performance of the contract does away with the necessity for a demand, so that in the present case the position would be that at the outbreak of war the plaintiffs were left simply with a credit balance at the defendants' Allenby Square branch payable without demand. This alternative would clearly be destructive of the plaintiffs' case. But, speaking for myself, I prefer the other alternative, and am content to assume that the necessity for a demand survived the outbreak of war just as a debt owing at the outbreak of war, and by virtue of the contract payable on a specified future date, would (though suspended in point of enforcement) survive as a debt payable on that date, and not be converted into a debt payable forthwith. There is no authority directly in point, in the sense of a decision whether a credit balance on current account payable on demand is or is not an accrued right within the meaning of the exception, but I think strong support for the view that it should be so considered is to be found in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (13). In particular, I would refer to the following passage from the speech of LORD THANKERTON ([1946] 1 All E.R. 41):

"I am inclined to agree with SIR ARNOLD MCNAIR's suggestion (LEGAL EFFECTS OF WAR (1944), 2nd ed., at p. 93), that the distinction between 'executed' and 'executory contracts' may not be very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war. In this view, I proceed to consider what is

included in the phrase 'a liquidated sum of money, which will be treated as a debt.' The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter. In my opinion the fact that the creditor held security for the payment of the debt, which would fall to be restored to the debtor on payment of the debt, would make no difference even though the security had been absolutely assigned to the creditor, and would require retransfer to the debtor. In my opinion, the present case only raises one further point, viz., the fact that the appellants were bound as principals to the respondents to discharge the debt in respect of which the German company were the original principal debtors, and were, therefore, entitled under the April contract on payment to the respondents of each instalment, to an assignment by the latter of a like sterling amount of their claim against the German company. My Lords, I cannot think that this makes any difference to the position. The appellants, under the April contract, were bound to discharge the whole debt within a period which would terminate before the lapse of the eight years, when the liability of the German company to make any payment towards the debt would first arise; in other words, the appellants were bound to acquire the debt, and their being placed by assignment in the shoes of the respondents is merely incidental to the discharge of the debt owed to the respondents and is not different in substance from the case of the return of securities to which I have already referred. It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract, as from the outbreak of war; or, as LORD DUNEDIN expresses it in the passage already quoted, the continued existence of the contractual relationship is prohibited . . . It seems clear to me that this reservation included matters involving intercourse with the enemy, but, as LORD DUNEDIN points out, the right of action is postponed. It seems equally clear it might involve substantial economic benefit to the enemy. The declaration of SIMONDS, J., contains no such reservation, and the result, in my opinion, is to confiscate the right of debt, which had arisen to the respondents on the delivery of the Reichsmarks on Apr. 28, 1936. I am not aware of any precedent for such confiscation, and it is clearly not justified under the decision of this House in the *Ertel Bieber* case (14). Indeed, it is inconsistent with it. I may add that in *Esposito v. Bowden* (16), the performance of the contract had not commenced prior to the outbreak of war."

LORD RUSSELL OF KILLOWEN, who dissented, but to this extent agreed with the majority, said (*ibid.*, 45):

"Thus a contract which is completely executed on one side, and under which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or debitum in praesenti solvendum in futuro, is unaffected by the outbreak of war. The payment cannot in fact take place between enemies in war time; so long as the war lasts the payment is suspended. Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of property are not put an end to at common law by the outbreak of war. The enforcement of them during the war may be impossible, but they will survive the war."

LORD GODDARD said (*ibid.*, 57):

"It is beyond question that if the result of performance of a contract

would be beneficial to the enemy or detrimental to this country the further performance is forbidden and the contract abrogated, though again rights, such as debts, accrued before the war are unaffected. This is illustrated by the order in the *Ertel Bieber* case (14) made by the Court of Appeal and affirmed in this House and which your Lordships have seen in the printed book. Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable until the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation."

If, as was recognised in the *Schering* case (13), a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security, on the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning, a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go to the length of confiscating enemy property, is recognised, I see no reason in principle or common sense why a debt, for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception. This would, indeed, be nothing more or less than the very confiscation of proprietary rights which the law declines to countenance. Accordingly, I am of opinion that the plaintiffs' credit balance in this case was not cancelled by the outbreak of war, but remained in existence subject to the suspension for the duration of the war of the plaintiffs' right to recover it. On this aspect of the case I find myself in complete agreement with the reasoning and conclusions of the learned judge, and, in particular, I would record my approval of the observation which he quotes from SIR ARNOLD MCNAIR'S *LEGAL EFFECTS OF WAR*, 3rd ed. (1948), at p. 121:

"It is inconceivable that upon the outbreak of war an English banker's obligation towards an enemy customer is ipso facto destroyed."

It follows that, in my opinion, the appeal must fail. This makes it unnecessary for me to consider at length the second stage in the argument of counsel for the plaintiffs, which was to the effect that the cancellation of the credit balance gave rise to a right in the plaintiffs to recover a like amount from the defendants as money had and received, or, alternatively, on the ground that the defendants were "unjustly enriched" to that extent by the cancellation of their contractual indebtedness. This argument is founded on *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (4). But even if, contrary to my opinion, the

plaintiffs' credit balance was cancelled by the outbreak of war because it was not an accrued right, but part and parcel of an executory contract the further performance of which was rendered unlawful by the outbreak of war, and, therefore, abrogated, I am by no means satisfied that the principle of that case would give the plaintiffs the substituted non-contractual right which they claim. If a trader (say in Germany) agrees to buy from another trader (say in Britain) goods for which he pays in advance, and before the goods are supplied war breaks out between Britain and Germany, further performance of the contract is abrogated and the British trader is for ever absolved from supplying the goods. Indeed, it would be illegal for him to do so. But, as I understand the principle, the German trader, by virtue of the payment made by him of the price of the goods before the outbreak of war, has from the instant of the outbreak of war a right to repayment of the money, as money paid for a consideration which has wholly failed, arising contemporaneously with the abrogation of the further performance of the contract. This seems to me to be a species of accrued right which, though suspended in point of enforcement during the war, is not abrogated. The law does not say to the German: "You shall have the goods after the war". It says: "Because you cannot have the goods, you shall have back after the war the money you paid before the war as the price of the goods which the war prevented you from receiving." But in the present case the contract, which, according to the argument of counsel for the plaintiffs, is abrogated, is a contract to repay on demand money lent, and the outbreak of war has made it illegal for the debtor to repay that money. I fail to see how in those circumstances the law can sensibly say to the debtor: "You must not pay this debt. It would be illegal for you to do so. The debt is, therefore, cancelled, and not merely suspended, because anything short of cancellation would aid the enemy. Nevertheless, it would be unconscionable in you not to pay the debt, which on grounds of public policy you are forbidden to pay, and you are, therefore, enjoined to pay a like amount to your enemy creditor, and to do that without any such demand or other formality as was required of him in relation to the recovery of the contractual debt which has been cancelled. Your obligation to make this payment will, however, be suspended during the war." This seems to me to be no more than a roundabout way of saying that the debt is not cancelled, but that the right to recover it is merely suspended for the duration of the war, the only difference between the contractual and non-contractual obligations being that, in so far as the need for a demand is dispensed with, the substituted obligation is more onerous to the Briton and more advantageous to the enemy German than the original obligation which, to prevent benefit to the enemy, the law was at pains to extinguish.

In a case in which the debtor was a British banker residing and carrying on business in England alone, and the creditor was an enemy German, the law, as counsel for the plaintiffs presents it, would be futile, to say the least. But the whole object of the two stages of his argument turns on the circumstances that in the present case the defendants carry on business in the belligerent country concerned, i.e., Israel, only through a branch, their place, or principal place, of residence being in England. In these circumstances counsel's preoccupation is to kill the contractual debt and its localisation in Israel, and resuscitate from its ashes a claim for the same amount in a new guise in which it becomes a claim against the defendants simpliciter, as distinct from a claim against the defendants at their Jerusalem branch. In this form, according to counsel, the claim can be pursued in England against the defendants as resident here, and, not being situated in Israel, it could not be caught by the Israeli regulations concerning the property of absentees, or be suspended in point of enforcement during the Israeli-Arab war. In such circumstances the law, as counsel for the plaintiffs presents it, would have the most extraordinary consequences,

Suppose a Swiss bank with a branch in London. Suppose a German has a credit balance on a current account kept by him with the London branch of the Swiss bank. Suppose a war breaks out between Britain and Germany, Switzerland remaining neutral. According to the theory of counsel for the plaintiffs, English law, to prevent benefit to the enemy, cancels the German's credit balance at the Swiss bank's branch in London, and at the same time presents the German enemy with an immediate right to recover the amount of the credit balance by suing the Swiss bank in Switzerland. This seems to me to involve a complete stultification of the common law in regard to trading with the enemy, and a complete negation of the considerations of public policy on which it is based. An interesting argument was presented to us as to the local situation of the resuscitated claim, supposing such a claim to exist. As to that, I need only say that the claim, as formulated by counsel for the plaintiffs, was by definition situated outside Israel. But if the cancellation of the contractual debt was brought about by Israeli law, it would, at least, be logical also to look to Israeli law for the consequences of such cancellation, and to regard any substituted obligation as the creature of that law, and, consequently, as situated in the country to whose law it owed its existence. It is, however, unnecessary in the view I take to give any decided answer to this hypothetical question, and I refrain from doing so. For the reasons above stated I would dismiss this appeal.

MORRIS, L.J.: When the plaintiffs presented their case at the trial of the action, it was based "first and foremost" on an alleged breach of contract before the mandate came to an end. It was said that up to May 13, 1948, the plaintiffs had persisted in an oral demand for payment of the balance of their account, that such demand had never been met, and that the contract of current account had been repudiated. After full and careful inquiry the learned judge was satisfied that there was nothing which could be said to amount to a demand the non-compliance with which would amount to a breach. In the result it was held that prior to the termination of the mandate there had been no breach of contract on the part of the defendants and no frustration. The plaintiffs do not, on appeal, challenge these conclusions, but they challenge the conclusion reached by the learned judge that their credit on current account was a liquidated sum of money the right to payment of which was not wiped out by the outbreak of war but was merely suspended. Having failed to establish that they had made demand, the plaintiffs submit that in the circumstances of the case their contract of current account was frustrated when war broke out with the result that no money was owing to them by the defendants. They submit that, where a customer has a balance on current account with a banker and has not made a demand, there is no debt at all owing by the banker and that, if banker and customer became separated by the line of war so that intercourse between them would be illegal, then their contract is at once abrogated and any credit on current account expunged. The plaintiffs submit that this is what happened as soon as war broke out following on the termination of the mandate. But they contend that the matter does not rest there. They submit that the law steps in again and does so by way of giving redress against the injustice of the enrichment which suddenly devolved on the defendants who would neither have expected nor desired to be enriched. The redress, it is said, would take the form that a new obligation would be imposed by law—an obligation to pay as a simple debt (which they would owe at the place where they reside) the amount which had previously stood to the credit of the plaintiffs on current account. In the result, therefore, the plaintiffs say that, whereas before war broke out they could at Allenby Square, Jerusalem, have demanded payment of the amount standing to their credit, the position immediately after war broke out was that the defendants in London

owed the amount to the plaintiffs and had the obligation to seek them out and to pay them.

The structure of the propositions so advanced requires testing. If correct, a strange result would follow, for the law (the law of Palestine or Israel, which, it was agreed, did not differ from English law) would prohibit the defendants from paying the plaintiffs, because to pay them would involve intercourse across the line of war and would delete the debt, but, nevertheless, in defiance of the prohibition and deletion and of their purpose and reason, the law would require the defendants to pay the plaintiffs. The submissions seem to require the law to function in an erratic and quixotic manner and to alternate between destructive and creative effect. It is necessary to consider what was the position between the plaintiffs and the defendants immediately before the war began. It was that the defendants owed a sum of money to the plaintiffs in the way in which a banker owes to a customer who is in credit. In addition, the parties were mutually willing to continue to have the banking transactions denoted by the terms of the plaintiffs' letter of Feb. 14, 1939, and by the course of their dealings. The nature and features of the relationship between banker and customer were detailed by ATKIN, L.J., in his judgment in *Joachimson v. Swiss Bank Corpn.* (1). It has never been doubted that the relation between banker and customer is that of debtor and creditor though there are, of course, super-added obligations. But I cannot think that it is correct to say that a contract of current account remains wholly executory until the account is closed or until an effective demand for payment of the whole balance has been made. The position at any given time is that many transactions will have been concluded and ended and that further transactions are anticipated, and that, if a customer is in credit, he is so because he has paid money to the banker so that a debt becomes owing by the banker to the customer which will be payable on demand. As between the plaintiffs and the defendants the position at the time of the outbreak of war was that the defendants owed a large sum to the plaintiffs, the debt being payable at Allenby Square, Palestine, and being payable on demand. The plaintiffs had a right to make demand for payment. It seems to me that that was a form of and a right to property. It has been the policy of the law not to confiscate enemy property on the outbreak of a war and there is certainly no justification for the confiscation by private persons of enemy property which they may happen to hold. Nor does an existing liability to pay money to an enemy become terminated. It would, therefore, appear to be a strange and irrational result if, after war broke out in Palestine, the defendants became relieved of the debt which they owed. The debt was owing and was unquestioned and would at any time on demand have been paid. The plaintiffs had money owing to them and could themselves have chosen the time to ask for payment of it. It cannot be said that they had a property right only if and when they made demand, and not before such time. Either before or after a demand they had a property right. In the one case, the money would be immediately payable, and, in the other case, it would await an indication of their wishes as to the moment when it was to be paid. It seems to me, therefore, that it would be a departure from principle as well as a violation of reason if it were held that after the outbreak of war the debt owed by the defendants to the plaintiffs became expunged. It would be strange and mercurial to eliminate a liability which the debtor would not wish to disown and then to fix him with a new and different obligation on the footing that he had been unjustly enriched. Unless directed by principle or by authority, it seems to me a pointless and profitless procedure for the law artificially to create a void and then to proceed artificially to fill it.

In *Hugh Stevenson & Sons v. Akt. für Cartonnagen Industrie* (22) LORD FINLAY, L.C., referred ([1918] A.C. 245) to

" . . . the principle that the property of an enemy is not confiscated, though his right to have it back is suspended during war."

Earlier in his speech (*ibid.*, 244) he said:

" It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime."

To the same effect was the statement of VISCOUNT HALDANE (*ibid.*, 247):

" The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended."

It is said, however, by the plaintiffs that, as they had not made a demand before the outbreak of war, the result was that they had no accrued right which could survive in suspension, but that their contract with the defendants remained mutually executory, and so was dissolved on the outbreak of war. [His LORDSHIP read passages from the speeches of LORD DUNEDIN ([1918] A.C. 269) and of LORD SUMNER (*ibid.*, 289) in *Ertel Bieber & Co. v. Rio Tinto Co.* (14), and continued:] The plaintiffs submit that, as they had not made a pre-war demand, they did not have a cause of action which had already accrued before the war. But LORD SUMNER spoke (*ibid.*) of the existence of a cause of action as implying an existing obligation to pay, and the important consideration is as to the effect of war on such an obligation. Just as "accrued rights" under a contract are not affected, so such an obligation is not destroyed. In tune with this principle it seems to me that an existing or accrued right to demand payment of a sum of money which is owing ought not to be destroyed though it will be suspended.

Under R.S.C., Ord. 45, r. 1, the court may on proof

" . . . that any other person is indebted to such debtor . . . order that all debts owing or accruing from such third person . . . to such debtor . . ."

shall be attached. If a debtor has a bank balance, the bank is regarded as "indebted" to the customer and the credit balance would be a debt "owing or accruing". If the line of war divides a creditor from one who owes him a debt which is both due and payable, the latter, as debtor, could not discharge his obligation of seeking out his creditor, for to do so would involve unlawful intercourse. Yet the debt is not expunged but is merely suspended. This serves to illustrate that the policy of the law is to avoid the confiscation of property even if there is some outstanding duty which would, or might, for its performance require intercourse across the line of war.

[His LORDSHIP read a passage from the speech of LORD RUSSELL OF KILLOWEN ([1946] 1 All E.R. 45) in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag* (13), and continued:] It is to be observed that LORD RUSSELL, who dissented from the majority, but not, apparently, in regard to the principles of law, includes within the words "liquidated sum" a sum which though "debitum in praesenti" is "solvendum in futuro". He was speaking in reference to "a contract which is completely executed." What, then, is the position in regard to a contract of current account where many past transactions are ended and concluded, where at the moment of outbreak of war there is a balance or debt owing to the customer, and where there was an expectation of the continuation of business on the same lines as before? The answer is, I think, denoted by LORD THANKERTON in his speech in the same case, where he said (*ibid.*, 41):

" I am inclined to agree with SIR ARNOLD McNAIR's suggestion . . . that the distinction between 'executed' and 'executory contracts' may not

be very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war."

The result is, in my judgment, that, when the war broke out, the contract between the plaintiffs and the defendants was abrogated in the sense that the continued existence of the contractual relationship was prohibited. But that did not involve destruction of the contract in regard to what had already been done or obliterate any accrued rights or existing debts. The position between the parties on the outbreak of war differed from that which existed between the parties in the *Fibrosa* case (4). In that case a debt arose by operation of law. In the present case a debt existed in fact and did not depend for its vitality on the assistance of any conception of law. While, therefore, when the war began the further performance of the contract between the parties was abrogated, the right of the plaintiffs to demand payment of the sum outstanding to their credit at the defendants' Allenby Square branch was not abrogated, but was suspended. I consider, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Stoneham & Sons* (for the plaintiffs); *Durrant Cooper & Hambling* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

J. D'ALMEIDA ARAUJO LDA. v. SIR FREDERICK BECKER & CO., LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), May 5, 6, 7, 8, 11, 12, 1953.]

Conflict of Laws—Contract—Breach—Damages—Remoteness of damage—Contract governed by lex loci contractus—Law applicable to question of remoteness.

The defendants, an English company, agreed to buy five hundred tons of palm oil from the plaintiffs, a Portuguese company. Payment was to be made by the defendants opening a credit in escudos in Lisbon in favour of the plaintiffs. To fulfil their contract with the defendants, the plaintiffs bought the palm oil in Lisbon from M., it being agreed that payment was to be made by the plaintiffs opening a credit in Lisbon in escudos in favour of M., and, if either party should fail to fulfil the contract, that party should pay to the other party, as indemnity for the damage, an amount corresponding to five per cent. of the total value of the contract. The defendants failed to open the necessary credit in Lisbon as a result of which the plaintiffs did not open the credit in favour of M., and were compelled to pay him £3,500 as indemnity. It was agreed that the contract between the plaintiffs and the defendants was governed by the *lex loci contractus*, Portuguese law. On a claim by the plaintiffs to recover the £3,500 from the defendants,

HELD: the question whether the plaintiffs could recover from the defendants the £3,500 which they had paid to M. was one of remoteness of damage; such a question must be determined by the proper law of the contract and not treated as a procedural or remedial matter determinable according to the *lex fori* (in the present case, English law); and, therefore, the question fell to be determined according to Portuguese law by which the £3,500 was recoverable.

Livesley v. Horst ([1924] S.C.R. 605), applied.

AS TO LAW GOVERNING MEASURE OF DAMAGES FOR BREACH OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 6, p. 355, para. 413.

Cases referred to:

- (1) *Livesley v. Horst*, [1924] S.C.R. 605; [1925] 1 D.L.R. 159; Digest Supp.
- (2) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub nom. Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest 29, 151.
- (3) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.
- (4) *Robinson v. Harman*, (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 17 Digest 83, 30.
- (5) *Fergusson v. Fyffe*, (1841), 8 Cl. & Fin. 121; 8 E.R. 49; 11 Digest 394, 678.
- (6) *Phillips v. Eyre*, (1870), L.R. 6 Q.B. 1; 40 L.J.Q.B. 28; 22 L.T. 869; 17 Digest 416, 16.

ACTION for damages for breach of contract.

In February and March, 1947, by a contract contained in a series of letters and cables, the plaintiffs, a Portuguese company, agreed to sell, and the defendants, an English company in London, agreed to buy, five hundred tons of palm oil at the price of 14.20 escudos per kilogram f.o.b. Angola, Portuguese West Africa. Payment was to be made by an irrevocable letter of credit in escudos to be opened with the Banco de Angola in Lisbon by the defendants in favour of the plaintiffs by Mar. 24, 1947. Both the plaintiffs and the defendants were middlemen in the transaction, and by a contract dated Mar. 20, 1947, the plaintiffs bought the palm oil from one Gustavo Mourao in Lisbon, who, in turn, bought it from one Guimaraes through the latter's agent in Lisbon. By their contract with Mourao the plaintiffs were to open an irrevocable credit in Mourao's favour at the Banco de Angola in Lisbon by Mar. 24, 1947, and, if either party failed to fulfil the contract, the defaulting party was to pay the other party, as indemnity for the damage, an amount corresponding to five per cent. of the total value of the contract. The defendants, while negotiating with the plaintiffs, agreed to sell the palm oil at a higher price to a French company, the Société Basque de Commission. Payment was to be made by an irrevocable letter of credit in escudos to be opened in Lisbon by the French company in favour of the defendants. The French company, in their turn, contracted to sell the palm oil to a Swiss company on similar terms as to payment. The Swiss buyers failed to open the necessary credit, as a result of which the French company failed to open the credit in escudos in favour of the defendants who, in their turn, failed to open the credit in escudos in Lisbon in favour of the plaintiffs. As a result of this, the plaintiffs did not open the credit in favour of Mourao in Lisbon, and on May 20, 1947, in accordance with their contract of Mar. 20, 1947, they paid to Mourao 350,000 escudos as indemnity, the equivalent in English currency at that time of £3,500. The plaintiffs claimed this £3,500, and a further £1,000 for loss of profit, from the defendants. The plaintiffs and the defendants agreed that their contract was governed by Portuguese law, but, while the plaintiffs contended that the damages to which they were entitled were also to be determined by Portuguese law, the defendants contended that where the substantive contract was governed by a foreign law, procedural or remedial questions, which included the question of damages, ought to be determined by the *lex fori*—in the present case the law of England.

Mocatta, Q.C., and *J. M. Shaw* for the plaintiffs.

Phillimore, Q.C., and *Scarman* for the defendants.

PILCHER, J., stated the facts, found that a concluded contract was arrived at between the plaintiffs and the defendants, one of the terms of which was that credit should be opened by the defendants in favour of the plaintiffs as soon as was reasonably possible in the ordinary course of business, that under Portuguese law the plaintiffs were contractually bound to pay, and

did pay, to Mourao the sum of £3,500, and that the defendants were in breach of their contract to open the credit provided for by the contract within a reasonable time, and continued: While it was common ground between the parties that the substantive contract between them was governed by Portuguese law, the plaintiffs contended that the damages which they were entitled to recover in the particular circumstances of the case were also to be determined in accordance with the principles of Portuguese law. The defendants, on the contrary, submitted that, even where the substantive contract is governed by foreign law, procedural or remedial questions, which include the question of damages, ought to be determined according to the *lex fori*, in this case the law of England. Subject to the question of the obligation of an innocent party to mitigate the damages, to which I will refer in a moment, the question of the proper law to be applied in regard to the damages has importance, because the plaintiffs are seeking to recover from the defendants the £3,500 as one head of damage, that being the sum they had to pay to Mourao for failing to carry out their contract with him.

The loss sustained by the plaintiffs in paying that sum was clearly not a loss which was foreseeable by the defendants at the time when they negotiated this contract with the plaintiffs, and it is quite clear that under English law this sum of £3,500 would be irrecoverable by the plaintiffs from the defendants. It was argued by counsel for the plaintiffs that under Portuguese law the plaintiffs would have been entitled to include this sum in their damages if damages were assessed in accordance with Portuguese law. While I feel no certainty that the plaintiffs' right to recover damages will turn out in the end to be any different, whether the principles of English or Portuguese law are applied, it is none the less desirable that I should state my view on the point.

I was referred to a number of text-books on the particular point whether, in a foreign contract which has to be determined by the *lex loci contractus*, the issue of damages is, in the words of some of the text-book writers "a procedural or remedial matter" such as falls to be determined in accordance with the *lex fori*, or whether, on the other hand, it is part of the substantive contract between the parties and so to be determined in accordance with the *lex loci contractus*. I propose to read certain short passages from the text-books to which I have been referred because there is very little authority indeed on this particular topic in English law. The passage from DICEY'S *CONFLICT OF LAWS*, 6th ed., to which I wish to refer, is at pp. 649 and 650:

"A further difficulty is created by the problem of how to distinguish between the effect of the contract and the remedies which are available for its enforcement. Whether a contract gives rise to a claim for performance or to a claim for damages, whether, in the event of a breach of contract, the other party has a right to rescind it, whether interest is payable on a debt—all these are matters which, on a proper analysis, should be regarded as affecting the rights and obligations to which the contract gives rise. While it is clear that, in the view of the English courts, the liability to pay contractual interest and the rate of such interest are determined by the proper law, it appears to be a generally accepted view that the measure of damages is, in an English court, governed by English law, whatever be the proper law of the contract. This principle is apt to deprive a party of rights he would have enjoyed under the proper law or to confer upon him an uncovenanted benefit merely owing to the fact that he happened to be able to invoke the jurisdiction of an English court. Its rigour could be mitigated if, following Cheshire's suggestion, the courts could separate from the question of the measure of damages that known as the 'remoteness of damage' and hold that it was one of the effects of a contract to determine what events may and must be taken into account in assessing the damages for which a party is liable."

On p. 862 the following passage occurs:

"While there is little authority, it appears that English courts, contrary to the prevailing American practice, tend to hold that damages are a matter of procedure in an action based on a foreign tort. In contract, there is no direct English authority, but it is submitted that questions of remoteness of damage should be determined by the proper law of the contract, and should not be treated as a matter of procedure: *Livesley v. Horst* (1). The rate of interest to be allowed (if any) for breach of a foreign contract must depend on its proper law."

There are certain passages in CHESHIRE'S PRIVATE INTERNATIONAL LAW, 4th ed., to which I also want to refer. After dealing, at pp. 658 and 659, with the principles on which damages are recoverable in this country in actions founded respectively in contract and tort, the learned author continues at p. 659:

"The truth would appear to be that judicial pronouncements and the statements in text-books are unintelligible unless two entirely different questions are segregated. In brief, remoteness of liability or remoteness of damage must be distinguished from measure of damages. The rules relating to remoteness indicate what kind of loss actually resulting from the commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated. Damage may be, but damages can never be, too remote. In tort the rule of remoteness established by *Re Polemis & Furness, Withy & Co.* (2) is that a tortfeasor is responsible for all the direct consequences of his wrongful act, even though they could not reasonably have been anticipated. The analogous rule in contracts, however, is different. The breach of a contract, like the commission of a tort, causes material loss, and it is that loss to which the rule in *Hadley v. Baxendale* (3) applies. In other words, it is impossible to claim monetary compensation in respect even of an admitted loss unless it arose naturally and in the ordinary course of things from the breach of contract. But the rule that regulates the measure of damages is the same for contracts as it is for torts. It requires restitutio in integrum. In torts compensation must be paid for the whole of the direct loss; in contracts, as *Robinson v. Harman* (4) insists, compensation must be paid for the whole of the natural or foreseeable loss. Alive to the distinction between remoteness of liability and measure of damages we can now attempt to state the relevant principles of private international law. There can be no doubt, at least on principle, that remoteness of liability must be governed by the proper law of the obligation that rests upon the defendant. Not only the existence, but also the extent, of an obligation, whether it springs from a breach of contract or the commission of a wrong, must be determined by the system of law from which it derives its source. The proper law admittedly determines the nature and content of the right created by a contract, and it is clear that the kind of loss for which damages are recoverable upon breach forms part of that content. Both the nature and the content of a contractual right depend in part upon the question whether certain consequential loss that may ensue if the contract is unperformed will be too remote in the eye of the law. If the proper law determines what constitutes a breach, it is also entitled to determine the consequences of a breach."

The conclusion at which Professor CHESHIRE arrives would seem to be that questions of remoteness of damage should be governed by the proper law of the contract, whereas the quantification of damage, which according to the proper law is not too remote, should be governed by the *lex fori*.

I must also refer to *Livesley v. Horst* (1), in which the headnote is as follows:

"The right to damages for breach of a contract made in a foreign country and to be executed there is governed by the *lex loci contractus* and not by the *lex fori*."

The case was an appeal from the decision of the Court of Appeal of British Columbia affirming the judgment of the trial judge. The contract was one which in its substance was governed by Californian law, and the only material issue, from my point of view, with which the Supreme Court of Canada was concerned was whether or not the measure of damages was also governed by the law of California. The case concerned the sale of hops, and I do not think I need refer to the facts any further. DUFF, J., said this ([1924] S.C.R. 606):

"The only question requiring discussion is the question raised by the appellant's contention that, as to the measure of damages, the rights of the plaintiff are governed by the law of British Columbia, and not by the law of California. There is not, and in view of the evidence there could not be, any serious controversy, either as to the law of California or as to its application to the facts. The expert witnesses are in agreement upon the point that, by virtue of the rules laid down in the California code, the plaintiffs acquired, under each of the contracts we are concerned with, a lien upon the subject-matter of the sale as soon as it was identified, for a sum equivalent to the purchase price; that, accessory to this lien, there is given by the same provisions a power of sale by auction on default of payment; and that, if a sum equal to the amount of the purchase money is not realised from the sale, the vendor also becomes entitled to require from the purchaser payment of the difference between the amount so realised and the sum due to the vendor under the contract of sale. The vendor is entitled to bid at the sale. And again there could be no dispute in view of what occurred at the trial, that each of the sales by the plaintiff was a sale valid in California; or that under the law and in the courts of that State the plaintiff is entitled to recover at all would be entitled to the amounts which have been awarded by the judgments appealed from. But damages are not exigible, the appellants argue, under the terms of the contract itself, but under a new obligation, which, with its accessory right of action, springs from the breach of contract; and this right, being strictly remedial in its nature, must on principle, it is said, be derived from and ruled by the *lex fori* and not the proper law of the contract. There is singularly little express authority of English law upon the broad question whether in an action on a foreign contract—that is, a contract made abroad, and to be executed abroad—the right to unliquidated damages for a breach of it is a right determined and measured by English law or by the appropriate foreign law; although, as we shall presently see, judicial dicta, the opinions of text-writers and the analogy of decided cases, all appear to point to a conclusion in a sense opposed to the contention of the appellants. In principle, it is difficult to discover a solid ground for refusing to classify the right to damages for breach of contract with other rights arising under the proper law of the contract, and recognisable and enforceable as such . . . The exception embraces a very wide field, and among other things excludes procedure, because the policy of the English law recognises no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy of the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here the questions as to substantive rights include all questions as to the 'nature and extent

of the obligation ' under the foreign contract. *Fergusson v. Fyffe* (5) per LORD COTTENHAM, L.C. (8 Cl. & Fin. 140). It is most important to observe that it is not the foreign agreement to which effect is given by English law but, as the language of the accurate judge, whose judgment is quoted, suggests, it is the civil or legal right generated by the contract. The right of action, as WILLES, J., said in *Phillips v. Eyre* (6) (L.R. 6 Q.B. 28), is a 'creature' of the law by which the contract is governed. Applying the principle to the circumstances of the case before us, the lien given to the vendor, and the accessory right of sale, are obviously substantive rights given by the law of California to the vendor as such; in his capacity, that is to say, as seller under a contract of sale. And the right to recover the difference between the contract price and the moneys realised on the sale would seem to be not less so."

The question which I have to determine really depends, if I accept and adopt, as I do accept and adopt, the analysis given by Professor CHESHIRE in his work, on whether or not the £3,500 which the plaintiffs have had to pay to Mourao is a head of damages which is recoverable on principles of remoteness of damage, or whether it is to be regarded as a mere established quantification of a part of the loss the plaintiffs have in fact sustained. While the decision in *Livesley v. Horst* (1) is not binding on me and while the facts of that case can be distinguished from those now before me, it is none the less a decision which I must, and do, treat with respect. I confess that in the absence of any direct authority I was attracted by the reasoning in the passage I have quoted from Professor CHESHIRE'S work. Fortified by the decision of the Supreme Court of Canada, to which I have just referred, I conclude that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to Mourao depends on whether that damage is, or is not, too remote. In my view, the question is one of remoteness, and, therefore, falls to be determined in accordance with Portuguese law. Whether the plaintiffs are entitled to recover this sum under Portuguese law is, however, another matter.

[His LORDSHIP found as a fact that the plaintiffs could have recovered the £3,500 from the defendants under Portuguese law, subject to their obligation to mitigate those damages. He further held that the plaintiffs' obligation to mitigate was the same under Portuguese as under English law, that the plaintiffs could and should have disposed of the palm oil after being informed by the defendants of their inability to carry out the contract, and that, if the plaintiffs had done so, they would have sustained no loss. He, accordingly, awarded them nominal damages which he assessed at 40s.]

Judgment for the plaintiffs.

Solicitors: *Stoneham & Sons* (for the plaintiffs); *H. B. Nisbet & Co.* (for the defendants).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

PETER DUMENIL & CO., LTD. v. JAMES RUDDIN, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), May 18, 19, 1953.]

Contract—Repudiation—Anticipatory breach—Refusal by sellers' agent to deliver part of goods sold.

By a contract, dated Jan. 4, 1952, the sellers agreed to sell and the buyers agreed to buy one hundred and forty cases of Australian skinned rabbits, Gaythorn brand, which the sellers deposited with a cold storage company. The purchase price was paid and the sellers gave to the buyers a document in the nature of a delivery order addressed to the storage company. On Mar. 14, after giving due notice, the buyers made demand on the storage company for delivery of twenty-five cases, but they were told by the company's servants in error that there were no Gaythorn brand rabbits in the stores. No further step was taken by the buyers until Mar. 17, when they wrote to the sellers claiming the return of the purchase price. In an action for the return of the price, the buyers contended that the sellers, by their agents, the storage company, in declining to deliver the goods had evinced an intention no longer to be bound by the contract which they (the buyers) were entitled to rescind.

HELD: there was a breach of contract with regard to the non-delivery of the twenty-five cases which should have been delivered on Mar. 14, and in respect of that breach the buyers were entitled to damages, but no request was made for the delivery of any further cases and the mistake made by the sellers' agents would have been discovered if the buyers had taken reasonable steps to inquire into the matter, and in the circumstances the failure to deliver the twenty-five cases coupled with the innocent misrepresentations made by the sellers' agents did not show an intention on the part of the seller, no longer to be bound by the contract, and, therefore, there had not been any repudiation of the contract by them.

Observations of LORD COLERIDGE, C.J., in *Freeth v. Burr* (1874) (L.R. 9 C.P. 213) and of LORD WRIGHT in *Heyman v. Darwins, Ltd.* ([1942] 1 All E.R. 350), applied.

AS TO REPUDIATION OF CONTRACT BY ANTICIPATORY BREACH, see HALSBURY, Hailsham Edn., Vol. 7, pp. 228-230, paras. 313, 314.

Cases referred to:

- (1) *Shaffer (James), Ltd. v. Findlay Durham & Brodie*, [1953] 1 W.L.R. 106.
- (2) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.
- (3) *Freeth v. Burr*, (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 12 Digest, Replacement, 378, 2970.
- (4) *Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co., Ltd.*, (1919), 88 L.J.K.B. 1194; *sub nom. Spettabile Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co., Ltd.*, 121 L.T. 628; 12 Digest, Replacement, 385, 3007.

APPEAL from an order of PARKER, J., dated Jan. 22, 1953.

Duveen, Q.C., and *A. L. Figgis* for the buyers.

Ashton Roskill, Q.C., and *McKinnon* for the sellers.

SINGLETON, L.J.: At the beginning of 1952, the defendants had a number of cases of Australian skinned rabbits, Gaythorn brand, ex s.s. Orion, and they agreed to sell one hundred and forty cases to the plaintiffs. The purchase price was fixed and paid. When the contract was made the sellers gave to the buyers a document in the nature of a delivery order, No. 1224. It is addressed to the Crown Wharf Cold Stores, Park Street, S.E.1, and reads:

"Please deliver to Messrs. Peter Dumenil & Co., Ltd., 1, St. John's Lane,

E.C.1, one hundred and forty cases of Australian skinned rabbits Gaythorn brand."

A That document is dated Jan. 4, 1952. A delivery order is an order given by the seller on a bailee who holds possession as agent of the seller, and until it is acted on a delivery order, properly so called, is a mere "promise to deliver", the delivery not being complete until the bailee attorns to the buyer and thus becomes the buyer's agent as custodian of the goods. Nothing further was done by the buyers until Mar. 13, 1952, when they wrote to the Crown Wharf Cold Stores a letter in these terms:

B "Dear Sirs, We enclose herewith transfer No. 1224 issued by Messrs. James Ruddin in respect of one hundred and forty cases of Australian skinned rabbits, Gaythorn brand, which they have transferred to our account. We propose to withdraw twenty-five cases of these rabbits tomorrow morning, Friday, 14 instant, and we should be pleased if you would have these available for us at 10 o'clock . . ."

C When that letter was written by the buyers the Crown Wharf Cold Stores were still in possession of the goods which had been deposited with them some considerable time before. On Mar. 14 the buyers' carter went to the cold stores and took with him a document which referred to the document No. 1224, and asked for delivery of twenty-five cases of Australian skinned rabbits, "Gaythorn, ex Ruddins." The carter did not receive the cases of rabbits. There was a misunderstanding between him and someone at the warehouse, and he was told that they had no Gaythorn rabbits. The word "Gaythorn" was struck
D out of the note he had taken with him in red, and he was offered some cases of rabbits marked "G.P.L." That was the finding of PARKER, J., who said that the warehouseman had used words to the effect: "I do not know anything about Gaythorn; you can have G.P.L.'s." The carter, accordingly, rang up the buyers' headquarters to ask what he was to do, and they said they were taking only Gaythorn brand rabbits. He was assured again by the warehouse-
E man that there were no Gaythorn rabbits in the stores and he was handed back the documents he had taken with him. Thereupon Mr. Dumenil, the managing director of the buyers, telephoned to the stores and spoke to someone who said he was the superintendent. In his evidence Mr. Dumenil said that he was told that there were no Gaythorn rabbits in the stores and the judge accepted that statement. The two companies, the buyers and the sellers, have
F offices which are near each other, and they are in regular communication. Mr. Dumenil said that he saw the sellers' salesman almost daily, but no step was taken by the buyers until Mar. 17 when Mr. Dumenil on behalf of his company wrote to the sellers:

G "We return herewith transfer No. 1224 in respect of one hundred and forty cases of Gaythorn brand Australian skinned rabbits which we understand from the cold stores superintendent are not in fact held in Crown Wharf to your account. These one hundred and forty boxes of rabbits were purchased on a transfer which you issued to us on Jan. 4 against a sample six boxes which we had in our store here and inspected, and we, in turn, have sold these rabbits to our client as Gaythorn skinned rabbits ex Crown Wharf Cold Stores. Our client, who decided to start clearing these rabbits this
H week, has now been informed that these rabbits are not in Crown Wharf Cold Stores to be transferred to his account and has, not unnaturally, been extremely annoyed, and has not only returned our transfer to us, but has issued us with a demand that his money be refunded to him. You will, of course, appreciate that this not only causes a good deal of unpleasant feeling with our client, but places us in an extremely difficult position. In view of the fact that this particular brand of rabbits was sold by us in Crown Wharf Cold Stores and we are now no longer in a position to fulfil our contract,

it has been necessary for us to refund the amount charged to our client, and we, therefore, have no alternative but to return your transfer and ask you to be good enough to let us have a cheque in respect of this outstanding amount at your early convenience."

The buyers had sold some twenty-five cases although it is not clear from the evidence how many. They had not sold the others, and it is clear that they could not have sold them at the contract price, because, according to the finding of the learned judge, there had been a fall of about twenty-five per cent. in the price of skinned rabbits of this class. On Apr. 24, 1952, the buyers commenced an action claiming their money back. The statement of claim was not delivered until Feb. 11, 1953, and that shows that their claim is for £682 10s. moneys payable by the sellers to the buyers for moneys received by the sellers for the use of the buyers, and, alternatively, damages for breach of contract. Particulars are given, and para. 3 of the particulars reads:

"On Mar. 13, 1952, the plaintiffs sent the said delivery order to the said stores and on Mar. 14, 1952, demanded from the said stores twenty-five of the said cases. The said stores on behalf of the defendants refused to deliver any of the said cases to the plaintiffs whereby the defendants wrongfully repudiated the said agreement and the consideration for the payment of the said £682 10s. has wholly failed."

Counsel, on behalf of the sellers, has pointed out to this court that the points of claim do not raise in so many words a case of anticipatory breach of contract. I am inclined to think that the pleader meant to cover that point by para. 3 of the particulars which I have just read. The sellers pleaded:

"The said stores did not refuse as alleged nor were they the agents of the defendants in the alleged or any respect . . . The alleged repudiation and the alleged failure of consideration are denied and traversed."

The surprising thing is that at the time the demand was made on Mar. 14, 1952, there were one hundred and forty cases of Australian skinned rabbits, Gaythorn brand, ex s.s. Orion in the Crown Wharf Cold Stores. The warehouseman did not look at the cases properly. Had he done so he would have seen the word "Gaythorn" marked on them, but they were noted in his book as "G.P.L." He told the buyers' carter: "I can give you G.P.L.'s, but we have no Gaythorn." In fact they are one and the same thing. The mistake was that of the warehouseman, who was the agent of the sellers to deliver, when proper demand was made by the buyers. The case which was argued before PARKER, J., was that there had been a breach by the sellers through their agents which entitled them (the buyers) to repudiate the whole of the contract and to have their money returned as money paid on a consideration which had failed. PARKER, J., was satisfied that there was a mistake, and that the mistake was that of the sellers' agents. What resulted from that? We were told by counsel for the sellers that the case was not put as one of an anticipatory breach of contract before PARKER, J., who was not referred to the authorities on that branch of the law. In the course of his judgment, he said:

"It is said, with some force: 'Why did not Mr. Dumenil write at once to the superintendent of the cold stores and demand an explanation?' Each case, as it seems to me, must depend upon its own facts. But on the facts in this case, I do not think it could possibly be said that the buyers were not justified in treating what the carter was shown and told on Mar. 14 as, if you like, an anticipatory breach. The carter was . . . told by the warehouseman: 'I do not know anything about Gaythorns'. Having been told that, it seems to me that he was perfectly justified in telephoning Mr. Dumenil and getting instructions, without in effect demanding to see the twenty-five cases which it was proposed to tender, and making certain that they were not Gaythorns. I am also satisfied that

Mr. Dumenil did have a conversation with some responsible official of the Crown Wharf Cold Stores, who, at any rate, conveyed to him, as the warehouseman had conveyed to the carter, that they knew nothing about Gaythorns. I think, having had that conversation with the person he understood to be the superintendent, he was abundantly justified in telling his sub-buyer that the goods were not available and in claiming from the sellers the return of the money."

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I agree with the learned judge that Mr. Dumenil was justified in telling the sub-buyer that the twenty-five cases were not available. There is no doubt as to that. The goods should have been handed over on Mar. 14, and for that breach of contract it seems to me that the sellers are responsible to the buyers in damages, for the one who was entrusted by the sellers with the duty of handing over those goods did not do so when demand was made. That consideration, however, does not dispose of this action. It has been argued in this court on the basis that the learned judge found, as I think he did, that there was an anticipatory breach by the sellers through their agent, and that thereupon the buyers were entitled to consider the contract as repudiated and to treat it as rescinded. The question we have to determine is, I think, one of law, and it is this. If there be a contract for the sale of one hundred and forty cases of Gaythorn brand Australian skinned rabbits which are in a particular store, and on a certain day the buyers ask for delivery of twenty-five cases and are told by the warehousemen they cannot have delivery as there are no Gaythorn rabbits there, does that entitle them to say that the contract has gone as the sellers have repudiated it and have evinced an intention no longer to be bound by it? Are they entitled, in the circumstances, to treat the contract as rescinded and to recover the price which they paid?

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This question has been considered many times, but I am not sure that it has ever had to be considered in circumstances where the repudiation by the sellers is a repudiation by the warehousemen who were their agents and when it arose purely out of a mistake. In dealing with this kind of question there are various matters for consideration. In this court we had to consider a question of a somewhat similar nature in *James Shaffer, Ltd. v. Findlay Durham & Brodie* (1), where some of the authorities are conveniently summarised. In *Heyman v. Darwins, Ltd.* (2) LORD WRIGHT said ([1942] 1 All E.R. 350):

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"Perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract, where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches, or for the breach which constitutes the repudiation. That is only a particular form of contract breaking and would generally, under an ordinary arbitration clause, involve a dispute under the contract like any other breach of contract. There is no difference, for instance, for this purpose between a refusal to take further instalments under a contract for the sale of goods by instalments and a refusal to take the entire contract quantity where the tender is to be a single delivery. I need scarcely add that one party to a contract cannot put an end to it. To produce that effect there must be rescission. An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked. It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used."

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In *Freeth v. Burr* (3) LORD COLERIDGE, C.J., said (L.R. 9 C.P. 213):

"But I think it may be taken that the fair result of them [the cases] is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

Counsel for the buyers submitted that the sellers are responsible for the acts and conduct of their agents, and that the agents, acting for and on behalf of the sellers in declining to deliver rabbits, were thereby and by their words and conduct evincing an intention no longer to be bound by the contract. They argued that the buyers accepted that repudiation and rescinded the contract, and that they are entitled to have their money back. Whether an agent can evince an intention of this kind on behalf of the principal must depend on the agent's authority. If an agent says: "I have no such goods for my principal", he is at least refusing to deliver. The superintendent said, according to Mr. Dumenil, that he had no such goods in the stores at that time. The contention is that by what was said and done on Mar. 14, the sellers showed the buyers that they no longer intended to be bound by the contract. The sellers' obligation was to give delivery when it was demanded on reasonable notice; they were under an obligation on proper notice to the Crown Wharf Cold Stores to see that the stores gave delivery of the required number of cases ex the Orion. If an agent makes a mistake which can be corrected, and that mistake leads him to think that he has no such goods as those asked for, does his conduct show on behalf of the principal an intention not to be further bound by the contract? That is a matter which must depend on the circumstances in each particular case. I do not think that it did in this case. I agree that there was a breach of contract in regard to the twenty-five cases which ought to have been delivered on Mar. 14, 1952. There was no request for delivery of any more, and I am unable to see that the failure to deliver the twenty-five, coupled with the warehouseman's statement: "We have none", is sufficient to enable the buyers to say the sellers evinced an intention no longer to be bound by the contract. I much regret that the authorities on this part of the case were not before PARKER, J. He gave judgment in favour of the buyers, holding that there was on the part of the sellers an anticipatory breach which entitled the buyers to treat the contract as rescinded. I do not agree to that extent. I think there was a breach in respect of the twenty-five cases, and as the buyers had paid for them they are entitled to recover against the sellers damages in respect of the non-delivery of those cases. Over and above that, I do not think the buyers are entitled to succeed. Therefore, in my view, this appeal should be allowed in part.

JENKINS, L.J.: I agree. The facts as found by the learned judge are that, having regard to what passed between the warehouseman and the buyers' carter, and having regard to what passed between Mr. Dumenil and the superintendent of the stores on the telephone, the buyers genuinely believed, and were justified in believing, that there were no Australian skinned rabbits, Gaythorn brand, held at the Crown Wharf Cold Stores for the account of the sellers—in other words, that there were at that time at the stores no rabbits answering the contractual description of which the buyers were entitled to have delivery on presentation of the delivery order which had been given to them by the sellers against payment of the purchase price of the rabbits. The question is whether the belief induced in the minds of the buyers by what was said to their carter and to Mr. Dumenil by the representatives of the Crown Wharf Cold Stores supports their claim to be entitled to consider the whole contract repudiated by the sellers, and repudiated by way of anticipatory breach. That, I think, resolves itself into the question whether, on the facts as represented to them by the servants of the Crown Wharf Cold Stores, the

buyers were entitled to infer that, in the words of LORD COLERIDGE, C.J., in *Freeth v. Burr* (3) (L.R. 9 C.P. 213), the sellers thereby "evinced an intention no longer to be bound by the contract". One must also bear in mind that, as appears from the citation in *James Shaffer, Ltd. v. Findlay Durham & Brodie* (1) ([1953] 1 W.L.R. 117), from the judgment of ATKIN, L.J., in *Spetabile Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co., Ltd.* (4) (121 L.T. 634):

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"They [i.e., the various judicial definitions of 'repudiation'] all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."

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The sellers' agents, the Crown Wharf Cold Stores, had by their servants made an innocent misrepresentation of fact which the buyers were entitled to believe and did believe. That state of facts, if true, meant that there were no rabbits in the cold stores to answer the buyers' demand under the contract, and, therefore, I think, clearly meant that the sellers were in breach of their contract at that date, but can it be said that the buyers were entitled to draw the inference from that believed state of facts that the sellers had evinced an intention not to carry out their contract?

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In my view, one cannot attribute that result to the state of facts as represented to the buyers. No doubt, what the buyers believed, that is to say, the absence from the cold stores of any Australian skinned rabbits of the appropriate brand, suggested that the sellers might be intending not to carry out their contract, but I cannot think it goes any further than that the buyers might reasonably say to themselves: "This looks as though the sellers have repudiated, or are intending to repudiate, the contract, unless there is some other explanation." It seems to me one must make that reservation—"unless there is some other explanation." I think it is impossible to say that there might not have been some other explanation. Possibly the sellers, still intending

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to honour their contract in every respect, might, for some reason or other, have removed the one hundred and forty cases of rabbits to some other store where they would be just as easily available. Perhaps the sellers might have made some other mistake, for example, they might have deposited the cases in one cold store and inadvertently given the buyers the address of another. If it be right to say that the most the buyers could properly infer was an intention on the part of the sellers to repudiate the contract unless there was some other explanation of the apparent absence from the stores of any rabbits of the appropriate brand, then it behoved them to take the simple and reasonable step, which any business man would take, of going to the sellers and saying: "What has happened about our rabbits? We are told by the Crown Wharf Cold Stores that there are none there." I agree with my Lord that this appeal should be allowed save as regards any relief to which the buyers may be entitled to in respect of the twenty-five cases.

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MORRIS, L.J.: I am in entire agreement with the two judgments which have been delivered. I think that it is of assistance in approaching the matters which arise in this appeal to state what was the promise made by the sellers. It seems to me that they promised the buyers that, in consideration of the payment to them by the buyers of a sum of money, they undertook that, if within a reasonable period or from time to time within such a period, the buyers made demand on the Crown Wharf Cold Stores, they would receive Australian skinned rabbits, Gaythorn brand, ex s.s. Orion to a total of one hundred and forty cases. On Mar. 14 there was a demand for twenty-five cases. The position at that date was that there were one hundred and forty cases of Australian skinned rabbits, Gaythorn brand, at the Crown Wharf Cold Stores, but the warehouseman erroneously said that, although they had rabbits

belonging to James Ruddin, Ltd., those rabbits were not in fact Gaythorn brand. Later in the day that was repeated by the superintendent of the Crown Wharf Cold Stores. It seems to me that, as the buyers made a proper demand for twenty-five cases, the sellers were in breach of contract, because the buyers were not able to obtain the twenty-five cases. When the buyers were told by the Crown Wharf Cold Stores that there were no rabbits which satisfied the contract in the store, it must have come to them as a surprise. The buyers had paid a sum of nearly £700, and on the first occasion when they demanded rabbits in accordance with the contract they were told: "There are not any rabbits to satisfy the contract here." It seems to me that the buyers must have thought that there was some mistake and that there would be some simple explanation if they sought it. In my view, the appropriate question to ask is whether the sellers made plain an intention not to perform the contract. It seems to me there was nothing to suggest that the sellers were not proposing to perform the contract, except this rather surprising statement, due to a misapprehension, made by the Crown Wharf Cold Stores. A reasonable thing for the buyers to have done would have been to seek an explanation which could so readily have been forthcoming. While I think there was a breach in regard to the twenty-five cases, I do not think that there was any further failure on the part of the sellers, or that they evinced an intention not further to perform their contract.

Appeal allowed in part.

Solicitors: *Bennett Hobson & Co.* (for the buyers); *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the sellers).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

Re MALDONADO (*deceased*). STATE OF SPAIN *v.* TREASURY SOLICITOR.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), April 27, 28, 29, 30, May 1, 4, 22, 1953.]

Conflict of Laws—Succession to estate of intestate—Foreign domicil of intestate—Personal property in England—Claim by foreign State as sole and universal heir.

On Oct. 11, 1924, the deceased, a Spanish citizen domiciled in Spain, died there a widow and intestate, leaving personal property in England. On June 4, 1930, the State of Spain obtained a declaration of heirship on failure of heirs on intestacy.

HELD: on the evidence, under Spanish law the State of Spain was the sole and universal heir of the deceased, and, there being nothing contrary to English public policy or repugnant to English law in a foreign State being permitted to take possession of the movables of one of its citizens in this country, the State of Spain was entitled to a grant of letters of administration of the English estate of the deceased.

Re Barnett's Trusts ([1902] 1 Ch. 847) and *In the Estate of Musurus* ([1936] 2 All E.R. 1666), applied.

AS TO INTESTATE SUCCESSION TO MOVABLES, see HALSBURY, Hailsham Edn., Vol. 6, p. 245, para. 299; and FOR CASES, see DIGEST, Vol. 11, pp. 367-369, Nos. 468-491.

Cases referred to:

- (1) *Enohin v. Wylie*, (1862), 10 H.L. Cas. 1; 31 L.J.Ch. 402; 6 L.T. 263; 11 E.R. 924; 11 Digest 366, 456.
- (2) *Re Barnett's Trusts*, [1902] 1 Ch. 847; 71 L.J.Ch. 408; 86 L.T. 346; 11 Digest 369, 490.
- (3) *In the Estate of Musurus*, [1936] 2 All E.R. 1666; Digest Supp.

(4) *In the Estate of Hanley*, [1941] 3 All E.R. 301; [1942] P. 33; 111 L.J.P. 8; 165 L.T. 440; 2nd Digest Supp.

ACTION by the State of Spain claiming a grant of letters of administration of the English estate of Eloisa Hernandez Maldonado, deceased.

A The deceased was a Spanish citizen domiciled in Spain. On Oct. 11, 1924, she died a widow and intestate, leaving securities to the value of £13,515 5s. 4d. in the custody of Hambros Bank, Ltd., London. At the date of her death the deceased had no collaterals within the sixth degree for the purpose of art. 955 of the Spanish Civil Code (amended, on Jan. 13, 1928, to collaterals within the fourth degree), and, therefore, art. 956 which, prior to its amendment on Jan. 13, 1928, read:

B “In default of persons having the right to inherit in accordance with the provisions of the foregoing sections the State shall inherit, the assets being devoted to institutions of charity and free instruction in the following order: (i) municipal charitable establishments and free schools of the place of residence of the deceased, (ii) establishments of both classes of the province to which the deceased belonged, (iii) charitable establishments and educational establishments of a general character.”

C On June 4, 1930, the State of Spain obtained in Spain a declaration of heirship in accordance with art. 958, “to enable the State to take physical possession of the estate”. The State of Spain, as plaintiff, now claimed a grant to its duly constituted attorney of letters of administration of the English assets, as the sole and universal heir by Spanish law. The Treasury Solicitor, as defendant, claimed that the English assets as bona vacantia belonged to the Crown which D was, therefore, entitled to a grant of letters of administration.

Russell, Q.C., and Lindner, Q.C., for the plaintiff.

Sir Lynn Ungood-Thomas, Q.C., and Victor Russell for the defendant.

Cur. adv. vult.

E May 22. BARNARD, J., read the following judgment. This action concerns the personal estate in England of Eloisa Hernandez Maldonado, who died on Oct. 11, 1924, a widow and intestate. The deceased was a Spanish subject, and at the time of her death was domiciled in Spain. The English estate of the deceased consists of securities in the custody of Hambros Bank, Ltd., London, and valued at £13,515 5s. 4d. at the time of her death. The State of Spain as plaintiff is claiming a grant of letters of administration of the deceased's English estate, by its duly constituted attorney, as the sole and universal heir to her estate by Spanish law. The defendant in the action is the Treasury Solicitor, who claims that the estate of the deceased in England belongs to the Crown as bona vacantia, and that, therefore, the Crown is entitled to a grant of letters of administration of her estate in England. The Probate Court is really only concerned to make a grant of letters of administration to the English estate of the deceased, and by the declaration of heirship the State of Spain has been constituted the personal representative of the deceased.

LORD WESTBURY, L.C., in *Enohin v. Wylie* (1) said (10 H.L. Cas. 13):

H “I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death . . . It is the right and duty of that judge [meaning the judge of the court of the domicile] to constitute the personal representative of the deceased.”

In so far as the right to the grant alone is concerned, that seems to be a complete answer to the defendant's claim. This would leave the question of distribution to be decided in the Chancery Division, but, as this issue is raised on the pleadings and as both parties seemed anxious that I should decide the whole question, and in view of s. 162 of the Supreme Court of Judicature

(Consolidation) Act, 1925, which directs the Probate Court in granting administration to have regard to the rights of persons interested in the estate, I have taken on myself the task of deciding the whole question.

In such cases the rule according to English law, which has been established for more than two hundred years, is that movable property in the case of intestacy is to be distributed according to the law of domicile of the intestate at the time of his or her death. I must, therefore, look to the Spanish law to ascertain who is entitled to succeed to this property. The requisite article in the Spanish Civil Code is art. 956 prior to its amendment of Jan. 13, 1928. Article 956 read as follows:

“In default of persons having the right to inherit in accordance with the provisions of the foregoing sections the State shall inherit, the assets being devoted to institutions of charity and free instruction in the following order: (i) municipal charitable establishments and free schools of the place of residence of the deceased, (ii) establishments of both classes of the province to which the deceased belonged, (iii) charitable establishments and educational establishments of a general character.”

Both Mr. Valls, a member of the Spanish Bar and legal adviser to the Spanish embassy, and Mr. Melchor, a member of the Spanish Bar of some twenty-four years' experience and legal adviser to the Spanish Foreign Office, have given evidence on behalf of the plaintiff to the effect that the Spanish State takes the property of a deceased intestate as heir, just like any other heir, but Dr. Colas, also a member of the Spanish Bar and called as a witness by the defendant, asserts, on the other hand, that the Spanish State takes such property as heir by reason of *bona vacantia*, and that, although the State takes such property as heir, it is not a true heir as are family heirs, but as heir subject to certain conditions and limitations.

Dealing with Dr. Colas's first point that the Spanish State takes such property as heir by reason of *bona vacantia*, WOLFF ON PRIVATE INTERNATIONAL LAW, 2nd ed., p. 579, states:

“In default of next-of-kin, the universal rule is that the property goes to the State or the Crown or a township or some other public body—in Germany, Italy and Switzerland as ultimate ‘heir’, in England, Austria and Turkey by virtue of a *jus regale* over *bona vacantia*. In the latter case the conflict rule on succession is not applicable because there is no ‘succession’ (inheritance) . . . the right to ‘heirless’ property is governed by the *lex situs*.”

WOLFF is clearly recognising two approaches to this subject, whereas Dr. Colas started his evidence on the assumption that, however the Spanish Civil Code was worded, it could not make the State an heir in the true sense. Dr. Colas was, however, unable to maintain this assertion under cross-examination. All the other text writers to whom I have been referred, including DICEY'S CONFLICT OF LAWS, 6th ed., p. 818, in the commentary on r. 178, agree with WOLFF's view. I also noted that BAR'S PRIVATE INTERNATIONAL LAW, Gillespie's translation, 2nd ed., p. 843, s. 387, states:

“The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered to be a right of occupation or a right of consolidation belonging to the feudal superior, or as a true right of succession. In either the first or second case, the property will go to the State where the property is situated; in the last case it will fall to that of the domicile of the deceased, in so far as both States hold the theory of an universal succession, or as the estate is made up of movables.”

It also seems to me to be implicit in both the judgment of KEKEWICH, J., in *Re Barnett's Trusts* (2), and in the judgment of SIR BOYD MERRIMAN, P., in *In the Estate of Musurus* (3), that there are these two approaches to the subject, as stated by WOLFF.

In *Re Barnett's Trusts* (2) an Austrian who was entitled to a fund in court in this country died in Vienna, a bastard, intestate, and without heirs. By Austrian law the succession of an Austrian citizen in such a case is confiscated as heirless property by the fiscus. The Austrian government having claimed the fund, it was held that, as the right claimed was not in the nature of a succession, the maxim "*mobilia sequuntur personam*" did not apply, and that the Crown, by the law of England, was entitled to the fund as *bona vacantia*. Article 760 of the Austrian Civil Code reads:

"If a spouse is no longer alive, the succession is confiscated as heirless property either by the fiscus or by those persons who according to the political ordinances are justified in confiscating heirless estates."

It was argued by the Crown that the succession by the law of Austria was confiscated as heirless property by the fiscus and that the right of the State, therefore, was not the right of succession, but the right to confiscate property

where there was no heir. The property in question was in this country, and the law of this country is that the Crown is entitled to it as *bona vacantia*. The Crown, moreover, referred to the section in BAR'S PRIVATE INTERNATIONAL LAW, which I have already quoted, in support of their argument. It was never a part of the Crown's case that a foreign State could in no circumstances claim the movables in this country of a deceased intestate domiciled in that

State. KEKEWICH, J., in the course of his judgment, stated ([1902] 1 Ch. 857):

"It is because there is no one who can claim through the deceased that the Crown steps in and takes the property. The Crown takes it because it is, as it is described in the cases, *bona vacantia*. It is property which no one claims—property at large—there is no succession."

And (*ibid.*, 859):

"It must come back to this: Under what circumstances does no succession arise? Under what circumstances is the paramount authority entitled to come in and say, 'I take it because there is nobody else to take'? That seems to me to be the whole question, and it matters not the least whether any description of person is allowed to come in or not, or what is the limit to those by law entitled. When once the principle which I have endeavoured to explain is arrived at, the large majority of the passages and dicta which have been quoted can be construed, regard being had to the unfortunate poverty of language which makes us speak of 'succession' when there is no succession, simply because there is no other expression which fits in so well with ordinary parlance."

In *In the Estate of Musurus* (3), a Turkish woman, domiciled in Turkey, died intestate and without heirs in 1915, leaving, *inter alia*, certain personal property in England. The British Crown claimed that, as this property was ownerless in Turkish law, it must be treated as *bona vacantia*. The Turkish government claimed that, under the law of the Ottoman Empire as it was in 1915, the property would have passed to the *Bait al-mál*, the treasury of the Moslems, which would have applied the property for the relief and benefit of the Moslems, and that, as the application of the property was thus limited to certain objects, it was impressed with something in the nature of a trust and it was impossible to liken it to *bona vacantia*, and it claimed the property. If for any reason the *Bait al-mál* did not take any uninherited property, there was no ultimate right in anyone else. It was held that the property was ownerless and the limited application of the property under Turkish law made no difference to its character, and that, as the authority by which the Turkish government claimed

was in substance the same as that by which the British Crown claimed, the Crown was entitled to the property as *bona vacantia*. The argument for the Crown is not set out, but it would not seem from the judgment of SIR BOYD MERRIMAN, P., that it was ever suggested by the Crown that a foreign State could in no circumstances claim the movable estate in this country of a deceased intestate domiciled in the foreign State. The Turkish embassy in this case claimed that the Turkish government was in some sense a trustee because by Turkish law it had to apply the property for the relief and benefit of Moslems, and, therefore, the property was not *bona vacantia*. Dr. Colas in his evidence stated the very reverse—that the State of Spain was not a true heir because it had to pass on the property in accordance with art. 956 of the Spanish Civil Code.

I have come to the conclusion that what matters is the capacity in which the person claims the property and that it is immaterial what happens to the property later. I, therefore, respectfully agree with what the President stated in the course of his judgment ([1936] 2 All E.R. 1668):

“The reason why on the one hand goods are *bona vacantia* in this country or why they go to the *Bait al-mál* in the old Ottoman Empire on the other, is because they are in the strictest sense of the word ownerless. To my mind what matters is not how the goods are disposed of when they get into the treasury, but the capacity in which they come to the treasury, and that capacity is, as I say, because they are without any owner; there is nobody who can succeed to them as an heir; there is nobody to whom they have been disposed as a legatee.”

DELGADO, the Spanish jurist, in dealing with art. 956, states:

“For some, this right of the State has the character of successor by being called to succeed as heir in default of collaterals within the fourth degree and for others, it means the enforcement of the right which the State has over vacant assets by a person who has no successor. The system of our Code follows the former principle.”

DELGADO is there referring to the amended Civil Code which cut down collaterals from the sixth to the fourth degree. All the other Spanish text writers to whom I have been referred agree with this view—CASTAN, LAGOS in his preface to DELGADO, and LLANAS. I think it is, therefore, abundantly clear that Spain falls into the same class as Germany, Italy and Switzerland referred to by WOLFF.

Dr. Colas also asserts that the Spanish State is not a true heir because it is subject to certain conditions and limitations. This view seems to me to be in conflict with the view of the above text book writers and also with the views of Mr. Valls and Mr. Melchor. Dr. Colas agreed in cross-examination that the relevant sections in the Civil Code dealing with heirship, e.g., arts. 440, 657, 658, 659, 660 and 661, applied equally to the State as heir as to an individual heir, and Mr. Valls, in his evidence, quoted a passage from MANRESA'S COMMENTARIES ON THE SPANISH CIVIL CODE, 1903, p. 143, to the effect that art. 957 required no further consideration, and all that was applicable to heirs was applicable to the State when it was an heir. Dr. Colas interpreted art. 955 as terminating the right to inherit, but it seems clear to me that that article is only stating that the right to inherit does not extend further than the sixth degree and that the emphasis should be on the words “sixth degree”, and, in any event, Dr. Colas's interpretation would be in direct conflict with art. 956 which says that the State shall inherit. As to the conditions and limitations to which Dr. Colas referred, first, in accordance with art. 957 the State is always understood to accept the estate subject to benefit of inventory. This does not apply to an individual heir. But when one examines the history of this matter one finds that originally the State was in precisely the same position

as an individual heir and was liable for the deceased's debts even if they exceeded the assets, unless the State, as any other heir, applied for benefit of inventory. But on Nov. 5, 1918, a Spanish royal decree made it obligatory for the State advocate, when applying for a declaration of heirship, always to ask for benefit of inventory, and now the State is always given benefit of inventory under art. 957. Secondly, creditors against the State must follow a certain course by procedural law. Thirdly, the State must deal with the property in a certain way; and, fourthly, the State cannot accept the estate in accordance with art. 999 before a declaration of heirship. As to the second point, this is merely a procedural course which is of convenience to the State in its capacity as heir. The third point I have already dealt with, and Dr. Colas is arguing the case for the Turkish embassy in *In the Estate of Musurus* (3) in reverse. As to the fourth point, this is in reality inherent in the State being an heir and is in accordance with art. 958, which reads as follows:

"To enable the State to take physical possession of the estate there shall be a prior declaration of heirship in its favour by which the property is allocated to it on the failure of heirs on intestacy."

Mr. Valls stated in his evidence that there was a judgment of the Supreme Court of Spain on June 3, 1947, to the effect that property vests in the State, as heir, as from the moment of death, and, according to the evidence of Mr. Melchor, the declaration of heirship merely provides evidence of title to the property. Article 958 only deals with how the State is to get physical possession of the property. Before the State can obtain a declaration of heirship there must be a declaration by the court that the property is vacant—in other words, that there are no lawful heirs with a prior right to that of the State. This is part of the procedural law of Spain, and all the expert witnesses agree that procedural law cannot override the substantive law of Spain as set out in the Civil Code. In the present case the declaration of heirship was obtained by the State on June 4, 1930. In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted the Spanish conception of heirship, for it would be wrong, in my view, to apply the English conception when dealing with Spanish law, and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion. I am satisfied on the evidence before me that the State of Spain is a true heir just as any individual heir according to Spanish law.

The only matter, therefore, which remains for consideration is whether or not there is anything either contrary to public policy or so repugnant to English law as to prevent such a right acquired under a law of a foreign country from being enforced in the English courts. All civilised States take possession of ownerless property, and according to MANRESA'S COMMENTARIES ON THE SPANISH CIVIL CODE:

"The right of the State over the property of any person dying intestate and without leaving heirs, is based on the actual situation of abandonment of the property in question, on the absence of any owner and of any other person entitled thereto."

But the law of Spain has developed along different lines from that of England. The State, by Spanish law, takes the property in a line of succession as ultimate heir. In England the property belongs to the Crown as bona vacantia, and since the Administration of Estates Act, 1925, s. 46 (1) (vi), in lieu of any right to escheat. The appearance of the Crown, as ultimately entitled to property, in a statute regulating the distribution of an intestate's estate, did not alter the capacity in which the Crown took such property. This was made clear by the Court of Appeal in *In the Estate of Hanley* (4), which held that the Crown under s. 46 (1) was not a person entitled on an intestacy.

Counsel for the defendant, in the course of his argument, stressed the fact that the State of Spain has created itself heir by its own act and that it becomes a question of public international law when a foreign State makes itself owner of property in another State. But I have come to the conclusion that the State of Spain is not making itself the owner of property in this country, nor is it seeking in any way to exercise its sovereignty in this country. It is merely claiming property in this country, as heir to the property by Spanish law, in the same way as one of the next of kin might claim as heir. Counsel for the defendant also argued that this claim put forward by the Spanish State conflicts with the right of the Crown to take the property as bona vacantia. This argument seems to me to beg the whole question. I feel satisfied that there is nothing either contrary to English public policy or repugnant to English law in permitting a foreign State to take possession of the movables of one of its subjects in this country. This point of view seems to me to be not only consistent with, but implicit in, the judgments of KEKEWICH, J., in *Re Barnett's Trusts* (2), and of SIR BOYD MERRIMAN, P., in *In the Estate of Musurus* (3). It also appears to me to accord with natural justice, namely, that the property of a deceased Spanish woman who died intestate should be distributed among charities in her own locality in Spain rather than go to the English Crown. I am satisfied that by Spanish law, the State of Spain is the sole and universal heir of the deceased, and that, therefore, the deceased's English assets are not ownerless, but belong to the State of Spain. I, accordingly, direct that letters of administration of the English estate of the deceased be granted to the duly constituted attorney of the Spanish State.

Solicitors: *Vernor Miles & Clark* (for the plaintiff); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

WHALL AND ANOTHER v. BULMAN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.J.J.), May 21, 1953.]

County Court—Appeal—Raising in Court of Appeal of point of law not argued in court below—Remission of case to trial judge—County Courts Act, 1934 (c. 53), s. 108.

Landlords claimed possession of rooms alleged to have been let under an oral agreement, confirmed in writing, by which the rooms were let "as office accommodation". It was further alleged in the particulars of claim that "it was a term of the said agreement that the said rooms should be used as office accommodation only", and that the tenant had consistently used the rooms as a dwelling-house. The landlords did not allege in their particulars an express agreement not to use the premises otherwise than for offices, nor did they plead that there was any proviso for re-entry or forfeiture on breach of the alleged term. The county court judge rejected the only defence argued before him, viz., that the rooms were let as a dwelling-house and that, therefore, the tenant was protected by the Rent Restrictions Acts, and he made an order for possession. On appeal,

HELD: in the absence of an allegation of an express covenant by the defendant that the rooms should not be used except as offices and of a provision for re-entry on breach of such a covenant the particulars of claim disclosed no cause of action, and the county court judge could not properly make an order for possession; the order made bore no relation to the claim as alleged; and, although the point as to the adequacy of the facts pleaded to support an order for possession was not taken before the county court judge and was not mentioned in the notice of appeal, the case would be remitted for re-hearing to the judge who tried the action.

Smith v. Baker & Sons ([1891] A.C. 325), distinguished.

AS TO RAISING ON APPEAL POINT OF LAW NOT ARGUED IN COURT BELOW, see HALSBURY, Hailsham Edn., Vol. 8, p. 380, para. 814; and FOR CASES, see DIGEST, Vol. 13, pp. 529, 530, Nos. 802-815.

Case referred to:

- (1) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 13 Digest 527, 789.

A APPEALS by the tenant from orders of His Honour Judge RICE-JONES at Croydon County Court, dated Mar. 5, 1953.

In three actions the landlords claimed forfeiture of the leases of three rooms (let under three separate leases) on the ground that the tenant had not complied with notices dated Jan. 9, 1953, served on him in pursuance of the Law of Property Act, 1925, s. 146. In their particulars of claim, the landlords alleged that the tenant was in breach of the leases because he had used the premises for living accommodation instead of office accommodation. The tenant admitted the notices served on him, but claimed that they were of no effect, and that it was expressly agreed between the parties that the tenant should use the premises for living accommodation. It was agreed at the trial that, if the premises were let as offices, the landlords were entitled to possession, and that the only question for decision was whether there was a letting as business premises or as a dwelling-house, the description of the letting as business premises being a mere sham. The county court judge found that the premises were let as office accommodation, and made orders for possession in six weeks. The tenant appealed, and at the hearing the Court of Appeal took the point that the landlords had not shown any cause of action. The landlords argued that the point was not raised at the trial, and, therefore, could not be taken on appeal.

Rountree for the tenant.

Ripman for the landlords.

E SIR RAYMOND EVERSHERD, M.R.: In this case I intend to treat the three cases as though they were one for the purposes of this judgment. The claims are brought by landlords to recover possession of three rooms in High Street, Colliers Wood, London. The particulars of claim in each action, after stating that the claim is for forfeiture of the lease of the relevant room, proceeds as follows:

F “(1) By an oral agreement (subsequently confirmed in writing by the defendant on Sept. 25, 1952), the plaintiffs let to the defendant as from Sept. 13, for a minimum period of fifty-two weeks the front room on the first floor of the said premises [at a certain rent] as office accommodation (the first month to be rent free). (ii) It was a term of the said agreement that the said room should be used as office accommodation only. (iii) The defendant has consistently used the said room for living accommodation. (iv) A notice under s. 146 of the Law of Property Act, 1925, was served on the defendant by registered post on Jan. 9, 1953, requiring him to remedy the breach of condition and to pay compensation to the plaintiffs. (v) The defendant has not complied with such notice and is still using the said room as living accommodation.”

H Since reference is made to the document of confirmation I read that document. Again, I note that there are three documents *mutatis mutandis* in the same form. After the name of the plaintiffs and their address, there appears as a heading the word, “Agreement”, and the document continues:

“I, Mr. J. Bulman agree to rent [the room described as] an office situated above the shop premises at 46, Colliers Wood, High Street, London, S.E. 19, for a minimum period of fifty-two weeks with the option to either

renew or discontinue renting at the end of the above period. In the event of it being the latter I agree to give one week's notice in writing."

On the face of it there is, to my mind, no doubt whatever that the pleading alleges an agreement which, so far as material to the claim for possession, contains no term or provision other than the terms stated in para. 1 of the particulars of claim or to be found in the written document. It is, therefore, quite plain that there is, at least, no express term or covenant not to use the premises otherwise than for offices. It is also quite manifest that there is no allegation of any proviso for re-entry on breach of the alleged covenant. It is true that in para. 4 of the particulars of claim there is a reference to "the breach of condition", but what has gone before does not, to my mind, lay any foundation for alleging that it was a "condition" of the renting that the rooms should be used for offices only. On that matter it is, indeed, permissible to add that the findings of the judge, so far as I understand them, are wholly contrary to any such contention. If I am right in my apprehension of the particulars of claim it follows that they disclose on the face of them no cause of action as alleged, and that the court could not on that pleading make and should not have made an order for possession whatever might have been said on any of the questions of fact which were debated at the trial. A B

What, in truth, happened was that the case was fought on this point, and this point only—that the letting, though described as being of office premises, was in truth a letting of those premises as and for a dwelling-house so that the defendant would be entitled to rely on the statutory protection of the Rent Restrictions Acts. No point was taken (though it was open to the defendant on these pleadings to take it) that in the absence of an allegation and proof of a condition or of an allegation and proof of a proviso for re-entry, the plaintiff had not pleaded a cause of action at all. Unfortunately, the judge's attention was not drawn by counsel to that circumstance and he dealt with the matter solely on the point which was debated. On that matter he expressed his conclusion thus: C D

"I did not think that in the first instance the plaintiffs cared how the defendant used the premises as long as they were let as offices."

On that view he came to the conclusion that the suggested defence that this was a letting of a dwelling-house was not established. E

The rule has been laid down as long ago as 1891, in *Smith v. Baker & Sons* (1), that on appeals from the county court (which are confined by Parliament in accordance with the terms of the County Courts Act, 1934, s. 108), this court will not entertain a ground for supporting an appeal which was not taken in the court below, and that rule is one which is strictly and regularly applied in this court. The peculiarity of this case is, as I have already indicated, that the real point which on the face of the claim is fatal to its success was never apprehended, and is not even now raised in the notice of appeal. In such very exceptional circumstances, it does not seem to me that this court should allow the matter to stand as it is. It is not a question of taking a new point in support of the appeal. The point is that the order made does not bear any relation to the claim as alleged. Put another way, the claim alleged on the face of it does not support the order which was asked for and which was made. This, therefore, seems to me to be a case so exceptional in character that an exceptional remedy is called for. I think in this case that the proper course is that we should set aside the order for possession which the learned judge made, and refer the matter back for re-hearing to the same judge. I am again departing from what is common practice in this court when a new trial is ordered. The common practice is to send the matter to another judge, a practice which, of course, does not indicate any criticism of the impartiality of the first judge, but here I deliberately suggest that the matter be referred back to the same judge because I see no reason for casting any doubt on the conclusion which F G H

- the judge reached in fact on the point which he did consider. I am not, therefore, suggesting that he should re-try that particular point. Since, however, it is going back, I think that the way in which the case is further heard or a re-trial had must be a matter for the discretion of the judge himself and I do not, therefore, seek to interfere with it. I have merely made an intimation which may guide him when he has to decide what matters he will treat as open for further argument before him. I think it right that the parties should have such liberty to amend their pleadings as the judge may direct. That, again, is a matter for his discretion. In the circumstances, I should obviously not be justified in expressing any further opinion on the points which have been somewhat discussed before us, whether there is any covenant or condition relating to user, and whether, in the absence of either the one or the other, this claim for possession can possibly succeed. Since the point was never taken by the defendant either here or in his notice of appeal, it would not, in my judgment, be right to allow him costs in this court or in the court below. It is an unfortunate state of affairs, for both parties seem to me to be to blame in that, on the one hand, the plaintiffs failed to put forward a sustainable cause of action, and, on the other, the defendant failed to perceive that fact. Unfortunately, the judge was allowed by the counsel who appeared before him to deal with the matter on a false premise. In the circumstances, the just order seems to me to be that which I have suggested, viz., that the order for possession be set aside and the case referred back to the judge for re-trial on such terms as to amendment of pleadings and otherwise as he may think fit, but there should be no order for costs in favour of either party in this court or in the court below on the first hearing.

D DENNING, L.J.: When the case was opened, all the members of the court noticed at once that the claim for possession was bad, because the tenancy agreement did not contain a proviso for re-entry. It is elementary that you cannot have a forfeiture unless there is a proviso for re-entry or its equivalent. There is none such here.

E What, then, is to be done? This point was not taken below nor in the notice of appeal. Can this court itself take it? I think so, for the reason that the case comes before the court as if the parties had said to one another: "Although there is no forfeiture clause, we agree that the court should treat the case as if there was one". If the parties had knowingly made such an agreement, this court would not adjudicate on it. This court is here to try real cases, not hypothetical ones. The parties cannot agree on a false hypothesis and ask the court to adjudicate on it.

F It is most unusual for this court to interfere on a point not taken below, but in this case I agree entirely with my Lord that the only thing we can do is to send the case back for re-trial so that it can be determined on a real and not a hypothetical footing.

G ROMER, L.J.: I also agree.

Appeal allowed; case remitted for re-trial.

Solicitors: *W. Timothy Donovan* (for the tenant); *Fairs, Blissard, Barnes & Stowe* (for the landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

TUNSTALL v. TUNSTALL.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.J.J.), May 20, 1953.]

Husband and Wife—Title to property—Matrimonial home—Both parties contributing to purchase—Separation of parties—Husband's sale of house and furniture—Wife's application for determination of question as to proceeds—No identifiable fund on which order could operate—No power to order payment of money—Married Women's Property Act, 1882 (c. 75), s. 17.

In 1918 the husband and wife were married. In 1927 a house was purchased for £720 in the husband's name, and subsequently furniture and a motor car. The wife alleged that she contributed £355 towards these purchases. In March, 1950, the parties separated and the wife obtained a maintenance order against the husband. Later in 1950 the husband sold the house for £2,350, and he also sold the furniture and the motor car. He used part of the proceeds to contribute towards the wife's upkeep, and in 1952 he had between £400 and £500 left. In proceedings commenced by the wife in September, 1952, under the Married Women's Property Act, 1882, s. 17, for the determination of all questions as to the proceeds of the sale of the house and contents and of the car, it was ordered that the husband and wife "do share equally in the proceeds of sale". On appeal,

HELD: the proceedings were misconceived because there was no property or identifiable fund on which an order under s. 17 could operate, and there was no power under that section to order the payment of money.

Rimmer v. Rimmer ([1952] 2 All E.R. 863), distinguished.

AS TO SUMMARY PROCEEDINGS BETWEEN HUSBAND AND WIFE AS TO PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 263-265, Nos. 2119-2133.

FOR THE MARRIED WOMEN'S PROPERTY ACT, 1882, s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 804.

Case referred to:

(1) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63.

APPEAL by the husband from an order of GORMAN, J., dated Jan. 21, 1953, dismissing an appeal against an order of Master CLAYTON, dated Dec. 10, 1952, ordering that the wife should share equally in the proceeds of sale of a freehold dwelling-house, 2, Stanley Avenue, New Malden, in the county of Surrey, together with the contents thereof, and in the proceeds of sale of a Morgan motor car.

The wife applied under the Married Women's Property Act, 1882, s. 17, for the determination of all questions between the husband and herself with respect to the proceeds of sale of the dwelling-house and its contents and the title to or possession of or the proceeds of sale of a Morgan three-wheel motor car purchased by the husband in 1929. The house was bought in June, 1927, in the name of the husband for £720, towards which the wife alleged that she advanced £145 from her savings in the Post Office Savings Bank and by the sale of National Savings Certificates, the total purchase price being made up by a government subsidy of £75 and by a mortgage of £500. The wife also alleged that after the purchase she bought furniture to the value of £75, drawing the money from her savings; that she paid all bills, rates, taxes and mortgage repayments, providing £30 in 1931 towards a sum which the husband paid completely to redeem the mortgage; and that in 1928 and 1929 she advanced money to her husband out of which the motor car had been purchased. The husband did not admit the amounts alleged to have been paid by the wife, and denied that she had paid all bills, rates, taxes and mortgage repayments in respect of the property out of her own moneys, and said that in so far as

she had made any payments they were out of savings from housekeeping money, or other moneys, provided by him. In March, 1950, the parties separated and on Mar. 9, 1950, a court of summary jurisdiction sitting at Wimbledon made an order for the payment of £2 5s. a week maintenance by the husband to the wife, the sum being increased to £3 a week on June 14, 1951. In 1950 the husband sold the house for £2,350, and he also sold the furniture and motor car. In September, 1952, the wife commenced proceedings under the

A Married Women's Property Act, 1882, s. 17, on which the master made an order that the proceeds should be shared equally, and GORMAN, J., upheld that order. The husband appealed.

Ogilvie Jones for the husband.

W. H. E. James for the wife.

B LORD GODDARD, C.J.: A summons was taken out by the wife and, following the appropriate procedure, it was referred to the master, who made an order in these terms:

C "It is ordered that the respondent and the applicant do share equally in the proceeds of sale of the freehold dwelling-house known as No. 2, Stanley Avenue, New Malden, in the county of Surrey, together with the contents thereof which have been sold and in the proceeds of sale of one Morgan three-wheel motor car. And it is further ordered that the applicant's solicitor and client costs be taxed by the taxing master in accordance with the rules set out in sched. III to the Legal Aid and Advice Act, 1949, and be paid out of the total proceeds of sale of the aforementioned property before such proceeds are equally divided as aforesaid."

D The parties were married in 1918, but in March, 1950, they separated and as a result of subsequent proceedings an order was made by the magistrates for the husband to contribute to the wife's support. A house in which they had been living and the furniture were sold by the husband in 1950 and he received the money paid for them. In 1952 the wife took these proceedings, claiming that she was interested in the house. She did provide a certain sum of money towards the purchase of the house in the first instance—that must, I think, be the conclusion to which the master came and which the judge has upheld. She has contributed, she alleges, something like £355 altogether to what I will call the matrimonial establishment, for a house, household furniture, a motor car and so on. The husband sold the house at a largely increased price for £2,350. The learned master made an order that the parties should share that £2,350 in equal shares and the judge upheld the order.

E It seems to this court that the proceedings were entirely misconceived, because the Married Women's Property Act, 1882, s. 17, under which the wife seeks relief, provides for questions as to the title to or possession of property to be dealt with in a summary way. There was no question here as to the title to or possession of the house. It was, undoubtedly, in the husband's name and he was entitled to sell it. If, when he was about to sell it, the wife had taken proceedings claiming a share in the proceeds of sale, a particular fund, those proceedings might have been appropriate. But the husband, having had the money for two years, has been living on it. He is now an old age pensioner, he has to contribute to his wife's upkeep, and, apparently, he has been using this money to do so. We are told that he has between £400 and £500 left.

F G H It becomes apparent how inappropriate is this order if one asks how it is to be enforced. An order might have been made on a bank in appropriate proceedings to prevent money being paid out, or a solicitor might have been called on by the court to hold money in his hands, but there is no means under s. 17 of giving a money judgment. No judgment has to be given. On proceedings taken by originating summons, I suppose, the court could make a declaration, but when a question as to the title to or possession of property arises the judge

" . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit."

In the case of chattels, or stocks and shares (which are specially mentioned) the judge could, no doubt, order that "that piece of property is to be handed over by the husband" or "these shares standing at present in the husband's name in part or in whole are to be transferred to the wife", and, no doubt, a husband refusing to obey that order could be attached. But I can see nothing in this section which empowers the court to give what is equivalent to a judgment for a sum of money. The wife says: "It is fair that I should have a share in the proceeds of sale of the house". But the proceeds of sale have nearly gone. If the husband had spent more (and he had the legal estate in the money at any rate) he would not have been committing any crime. If he had spent it all there would be nothing on which the order of the court could operate, and there is nothing here on which an order of the court can operate so far as I can see. The order which has been made cannot be implemented in any way. There is no provision in the section for an order made under it being made a rule of court under which execution can issue. I should think it would be most unlikely that the court would enforce an order for the payment of money by way of attachment except in a case where a man was a trustee. The Court of Chancery on a four-day order could attach a man if he did not bring money into court when ordered to do so, but ordinarily a man is not sent to prison for failing to pay money except under what I may call judgment summons procedure. The wife's real remedy in this case might have been to have brought an action under s. 12 of the Act of 1882. I am far from desiring to encourage her to do that, because if she brings an action the court has to proceed on strictly legal principles. This court feels that this order is entirely inappropriate and that these proceedings are misconceived.

The court desires to say that in *Rimmer v. Rimmer* (1) the court was expressly dealing with a fund which was in existence. No question like this was raised there. There was a fund. The court was deciding how the parties were to share in the fund and the court divided it equally, and I suppose that on that account the judge and master thought in this case it was also right to divide it equally. But, there being no fund here, there is nothing on which this order could operate, and, therefore, it must be discharged.

BIRKETT, L.J.: I agree.

HODSON, L.J.: I agree.

Order discharged.

Solicitors: *Gregsons* (for the husband); *Hays, Roughton & Dunn*, agents for *T. W. Tilbrook*, Kingston-on-Thames (for the wife).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

STOKES v. BENNETT (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Upjohn, J.), May 5, 6, 7, 21, 1953.]

Income Tax—Annuity—Annuity “free of income tax”—Assessment on annuitant—Payments made by divorced husband under maintenance order—Husband resident abroad—No evidence of deduction of tax—No evidence of husband’s receipt of taxed income—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21 (1).

A In 1938 a wife obtained a divorce from her husband, a British subject then resident in the United Kingdom, and an order of the court that he should pay her monthly during their joint lives or until further order maintenance at the rate of £22 per month “free of tax”. In 1946 the husband went to reside and work in Brazil. He continued to make the monthly payments to his wife, but there was no evidence that he had deducted tax or that he was in receipt of income which had suffered British income tax, and he did not render to the Inland Revenue authorities an account of payments to the wife and of tax deducted therefrom pursuant to r. 21 (1) of the All Schedules Rules of the Income Tax Act, 1918. Assessments to income tax were made on the wife on the footing that the payments were untaxed income in her hands.

C HELD: (i) if the wife was to be treated as having a sum of untaxed income in her hands, she was directly assessable to tax in respect of it, notwithstanding the rights against the person who should have deducted tax conferred on the Crown by the Finance Act, 1927, s. 26 (1).

D *Glamorgan Quarter Sessions v. Wilson* ([1910] 1 K.B. 725), applied.
 (ii) the husband’s conduct in paying the exact sum for which the order made provision raised the inference that he had intended to, and had deducted, tax from the gross amount due; as the wife could not sue the husband for the balance of the payments on the footing that those received were gross sums, and as there was no provision in the Act of 1918 that the payee must produce a receipt for tax from the commissioners in order to prove deduction under r. 21 (1) of the All Schedules Rules, the wife must be treated as the recipient of a sum which had borne tax and she could not be further assessed in respect thereof; and it made no difference that the husband was resident abroad, because the income was English income of the wife, a person resident in the United Kingdom, and the husband had in his hands the amount of the tax which he had withheld under statutory authority, in effect as collector for the Crown.

F FOR THE INCOME TAX ACT, 1918, ALL SCHEDULES RULES, r. 19 (1) and r. 21 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, pp. 188, 190.

Cases referred to:

- G (1) *Dayrell-Steyning v. Dayrell-Steyning*, [1922] P. 280; 91 L.J.P. 210; 127 L.T. 846; 27 Digest, Replacement, 633, 5936.
 (2) *Spilsbury v. Spofforth*, [1937] 4 All E.R. 487; 21 Tax Cas. 247; Digest Supp.
 (3) *Wallis v. Wallis*, [1941] 2 All E.R. 291; [1941] P. 69; 110 L.J.P. 38; 166 L.T. 58; 105 J.P. 324; 2nd Digest Supp.
 (4) *Burroughes v. Abbott*, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 28 Digest 68, 358.
 H (5) *Allchin v. Coulthard*, [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; *sub nom. Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.
 (6) *Glamorgan Quarter Sessions v. Wilson*, [1910] 1 K.B. 725; 79 L.J.K.B. 454; 102 L.T. 500; 74 J.P. 299; 5 Tax Cas. 537; 28 Digest 63, 319.
 (7) *Hemsworth v. Hemsworth*, [1946] 2 All E.R. 117; [1946] K.B. 431; 115 L.J.K.B. 422; 2nd Digest Supp.

(8) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 28 Digest 105, 649.

CASE STATED by the Special Commissioners of Income Tax.

A wife appealed against assessments made on her under Case III of sched. D to the Income Tax Act, 1918, for the years 1946-47 to 1950-51 inclusive, in respect of payments made to her by her divorced husband, then resident in Brazil, following an order of the Divorce Court that he should pay her maintenance by way of monthly payments of £22 "free of tax". The wife contended that, by virtue of the effect of this order, the annual sums she received were net sums in respect of which she had suffered tax by deduction on payment under either r. 19 (1) or r. 21 (1) of the All Schedules Rules, and that she could not again be subjected to income tax by direct assessment in respect of them. If they fell within r. 19 (1), assessment of the wife was prohibited by that rule, and if within r. 21 (1) she would only be assessable if and to the extent that they were gross sums in her hands from which tax had not been deducted. As the payments were made pursuant to the court order the proper inference was that they were net sums received after deduction of tax, and r. 21 (1) was fully applicable to a person making an annual payment under an order of the High Court of this country, whether or not resident in the United Kingdom. The Crown contended that the wife had failed to show that the payments were payable wholly out of profits or gains brought into charge to tax under r. 19 (1), and that she had failed to show that tax had been deducted from the payments under r. 21 (1), and that that rule in any event did not apply to payments by a person not resident in the United Kingdom. The commissioners held that, in the absence of evidence, they were unable to say that the payments were made under r. 19 (1), and, if they were made out of profits or gains not charged to British income tax, r. 21 (1) and (2) were inapplicable to a person making such payments not resident in the United Kingdom and they were unable to draw the inference that tax was deducted in making the payments. They held, therefore, that the sums were untaxed income in the hands of the wife and the assessments were correctly made. The wife appealed.

Heyworth Talbot, Q.C., and *Tribe* for the wife.

Pennycuik, Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

May 21. **UPJOHN, J.**, read the following judgment. This is an appeal by the wife, Mrs. Ann Gordon Stokes, from a decision of the Special Commissioners confirming assessments in respect of the years 1946-47 to 1950-51 inclusive under Case III of sched. D on income received by her under an order of this court. In 1938 the wife obtained a divorce from her husband in the Divorce Division of this court, and on Feb. 1, 1938, an order was made in these terms:

"It is ordered that Stephen Eric Westley Stokes the respondent do pay or cause to be paid to Ann Gordon Stokes the petitioner during their joint lives or until further order, as from the date of the decree absolute herein, to wit, Jan. 24, 1938, maintenance at and after the rate of £22 per month free of tax the said sum to be payable monthly."

I shall call this the 1938 order.

The husband made monthly payments regularly to the wife throughout the relevant years of assessment, and the commissioners have found as a fact that such payments were made pursuant to the order I have just read. The payments were not always of £22 a month for two reasons, first, that the amount payable was reduced by virtue of the Finance Act, 1941, s. 25, and by the Finance (No. 2) Act, 1945, s. 20; secondly, down to 1947 the husband paid rather less than was due from him, and since that date rather more than was due from him, and the wife regarded such excess payments in the latter years to be on

account of arrears in the earlier years. For the purposes of argument before me, however, these matters have been ignored, and the case has proceeded on the footing that the husband has regularly made payments of £22 a month pursuant to the order.

In 1946 the husband, a British subject, went abroad to reside and work in Brazil, and he has remained so resident ever since. There was no evidence before the commissioners to show that since 1946 the husband has been in receipt of income which has suffered British income tax. They also found as a fact that the husband had rendered to the British Revenue no account of payments to the wife and of tax deducted therefrom pursuant to r. 21 (1) of the All Schedules Rules of the Income Tax Act, 1918. In these circumstances the Crown have made assessments on the wife in respect of the sums received by her, and the commissioners have upheld these assessments, holding that the sums received by her were untaxed income in her hands. The question is whether they were right.

The 1938 order was made in what was then the common form following certain principles laid down by SIR HENRY DUKE, P., in *Dayrell-Steyning v. Dayrell-Steyning* (1) ([1922] P. 282), principles which incidentally have since been attacked and overthrown: see *Spilsbury v. Spofforth* (2) ([1937] 4 All E.R. 488), and *Wallis v. Wallis* (3) ([1941] 2 All E.R. 293). Both sides agree, however, that, having regard to *Spilsbury v. Spofforth* (2) and the earlier case of *Burroughes v. Abbott* (4), an order in that form is to be construed as an order to pay a gross sum of such amount as after deducting income tax for the time being payable in respect thereof will leave the clear monthly sum of £22. The case has been argued before me by both sides in two stages, first, by considering the position on the footing that the husband remained resident at all material times in the United Kingdom, and, secondly, by considering how that is affected by his residence abroad, and it will be convenient to follow that course in this judgment.

At the first stage it is clear that, in making the payments, the husband was entitled to deduct tax if he was paying the annuity wholly out of profits or gains brought into charge to tax, and was compelled to do so if he was paying the annuity otherwise than out of such profits or gains. That is the scheme of collection embodied in r. 19 and r. 21 of the All Schedules Rules of the Income Tax Act, 1918. I need not read those rules, for VISCOUNT SIMON, L.C., in *Allchin v. Coulthard* (5) put the matter succinctly ([1943] 2 All E.R. 354):

"The three heads under which the existing scheme of collection of income tax embodied in rr. 19 and 21 may be stated are as follows:—(a) A person liable to pay any yearly interest of money, annuity or any other annual payment to a recipient is not entitled to deduct this payment in arriving at his profits or gains to be assessed and charged with income tax. If the amount is payable and paid out of his profits or gains, he is assessed on a sum which includes such payments, while the recipient is not directly assessed in respect of the amount at all. Consequently, the Crown gets from the payer both the tax at the standard rate which would otherwise be due from the recipient of the annual payment and the tax due from himself in respect of what is left of his profits and gains after the payment is made. (b) If the annual payment is payable and paid out of his profits and gains, the payer is entitled to deduct from the payment he makes to the recipient income tax at the current rate, and the recipient is bound to allow the deduction upon receipt of the residue and to treat the payer as acquitted of liability to him in respect of the amount thus deducted. By this means, the payer recoups himself for the tax which he has paid or will pay on the annual payment. (c) If and in so far as the annual payment is not payable and paid out of profits or gains brought into charge, the person making the payment is bound to deduct from it income tax

at the current rate and to account to the Crown for the amount deducted. In effect, the payer in such a case acts as collector for the Crown of the tax due from the recipient. The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in r. 21, but must be implied."

It was contended on behalf of the Crown that these monthly payments of £22 must be taken to be gross sums, because it is said that, having regard to the proper construction to be put on the 1938 order, the husband can comply with it in three ways: (a) by paying £22 and producing evidence that he has paid it wholly out of profits or gains brought into charge to tax, (b) by paying £22 and producing evidence that he has accounted for and paid tax to the Revenue, or (c) by paying £44 (assuming tax to be at 10s. in the £) cash to the wife. Then it is said that the wife cannot prove that the requirements of (a) or (b) are satisfied, so that she can still sue for the gross sum of £44 each month, and in the meantime she must be taken to have received £22 on account of a gross sum of £44, and in respect of this gross sum she is directly assessable to tax. The wife admits that she cannot prove that the husband made a deduction pursuant to r. 19 (1), so I need not further consider that particular matter.

It will be convenient next to consider the validity of the last step in the Crown's argument, viz., assuming the wife to have received a gross sum, can she be directly assessed to tax? A gross sum of this nature is admittedly chargeable to tax under para. 1 (b) of sched. D and falls within Case III. Counsel for the Crown pointed out that, while the equivalent of r. 19 has been present in income tax legislation from the earliest times, yet, when payments were made otherwise than out of profits or gains brought into charge to tax, the gross sum had to be paid, and, until 1888, an assessment was made directly on the recipient under the earlier taxing provisions corresponding to r. 1 of the Miscellaneous Rules Applicable to sched. D. This was altered by s. 24 (3) of the Customs and Inland Revenue Act, 1888, which contained provisions (substantially re-enacted in r. 21 (1) of the Act of 1918) compelling the payer to deduct tax and making the tax deducted from the annuity a debt due from the person deducting the tax to the Crown. The Finance Act, 1927, s. 26 (1), improved the machinery of collection by enabling the Crown to make an assessment on the person who deducted the tax and giving them ancillary rights to enforce collection against him. But, said counsel for the Crown, the power to make an assessment directly on the recipient remained. He relied on *Glamorgan Quarter Sessions v. Wilson* (6) in support of that view. Counsel for the wife challenged the binding authority of that case having regard to the passage in LORD SIMON's opinion in the *South Shields* case (5) which I have read and to the alteration of the law in 1927. In my judgment, the Finance Act, 1927, only improved the machinery but was not intended to alter any principle of collection, and the *Glamorgan* case (6) is a direct decision on the point, not directly overruled by anything in the *South Shields* case (5), and is binding on me. I would point out, however, that BRAY, J., in the last paragraph of his judgment ([1910] 1 K.B. 735) made it clear that he was only deciding that a gross sum was chargeable by direct assessment on the recipient. If, therefore, on the true view of the facts of this case and of the law applicable thereto, the wife is to be treated as having a sum of untaxed income in her hands she is, in my view, directly assessable to tax.

I turn, to the submission of the Crown which (omitting consideration of any r. 19 payment) may be further analysed in this way, that the payment of £22 must be treated as being intended to be payment on account of an obligation to pay £44, unless it be proved that the husband has in fact (i) deducted tax, and (ii) accounted for and paid the tax deducted to the Crown. On the first point I was referred to a decision of DENNING, J., in *Hemsworth*

v. *Hemsworth* (7). The report is very short. It was an action between husband and wife, and turned solely on the question whether as between payer and payee the husband could claim that he had made a deduction under r. 19 (where, of course, the right to deduct is optional) without notifying the wife that he had done so and without providing her with a calculation showing the amount deducted. In that case it is to be noted that the obligation was to pay a gross sum, and the net sum payable would vary according to the rate of tax, so
A (especially where there were heavy arrears extending over a number of years) it would be right to compel the husband to make the calculation of the net sum due and notify the wife accordingly. Whether that would be necessary in a case such as this, where the net sum is fixed and the gross sum varies according to the rate of tax, I need not consider. What was also important in that case was that, down to 1940, the husband had paid the wife the gross
B sum due without exercising his right to deduct tax. On a consideration of all the facts, the learned judge came to the conclusion that, in making several comparatively small payments on account, the husband must be taken to have made gross payments.

The facts of that case are far removed from the present, and I do not derive any assistance from it. No general principle is there laid down, except possibly
C in relation to r. 19 (1). The facts of this case are that the husband made, more or less exactly, payments of the net sums prescribed by the order, and, in my judgment, the only permissible inference to be drawn from that is that he was intending to and did deduct tax from the gross amount which was due from him on the proper construction of the order. There is no magic in the word
D "deduct". It merely means that less is paid and the balance is retained if r. 19 is applicable. If r. 21 (1) is applicable the balance unpaid, being the amount representing the tax, is or ought to be paid to the Crown.

I turn, then, to the last point of the Crown, that, whatever was intended by the parties, payment of the monthly sum must be treated as a gross sum unless and until it be proved that the amount has been accounted for and paid to the Crown. That is a question of construction of r. 21. Sub-rule (1) provides that,
E on payment of the annuity, the payer shall deduct the amount of tax. Sub-rule (2) provides that where any such payment is made the payer "shall forthwith" deliver an account to the commissioners and so on. The commissioners have wide powers of collection of the tax from the payer, the payee has none. The wife cannot sue for the balance on the footing that she has been paid a
F gross sum, because she will be met with a defence under r. 21 (1), that rule being construed in the light of the implication to be read therein; see per VISCOUNT SIMON, L.C. ([1943] 2 All E.R. 354) in the passage I have read from the *South Shields* case (5). Moreover, there is nothing in the Act which entitles the payee to say the payer has deducted tax if, but only if, he can produce a receipt from the commissioners. In my judgment, the construction propounded by the Crown strikes at the whole scheme of collection of tax in these cases,
G and I see no warranty for it.

In my view, if I am right in coming to the conclusion that the wife is to be treated as the recipient of a sum from which tax has been deducted by the payer, that sum is, so far as she is concerned, to be treated as a sum which has borne tax, and no further assessment in respect of tax can be raised on her.
H Collection of the tax which has been deducted is a matter entirely between the Crown and the payer. I reach the end of the first stage by concluding that, if the husband were still resident in this country, the Crown's claim would fail.

At the second stage, how is the matter affected by the continued residence of the husband in Brazil? The Crown submit, and the commissioners accepted the view, that where the payer is resident abroad then r. 21 has no application. Consequently it was said (and on the footing that r. 21 (1) does not apply, rightly said) that the husband's obligation was, on the proper construction

of the order, an obligation to pay the gross sum provided by the order and not the net sum, so that the monthly payments of £22 must be taken to be payments on account of the gross sums due which have not borne tax in the hands of the recipient. The whole question is: Does r. 21 (1) apply? As a matter of construction of the Act it seems to be clear, and, indeed, the contrary was not seriously pressed, that r. 21 (1) is as applicable to a person resident abroad as to one resident in the United Kingdom, and it was conceded that r. 19 (1) was so applicable. It was said, however, that the Income Tax Act, 1918, in the words of LORD WRENBURY ([1926] A.C. 56) in *Whitney v. Inland Revenue Comrs.* (8),

" . . . has nothing to do with the foreign income of one who is not a British subject and who is not resident here."

A little later he says (*ibid.*):

"The Act nowhere purports to tax income which is neither derived from property in the United Kingdom nor income received by a person resident in the United Kingdom."

Therefore, it is said, to apply r. 21 (1) to a person resident abroad (having, as I must assume, no English income of his own) would conflict with the above principle and would result in the taxation of a person wholly outside the scope and ambit of the Income Tax Acts.

I think there is a short answer to that. This income is the income of the wife, a person resident in this country, and it arises under an order of this court. There is no foreign element about the income at all. The husband has in his hands tax on this English income which he has withheld solely in reliance on an imperial statute. He holds that income, as LORD SIMON said in the *South Shields* case (5) in the passage I have already quoted ([1943] 2 All E.R. 354), in effect as collector for the Crown of tax due from the recipient. That is, he is an agent bound to account to his principal. The Crown may not be able to recover it in a foreign court, as it would be an action to enforce our revenue laws, but there can be no doubt of the matter in principle. The *Whitney* case (8) also shows that, even if the husband were an alien, which he is not, an assessment could be made on him directly in his own name at his address abroad for tax in respect of English income. In my judgment, the husband having tax on English income in his hands as an agent can be in no better position.

It follows, in my judgment, that the claim of the Crown fails. The appeal must be allowed and the assessments discharged. The Crown must pay the wife's costs. The wife is legally aided, and her costs must be taxed as between solicitor and client for the purposes of the Legal Aid and Advice Act, 1949.

Appeal allowed.

Solicitors: *Taylor, Jelf & Co.* (for the wife); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

In the Estate of LINDLEY (deceased). LINDLEY v. LINDLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 6, 1953.]

Intestacy—Grant of administration—Administration pendente lite—Number of administrators—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 160 (1), s. 163 (1).

By s. 160 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925: "Probate or administration shall not be granted to more than four persons in respect of the same property, and administration shall, if there is a minority or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals". By s. 163 (1): "Where any legal proceedings . . . for obtaining . . . any grant, are pending, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the court and act under its direction". On a motion for the appointment of one administrator pendente lite under s. 163 (1),

HELD: section 163 (1) was not controlled by s. 160 (1), which regulated the grant of general administration, and, therefore, notwithstanding the possibility of a life or a minority interest arising, a grant to one administrator could be made under s. 163 (1); there were no special circumstances requiring the appointment of two administrators; and, accordingly, the grant would be made to one administrator as sought.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 160 (1), s. 163 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 776, 779.

MOTION by the plaintiff for the appointment of an administrator pendente lite of the estate of Edgar Ivor Lindley, deceased.

The plaintiff, the widow of the deceased, claimed a grant of letters of administration of the deceased's estate. The defendant, by his defence and counterclaim, claimed to be the residuary legatee named by the deceased in a will dated Mar. 16, 1952, and sought to set up that will as the last will and testament of the deceased. The will could not be found, but it was alleged to have modified an earlier will dated Feb. 2, 1952. In the event of there being an intestacy, as alleged by the plaintiff, a life interest would arise in favour of the plaintiff as widow and a further interest in favour of an infant during minority.

John Latey for the plaintiff.

Hollins for the defendant.

WALLINGTON, J.: In this case I am invited to appoint John William Redman as administrator pendente lite of the real and personal estate of the deceased pursuant to the provisions of s. 163 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

A point has been raised whether there should be two administrators and not only one by reason of the fact that there is a possibility of a life or a minority interest arising during the course of, or resulting from, the proceedings in the action. I can well imagine that there may be cases of applications under s. 163 (1) which, owing to their circumstances, may call for the appointment of a trust company or two administrators either because of some special powers which the court may think it right to confer on the administrator pendente lite, or, possibly, for other reasons, but, in my opinion, there are no such circumstances in this case. There is a possibility, but no more than a possibility, of a life or minority interest arising, but no circumstances exist

which, in my view, make it necessary for me to consider the appointment of more than one administrator. In my opinion, s. 163 (1) is not controlled by s. 160 (1) of the Act of 1925, which regulates the grant of general administration. Accordingly, I appoint John William Redman as administrator pendente lite.

Solicitors: *Forsythe, Kerman & Phillips*, agents for *G. Rowberry*, Cheltenham (for the plaintiff); *Kimber, Williams, Sweetland & Stinson*, agents for *A. V. Gregory, Phelps & Co.*, Cheltenham (for the defendant).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.] A

ADSETT v. K. & L. STEELFOUNDERS & ENGINEERS, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.J.J.), May 15, 1953.] B

Factory—Removal of dust—“All practicable measures” to be taken—Provision of exhaust appliances—Standard of duty—Factories Act, 1937 (c. 67), s. 47 (1). C

From July, 1940, to Oct. 22, 1944, the plaintiff was employed in the defendants' steel foundry as a labourer whose duty it was to shovel dry sand, which was tipped out of moulds, through a grid on to a conveyor belt several feet below. A considerable amount of dust rose through the grid when the sand fell on to the belt, and in January, 1942, the defendants installed a new type of extractor plant under the grid to draw off the dust. In August, 1949, the plaintiff was certified to be suffering from pneumoconiosis and he was found as a fact to have contracted it by November, 1943, in the course of his employment with the defendants. In an action against his employers for breach of their duty under s. 47 (1) of the Factories Act, 1937, to take all practicable measures to protect their employees against inhalation of dust, D

HELD: in deciding whether all practicable measures had been taken to protect the plaintiff against the inhalation of dust, regard must be had to the state of knowledge at the material time, and, particularly, of that of scientific experts; on the facts the defendants had taken all measures which were practicable before and in 1942; and, therefore, they were not in breach of their statutory duty. E

Decision of PARKER, J. ([1953] 1 All E.R. 97), affirmed.

FOR THE FACTORIES ACT, 1937, s. 47 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1038. F

Case referred to:

(1) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.

APPEAL by the plaintiff from an order of PARKER, J., dated Dec. 8, 1952, and reported [1953] 1 All E.R. 97.

The plaintiff was employed by the defendants at their steel foundry at Letchworth for various periods between 1940 and 1948. From July, 1940, to Oct. 22, 1944, the relevant period for the purpose of this case, he was engaged in alternate spells of two hours each in mixing dried sand, fresh sand, and a mixture known as bentonite in a hopper, and in shovelling mainly dry sand which was tipped out of moulds through a two-inch grid or grating on to a conveyor belt several feet below. A considerable amount of dust rose through the grating when the sand fell on the conveyor belt, and in January, 1942, the defendants installed an extractor plant underneath the grid which drew off the dust. In August, 1949, the plaintiff was certified by the pneumoconiosis board to be suffering from pneumoconiosis, and he was found as a fact to have contracted it in the course of his employment with the defendants by November, 1943. In an action against his employers for damages for negligence and breach G H

of statutory duty under the Factories Act, 1937, s. 47 (1), it was contended, inter alia, that the defendants had failed to comply with the requirements of that sub-section that:

" . . . all practicable measures shall be taken to protect the persons employed against inhalation of the dust . . . and . . . where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust . . ."

A PARKER, J., held that there had been no negligence or breach of statutory duty and gave judgment for the defendants.

Croom-Johnson for the plaintiff.

P. M. O'Connor for the defendants.

B SINGLETON, L.J., stated the facts and continued: Counsel for the plaintiff has limited the appeal to one point under s. 47 (1) of the Factories Act, 1937, namely, that the defendants had failed in their duty under that sub-section which provides:

C "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as
D near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

By January, 1942, the defendants had installed a dust extractor of a novel kind in that it was placed under the grid to take the dust away as far as possible. That plant was in operation during the greater part of three years before the end of the plaintiff's first period of work with the defendants, i.e., July, 1940, to October, 1944. It is now said by the plaintiff: "You ought to have done
E it earlier, and if you had done it by July, 1940, when I went to work for you, I should not now have been suffering from this disease."

The question for consideration is whether on the facts the defendants are in breach of their duty under s. 47 (1). The word "practicable" appears in each limb of the sub-section, and discussion on its meaning took place both
F before PARKER, J., and in this court. The learned judge said that the real question was what the word "practicable" meant. Counsel for the plaintiff referred to WEBSTER'S DICTIONARY where "practicable" is defined as "possible to be accomplished with known means or resources." LORD GODDARD in *Lee v. Nursery Furnishings, Ltd.* (1) ([1945] 1 All E.R. 389), adopted a definition in the OXFORD DICTIONARY, namely, "capable of being carried out
G in action" or "feasible."

The complaint made here is in respect of the period from July, 1940, when the plaintiff became employed, until the installation of the extractor in January, 1942. The impression to be gained from one passage in the learned judge's judgment is that by reason of complaints made by the plaintiff and another employee the extractor was installed within a fortnight of those complaints.
H I think it is clear that that does not accurately state the position. The defendants had been in the forefront of the campaign to have a good factory; no other factory owners had thought of installing an extractor below the grid before this time and it has worked well. The ordinary kind of dust extractor is set close to the place where the dust rises and draws it off, and it is conceded that that type of extractor would have been, if not impossible, certainly impracticable in the defendants' foundry. Counsel for the plaintiff submits,

however, that it was practicable to have a dust extractor below the grid before the date on which it was installed, that it would have been practicable to put in there when the grid system was installed in 1938, and, if it was practicable and it was not done, then the defendants are in breach of their statutory duty.

I am unable to accept that submission. It seems to me that you must have regard to the position which existed at that time. The plaintiff started work with the defendants during the war. Before and during the war the defendants did all they could to make their foundry fit for their men to work in. I realise that that is not the test under s. 47 (1) of the Act, and that the question is whether they had taken all practicable measures, but it must be remembered that, until the defendants discovered the system of installing an extractor under the grid, there was no such system in existence. Can it, then, be said that the system which they discovered was practicable long before such discovery? The plaintiff's expert witness said that the extractor below the grid was an improvement and was the only one of its kind he had seen. Through the instrumentality of someone who could not be called as a witness, they installed this kind of device which is of particular benefit in their foundry and may well prove a benefit in others, although, so far as I can find from the evidence, it has not been adopted generally. It would appear to be hard on the defendants if, in those circumstances, they were made liable for not discovering sooner something which, for the benefit of the community, they discovered in 1941.

I now go back to the question: What were the measures which it was practicable for the defendants to take in 1940 or 1941? It is argued by the plaintiff that it was practicable for the defendants to install the new extractor plant because they ought to have thought of it earlier. I do not think that that is the right test. In deciding whether all practicable measures were taken one must have regard to the state of knowledge at the material time, and, particularly, to the knowledge of scientific experts. I find it impossible to say on my view of this sub-section that the defendants were in breach of their statutory duty. In my opinion, this appeal should be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

NOTE.

BLACKMAN v. RAILWAY EXECUTIVE.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.J.J.), May 7, 1953.]

Negligence—Invitee—Railway station—Passenger slipping on patch of oil—Duty owed by Railway Executive.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.

APPEAL from an order of HILBERY, J., dated Dec. 3, 1952, and reported [1953] 1 All E.R. 4, in which he gave judgment for the defendants in an action for damages for negligence.

The defendants, the Railway Executive, were the occupiers of Paddington Station. Part of the station was used for the loading and unloading of mail vans, for mail bags and trolleys, and for standing barrows used to convey mail bags to platforms, but there was nothing to show that passengers should not go on that part. On the removal of certain of the barrows the foreman on duty noticed a patch of oil which had dripped on the ground and had previously been hidden by the barrows. He at once tried to stop people passing that way and shouted to a trolley driver to get sawdust and put it on the oil. The plaintiff, while crossing that part of the railway station, did not hear the shout of the foreman, and he did not see her, and she slipped on the oil, fell, and was injured. The defendants denied negligence, and HILBERY, J., gave judgment in their favour. The plaintiff appealed.

Wooll, Q.C., and *F. L. Clark* for the plaintiff.

N. Lawson for the defendants.

LORD GODDARD, C.J., said the learned judge admittedly applied the correct principle of law to the matter, namely, that it was the duty of the Railway Executive to keep their platforms reasonably safe so as to prevent a passenger meeting with an unexpected danger. It was utterly impossible to prevent a patch of oil getting on the platform or to prevent some slippery place occurring. The most the Railway Executive could do when they knew oil was on the platform was to take reasonable steps to prevent the public slipping on it. What more could be done than for the foreman porter to stand and shout to people to go the other way, warning them against coming that way until sawdust was procured, he did not know. The learned judge came to the conclusion after hearing the evidence that the defendants had taken all reasonable steps to avoid danger to passengers. It was impossible for the Court of Appeal to interfere with that finding unless they came to the conclusion that the judge had applied either too high or too low a test in some way so as to make his judgment on that point obviously wrong. They must not confuse questions of fact and questions of law. Once the standard of duty was laid down correctly, whether the Railway Executive took adequate and reasonable steps was purely a question of fact. The learned judge found, and rightly found, that the Railway Executive did what was reasonable in the circumstances. The appeal must be dismissed.

BIRKETT and HODSON, L.J.J., concurred.

Appeal dismissed.

Solicitors: *A. Bieber & Bieber* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

F.A.A.

R. v. HOLMES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.),
March 30, 1953.]

Criminal Law—Evidence—Insanity—Questions put to medical witness as to appellant's state of mind.

On the trial of the appellant on a charge of murder the defence raised was that of insanity, and a doctor who was called for the defence was asked in cross-examination whether the appellant's conduct immediately after the murder indicated to him that at the time of the murder the appellant knew (i) the nature of the act he was doing and (ii) that his conduct was contrary to the law of the land. The answer to both these questions was in the affirmative. On appeal, it was contended that the questions were inadmissible on the ground that they were tantamount to asking the doctor to express an opinion on the very issue which the jury had to decide.

HELD: the questions had been rightly admitted.

AS TO EVIDENCE OF INSANITY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 20-22, paras. 14-17.

Cases referred to:

- (1) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; 14 Digest 56, 229.
- (2) *R. v. Francis*, (1849), 14 J.P. 24; 4 Cox C.C. 57; 14 Digest 63, 284.

APPEAL against conviction.

The appellant was convicted before STREATFEILD, J., at Nottinghamshire Assizes of the murder of Harriett Ann Eyles and was sentenced to death.

C. N. Shawcross, Q.C., and *Cotes-Preedy* for the appellant.

G. Terrell for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before STREATFEILD, J., at Nottinghamshire Assizes of murder. The case was one in which the defence set up the plea of insanity, the onus of proving which is on the prisoner. The medical witnesses for both the defence and the prosecution were agreed that at any rate at the time of the trial and probably previously the appellant was suffering from a disease of the mind, a particular form of paranoia.

The test of insanity, when it is sought to establish it as an excuse for a criminal act, according to the answers the judges gave in *M'Naghten's Case* (1), which were adopted by the House of Lords, is whether or not the accused person knew the nature and quality of the act he was doing. If he did not, that establishes insanity. If he did, one must then go further and ask whether he knew at the time of its commission that the act was wrong—wrong in the sense of contrary to law, not wrong in the sense of contrary to morals. In the present case the appellant, after a savage attack on the murdered person, went to a police station, gave himself up, said he was giving himself up for murder, and gave a detailed account of what he had done and how he had done it. A medical witness who was called for the defence, was asked in cross-examination:

“ You remember that I asked you the question whether the accused's conduct immediately after this incident would indicate to you that he knew the nature of the act that he was committing and your reply was ‘ Yes ’. That is so, is it not ? A.—Yes. Q.—Would his conduct immediately after indicate equally that he knew his conduct was contrary to the law of the land. A.—Yes.”

Counsel for the appellant has submitted that those questions were inadmissible. Whatever fine distinctions may have been drawn in days before or soon after *M'Naghten's Case* (1), we can only say that no member of the court has ever heard an objection being taken to such questions as those. Moreover, if the objection prevailed, it would, as it seems to us, put an insuperable difficulty in the way of the defence whenever they were trying to establish insanity. For instance, if a medical witness could not be asked whether the defendant's conduct immediately after the act in respect of which he was charged indicated that he knew his conduct was contrary to the law of the land, the doctor being prepared to answer "No", it would be a great hardship on the defendant who was setting up a plea of insanity if the doctor was not to be allowed to answer that question. It seems to the court that that is essentially a question that may be asked and answered. Counsel for the appellant has referred to a large number of cases in which the court has set out what is the right question and issue, and he has relied particularly on the judgment in *R. v. Francis* (2) of ALDERSON, B., who evidently had not approved of the decision in *M'Naghten's Case* (1), where he said (4 Cox C.C. 58):

"The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner."

When the learned judge says "insanity", he is using the word in the sense that it is understood in criminal law as an excuse for crime. Therefore, the question asked in the present case falls exactly within what the learned judge says is admissible because, to expand the question it is this: "Does the fact that the appellant went immediately to the police station, gave himself up, and wrote out a full description of the crime indicate to you insanity on his part, that is to say, insanity within the *M'Naghten Rules*, that he did not know that what he had done was contrary to law."

That is quite enough to dispose of this case, and this court does not propose to go into all the cases cited because, in their opinion, the matter is quite clear and it would be to introduce a great deal of confusion and injustice to an insane prisoner if we were to give effect to the argument. This appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

R. v. WILSHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hallett and Donovan, JJ.),
June 9, 1953.]

Criminal Law—Sentence—Corrective training—Sentence on offender already serving sentence of corrective training—Further offence committed while offender released on licence.

On Jan. 27, 1953, when the applicant had been committed for trial at assizes on charges of office breaking, he was convicted at the Central Criminal Court of a similar offence and was there sentenced to four years' corrective training. On Feb. 20 he was convicted at assizes and was sentenced to two years' corrective training to run consecutively to the sentence passed at the Central Criminal Court.

HELD: the sentence passed at the assizes was a correct and proper sentence.

Per curiam: When an offender who has been sentenced to a term of corrective training and released on licence commits a further offence while he is on licence, a sentence of imprisonment should be imposed in respect of the further offence unless the Prison Commissioners recommend the offender for a further sentence of corrective training, in which case the court can exercise its discretion to pass either a sentence of imprisonment or one of corrective training.

Case referred to:

(1) *R. v. Talbot*, [1953] 1 All E.R. 340; 117 J.P. 119.

APPLICATION for leave to appeal against conviction.

On Jan. 27, 1953, the applicant was convicted at the Central Criminal Court of shopbreaking and was sentenced to four years' corrective training. At that time he had been committed for trial at Chelmsford Assizes, where, on Feb. 20, 1953, he was convicted of office breaking, larceny, office breaking with intent to commit a felony, and causing grievous bodily harm to a police constable, and was sentenced by HALLETT, J., to two years' corrective training to run consecutively to the sentence passed at the Central Criminal Court.

No counsel appeared.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: There is no ground for interfering with the conviction of the applicant. HALLETT, J., having heard that the applicant had been sentenced at the Central Criminal Court to a sentence of corrective training, felt himself to be in a difficulty because this court has said in *R. v. Talbot* (1) that it is undesirable to pass a sentence of imprisonment when an offender who is undergoing a sentence of corrective training is brought before the court for a further offence which has not been tried at the time he received the sentence of corrective training, because that would mean that the moment he finishes his corrective training he will have to undergo imprisonment, and that, very likely, would do away with any good he may have received from the corrective training. In the present case, the applicant having received that sentence of corrective training, the learned judge thought—in our opinion, quite rightly—that the only thing to do was to add some period to his term of corrective training, and so he passed a sentence of two years' corrective training which would mean that the applicant would serve at least an additional year because it was to follow consecutively on the sentence that he was already serving.

So far as that is concerned, the court entirely approve, but it occasionally happens that when offenders who have been sentenced to corrective training are released on licence, they commit offences while they are on licence. Since the coming into force of the Criminal Justice Act, 1948, s. 56 (1), where an offender earns a remission of imprisonment, the sentence comes to an end. The position

is not the same in the case of corrective training, or, as a matter of fact, preventive detention. If an offender has been sentenced to corrective training he can be released on licence, but he is liable to be recalled if he commits an offence while he is on licence. Certain recorders have recently found difficulty in dealing with cases where offenders have committed offences while they are on licence. They are told that the Prison Commissioners will recall the offenders, and very often the commissioners report that the offenders in question have shown that they receive no benefit from corrective training and that they do not recommend them for a further sentence of corrective training. The court thinks that in a case where an offender commits an offence while on licence a sentence of imprisonment should be imposed unless the Prison Commissioners report to the court that they think that a further period of corrective training may be of use. Then the court can exercise its discretion whether to pass a sentence of imprisonment or one of corrective training, but, unless there is that report, the only way the case can be dealt with is by passing a sentence of imprisonment. In the present case there is no application for leave to appeal against sentence, and, therefore, it is not necessary to say more than that the application for leave to appeal against conviction is dismissed.

Application dismissed.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

LEOLGA COMPANIA DE NAVIGACION v. JOHN GLYNN & SON, LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), May 14, 15, 22, 1953.]

Shipping—Charterparty—"Lawful merchandise"—Cargo not capable of being lawfully discharged at destination.

Under a charterparty dated Dec. 12, 1951, a vessel was "to be employed in lawful trades for the conveyance of lawful merchandise between good and safe ports or places within" certain limits. The charterers were "to be responsible for loss or damage caused to steamer or owners by goods being loaded contrary to the terms of" the charter, but it was contemplated that the vessel might load explosives or other dangerous cargo. The vessel loaded cargo at Malta, Tripoli, Benghazi and Tobruk which contained ammunition and other explosive war stores consigned to Adabiya for the British forces in Egypt. She called at Port Said and was "blacklisted" by the Egyptian authorities there in accordance with a letter dated Nov. 1, 1951, by which the Egyptian authorities prohibited vessels from discharging and/or loading cargoes belonging to the British army at any place in Egypt except Alexandria, Port Said and Suez. The charterers, by their agents, had received a copy of this letter before they had entered into the charterparty. The vessel proceeded to Adabiya where she discharged her cargo and loaded a cargo of military stores. Before she sailed her propelling machinery broke down, and, due to her being "blacklisted", the Egyptian authorities refused to allow repairs to be carried out on the spot. She was thus immobilised for thirty days while the necessary repairs were done, that period being twenty-six days longer than the repairs would otherwise have taken.

HELD: to be "lawful merchandise" goods loaded under the charterparty must not only be such as could be loaded without breach of the law in force at the port of loading, but must also be such as could lawfully be carried and discharged at the port of discharge; as the cargo in the present case could not be lawfully discharged at the port of discharge it was not "lawful merchandise" within the terms of the charterparty;

and, therefore, the charterers were in breach of the charterparty and liable to the shipowners in damages.

Vanderspar & Co. v. Duncan & Co. (1891) (8 T.L.R. 30), discussed.

Cases referred to:

- (1) *Vanderspar & Co. v. Duncan & Co.*, (1891), 8 T.L.R. 30; 41 Digest 336, 1893.
- (2) *Hudson's Bay Co. v. Domingo Mumburu Sociedad Anonima*, (1922), 10 Lloyd L.R. 476. A
- (3) *Board of Trade v. Temperley Steam Shipping Co., Ltd.*, (1927), 27 Lloyd L.R. 230.
- (4) *Capper v. Forster*, (1837), 3 Bing. N.C. 938; 6 L.J.C.P. 332; 132 E.R. 672; 41 Digest 654, 4867.
- (5) *Potter & Co. v. New Zealand Shipping Co., Ltd.*, (1895), 64 L.J.Q.B. 689; 41 Digest 339, 1913. B

SPECIAL CASE stated by umpire.

By a time charterparty dated Dec. 12, 1951, on the Baltimore 1920 form, the charterers, John Glynn & Son, Ltd., chartered the vessel s.s. Dodecanese, owned by the shipowners, Leolga Compania de Navigacion, for a period of about three months. The charterparty contained (inter alia) the following clauses: C

"1 . . . Steamer to be employed in lawful trades for the conveyance of lawful merchandise between good and safe ports or places within the following limits: Full Mediterranean and Red Sea . . . 10. In the event of loss of time caused by drydocking or by other necessary measures to maintain the efficiency of steamer, or by . . . breakdown of machinery, damage to hull, or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service . . . 12. . . Charterers to be responsible for loss or damage caused to steamer or owners by goods being loaded contrary to the terms of this charter . . . 31. In the event of explosives being shipped it is agreed that the charterers are to supply at their expense the necessary magazine in order to comply with Board of Trade regulations. 32. Dangerous cargo may be carried in accordance with Board of Trade rules . . ."

On Dec. 20, 1951, the vessel was delivered to the charterers at Malta. Cargo, some of which consisted of ammunition, fused shells, and other fuses, was loaded there and at Tripoli, Benghazi and Tobruk. On Jan. 14, 1952, the vessel arrived at Port Said where she was boarded by the Egyptian authorities who made an entry in Arabic in her logbook that she was "blacklisted" under Egyptian law in accordance with a letter, No. 9443, which had been sent by the Egyptian authorities to the charterers' agent on Nov. 1, 1951, stating, inter alia, that any cargo or materials consigned to the British forces in Egypt were not allowed to be discharged without obtaining special permission from the Customs and that it was prohibited for vessels to berth for the discharge and/or loading of cargoes belonging to the British army at any place in Egypt except the ports of Alexandria, Port Said and Suez. The vessel then proceeded through the Suez Canal to Adabiya where she discharged her cargo. After discharge she loaded a cargo of military stores, including ammunition, at Port Tewfik for Aquaba, and was due to sail on Jan. 31, 1952. On Jan. 30, 1952, however, she suffered a breakdown of her propelling machinery which immobilised her till it could be repaired, and on Feb. 4, 1952, the charterers' agent notified the master, by letter, that his ship must be considered as "off hire" from Jan. 30, 1952. The Egyptian authorities refused to allow the repairs to be effected on the spot owing to the fact that the vessel had been blacklisted, but the master had the defective part repaired in Cairo and the

vessel eventually sailed on Mar. 2, 1952. The shipowners claimed £2,131 12s. 11d. being the amount of hire from Jan. 31, 1952, to Mar. 1, 1952, less four days hire representing the time which would normally have been spent in effecting repairs. They also put in an alternative claim for damages for breach of the charterparty amounting to the same figure. In accordance with the terms of the charterparty the parties appointed arbitrators, and they, being unable to agree, appointed an umpire, who, on Dec. 11, 1952, found that the charterers were in breach of the charterparty, holding, on the authority of *Vanderspar & Co. v. Duncan & Co.* (1), that government stores (armaments, ammunition, etc.) were not "lawful merchandise", and that the shipowners were entitled to recover the £2,131 12s. 11d.

Eustace Roskill, Q.C., and *Bateson* for the charterers.

Sir Robert Aske, Q.C., and *M. R. Holman* for the shipowners.

Cur. adv. vult.

May 22. PILCHER, J., read a judgment in which he stated the facts and continued: One of the difficulties in the case arises from the fact that the umpire has not set out some of the facts with any great precision. On the face of the award the umpire has found, subject to the opinion of the court, that the charterers committed a breach of contract, taking the view, on the authority of *Vanderspar & Co. v. Duncan & Co.* (1) that government stores (ammunition, etc.) were not lawful merchandise. He has assessed the damages payable by the charterers in respect of the breach of contract on the basis of the hire payable by them, but withheld, throughout the period during which the vessel was delayed, namely, thirty days, less four days, which was agreed by the parties as being the time in which the repairs to the defective part would have been effected but for the refusal of the Egyptian authorities to allow repairs to be done. Another difficulty in the case has arisen because of the umpire's reference to *Vanderspar & Co. v. Duncan & Co.* (1). It was urged with some force by counsel for the charterers that that case is no authority for the bald proposition that government stores, including ammunition, are not covered by the words "lawful merchandise". This was conceded by counsel for the shipowners. In my view, it is quite clear that *Vanderspar & Co. v. Duncan & Co.* (1) is no authority for the proposition for which it would appear, on the face of the award, that it was invoked by the umpire. The report of the case is not satisfactory, and, at the most, it is only an authority on "usage" applied to its own particular facts.

In these circumstances the charterers contend that the award is bad on its face and should be set aside. Counsel for the shipowners pointed out, however, that the umpire states the question for the decision of the court in the widest possible terms, namely, whether on the facts and the construction of the charterparty the shipowners are, or are not, entitled to the damages which he has awarded them. Counsel contended that, on the wide question submitted, it was open to this court, if the necessary facts have been found by the umpire, to consider not only whether there has been a breach of contract by the charterers on the grounds found by the umpire, but whether, on the facts found, the charterers have been guilty of any breach of contract at all which entitles the shipowners to claim damages.

On the broad question submitted for the opinion of the court I have no doubt that, if sufficient facts have been stated by the umpire to enable the court to arrive at a conclusion, it is open to me to consider whether the charterers have, in the circumstances, been guilty of any breach of the charterparty, and, if necessary, also to consider the question which is necessarily bound up with this point, namely, whether the charterers were entitled, in the circumstances, to treat the vessel as off hire and to withhold hire under the off hire clause. In this connection I need only refer to certain passages in the judgment of

BANKES, L.J., and ATKIN, L.J., in *Hudson's Bay Co. v. Domingo Mumburu Sociedad Anonima* (2), one of the points in the case being whether or not it was open to the parties, on the statement by the umpire of the question for the decision of the court, to argue a point which apparently had not been dealt with or decided by the umpire. BANKES, L.J., said (10 Lloyd L.R. 478):

" . . . the Special Case takes the form that the umpire states the facts as he finds them, and then asks the court not a question as to a specific point of law, but he asks the court generally to say whether having regard to those facts as found by him the one party or the other was in the right. So I think it was open to the shipowner to raise the point."

ATKIN, L.J., said (*ibid.*):

"Now the first question is: Is that open to them? For the reasons given by my Lord, I think that that point is open to them, though, in fact, it was not taken before the umpire where apparently the arbitration seems to have been conducted before two arbitrators and the umpire, and we are not told whether legal advisers were present or not. It seems to me that, where an umpire states a Case in the form that subject to any questions of law he finds the facts so-and-so, and awards so-and-so, the parties are entitled to take any questions of law that arise upon those facts; and I think it is a good thing that that should be made clear. I am not at all sure that by far the most important part of our decision in this case to the public at large is that part of the decision and not that part that immediately concerns the construction of this charterparty."

In common parlance, the real point in this case is very shortly summarised by the umpire in para. 7 of the award, where he says this:

"This case turns upon the question as to who is responsible for the time used doing repairs, which repairs were inordinately delayed on account of the vessel being blacklisted by the Egyptian authorities owing to her having or having had on board military stores, cartridges, bombs, shells, etc. for the British forces in Egypt."

I start with this general proposition, that, *prima facie*, the charterers' obligation to pay hire is continuous. If a charterer withholds hire, purporting to do so under the off hire clause, it is for him to establish facts which entitle him to do so: see *Board of Trade v. Temperley Steam Shipping Co., Ltd.* (3). Correspondingly, if the shipowner alleges a breach of contract he must prove it. In the present case the charterers allege that the vessel was off hire within the words of cl. 10 of the charterparty throughout the whole month during which she was held up at Adabiya, and they deny that they have been guilty of any breach of contract. They further say that, if they have been guilty of any breach of the charterparty, the damages recoverable are only nominal in that the fact that the Egyptian authorities might refuse repair facilities to the ship was not a matter which was foreseen or foreseeable by the parties.

The first matter which I have to consider is: What are the material facts found by the umpire? Paragraph 3 of the award commences: "The sequence of events I find to be as follows: . . ." I, accordingly, take the statements in this paragraph to be the findings of fact, namely, that the vessel, loaded with war stores, was boarded at Port Said on Jan. 14, 1952, by the Egyptian authorities who "made an entry in Arabic in the logbook that the vessel was blacklisted according to Egyptian law". I take para. 5 to be a finding of fact that, after the breakdown, the Egyptian authorities refused to allow any repairs to be done owing to the fact that, as the vessel had carried military stores for the British forces in Egypt, she had been "blacklisted". The vessel was, in fact, delayed about thirty days, and I assume from para. 6 of the award that it was agreed that, but for what I will call the action of the Egyptian authorities, the vessel would have been delayed as a result of the breakdown

of her machinery for only four days instead of thirty days. It is also clear from this paragraph that the sum of £2,131 12s. 11d. was agreed by the parties as a figure, after taking all proper matters into account, representing the hire to which the shipowners were entitled if the vessel was not, as the charterers alleged, off hire during the difference between four and thirty days, namely, twenty-six days. Under cl. 10 of the charterparty it is only loss of time caused, inter alia, by breakdown of machinery, which enables the charterers after

A twenty-four hours to put the vessel off hire. There is no doubt that the Dodecanese, having become physically immobilised by the breakdown, remained so physically immobilised for thirty days, and cl. 10 provides that hire shall cease from the moment of the loss of time until the vessel again is in an efficient state to resume service. This did not occur until the end of the thirty days. The umpire has found this very clearly in his award. He has not dealt with the

B shipowners' first claim, which was for loss of hire withheld during the whole period by the charterers, but, finding that the latter were in breach of the charterparty for a reason which no one now seeks to support, he has awarded the shipowners damages based on the rate of the charter hire for the period by which the delay to the vessel was prolonged by the action of the Egyptian authorities in refusing repair facilities.

C It is, I think, quite clear from the passages in the award to which I have referred that the umpire found as a fact that some twenty-six days of the delay which the vessel incurred was due to what I will continue for the moment to call the action of the Egyptian authorities in refusing repair facilities. He found as a fact that this action was taken by them because the vessel had been "blacklisted" by the Egyptian authorities because she had carried military

D stores for the British forces in Egypt. What he does not find as a fact is that there was any Egyptian law entitling the Egyptian authorities to blacklist the vessel, nor what "blacklisting" entailed, nor whether the Egyptian authorities had any right under Egyptian law to refuse repair facilities to a vessel which they had blacklisted. He does find that the charterers' agents, and the charterers, had notice of the contents of letter, No. 9443, before the

E vessel entered on the charter and "were aware of the embargo" before any cargo was loaded on the vessel, whereas there was no evidence that the charterers brought that letter to the notice of the master of the vessel until Jan. 14, 1952, which was the day the vessel entered the canal and the day she was "black-listed". I think it would be right that I should assume that wherever in his award the umpire refers to "the Egyptian authorities" he means the officials

F of the Egyptian government charged with the administration of Egyptian law.

In these circumstances the shipowners contend that the charterers, who were, under the charterparty, the masters of the vessel's trading activities, deliberately sent the vessel loaded with war stores destined for the British forces in Egypt into the Suez Canal and caused her to discharge this cargo at Adabiya, which was a port in Egypt where the loading and discharge of such cargo was, to their knowledge, prohibited by the terms of the letter referred to. In so doing, the shipowners contend, the charterers were in breach of the terms of the charterparty inserted for the protection of the owners: "Steamer to be employed in lawful trades for the conveyance of lawful merchandise". They also point to cl. 12 of the charterparty, which provides that charterers shall

H "be responsible for loss or damage caused to . . . owners by goods being loaded contrary to the terms of this charter . . ."

Counsel for the shipowners contended that ordnance stores and munitions carried by the vessel were not "merchandise" at all, because they were British government property and were not "commodities of commerce", that is to say, goods ordinarily dealt in by merchants. In a charterparty of this kind in which the carriage of explosives and dangerous cargoes is specifically permitted subject to Board of Trade rules and regulations, I think that this submission

is too wide. Whether in the particular circumstances of the case the cargo carried was "lawful merchandise" is another matter. Before they entered on the charterparty the charterers had received letter No. 9443 and must be taken to have known that the Egyptian authorities had prohibited vessels from discharging or loading cargoes belonging to the British army at Adabiya. In spite of this, they caused or permitted the vessel to berth for the purpose of discharging and to discharge her cargo of ammunition, etc., at Adabiya, and while there is no specific finding by the umpire that this cargo belonged to "the British forces in Egypt", I think that it would be proper for me to infer this fact from this and other facts found in the award rather than to remit the award to the umpire for a specific finding on this point alone.

There is very little authority on the point as to what, in any given circumstances, constitutes "lawful merchandise". In SCRUTTON ON CHARTERPARTIES, 15th ed., at p. 156, there is this very short passage: "*Lawful Merchandise*—goods ordinarily shipped from the port of shipment." Then there is a reference to *Vanderspar & Co. v. Duncan & Co.* (1) to which I have already referred. I am told that that short passage is of some standing in the book, and that it was already there when the learned author himself was responsible for what was contained in the book. In CARVER'S CARRIAGE OF GOODS BY SEA, 9th ed., p. 454, under the heading "Goods that may be loaded", there is this passage:

" '*Merchandise* ' and '*produce* '.—General expressions, such as '*merchandise* ', or '*produce* ', used to describe the intended cargo, denote things which have those characters in the particular trade, having regard especially to the particular port of loading. '*Produce* ' has been said to mean '*anything produced by the country in the neighbourhood of the port of loading, and being an ordinary subject of importation* '. Government stores (ordnance, ammunition, etc.) have been held to be not covered by '*lawful merchandise* '";

and once again there is a reference to *Vanderspar & Co. v. Duncan & Co.* (1). If I may say so, it seems doubtful whether that case is an authority for the proposition for which it is cited by the learned editor.

It is clear that, if any real meaning is to be given to the words "lawful merchandise", which are, of course, inserted into the charterparty for the protection of the owners, the goods loaded must be such as can be loaded without breach of the law in force at the port of loading. Inasmuch as the master is under the general orders of the charterer as to where a cargo shall be carried within the charter limits, it is at least logical to suppose that the charterer undertakes that the cargo shall also be the type of cargo which can be lawfully carried and discharged at the port to which he has ordered the vessel to proceed. The purpose of the provision that only "lawful merchandise" shall be carried by the charterers would be largely nullified if all that was necessary was that the cargo could be loaded without breaking the laws of the country where it was loaded. I was referred to *Capper v. Forster* (4), and also to *Potter & Co. v. New Zealand Shipping Co., Ltd.* (5). Neither of these cases, however, assists me in the determination of what is meant by the words "lawful merchandise".

Egypt is a sovereign State, and the principal difficulty which I have found is whether I am able to spell out from the facts found by the umpire a finding of fact that the Egyptian law was as stated in letter No. 9443. The umpire finds as a fact that the Egyptian authorities issued this letter, and that the charterers had knowledge of its contents before the cargo was loaded. The letter, no doubt, constitutes some evidence of what the Egyptian law was at the material time. Egyptian law, for the umpire, was a question of fact. I have little doubt that the umpire was satisfied, on the evidence of letter No. 9443, that the Egyptian law was as stated in the letter, and he, accordingly, stated

the purport of the letter in para. 8 of his award, to which the preface is: "Upon these contentions I find the following further facts . . ." I, therefore, infer that the umpire has found that the letter in question stated accurately the effect of Egyptian law. If this be so, the cargo was one which the charterers knew, or ought to have known, before they loaded it, could not be discharged at Adabiya without breaking Egyptian law. The cargo was discharged at Adabiya, and it was not until after this was done that the Egyptian authorities

- A took any active step against the vessel by refusing her repair facilities. The cargo was destined for Adabiya, and, in causing it to be discharged there, the charterers disregarded the prohibition in letter No. 9443 which, in my opinion, the umpire has found to be an accurate statement of Egyptian law. If the cargo could not lawfully be discharged at the port where the charterers ordered it to be discharged, it was not, in my opinion, lawful merchandise. The umpire
- B has found as a fact—and I quote from para. 5 of the award:

"The Egyptian authorities refused to allow any repairs to be done owing to the fact that as the vessel had carried military stores for the British forces in Egypt she had been blacklisted . . ."

- C He has found the total period of delay, and it was agreed by the parties that the repairs to the engine breakdown would only have taken four days but for the interference of the Egyptian authorities.

In my view, for the reasons which I have set out, the umpire was right in finding that the charterers committed a breach of the charterparty in that they failed in all the circumstances to load the vessel with "lawful merchandise", but wrong in so far as he arrived at that conclusion on the authority

- D of *Vanderspar & Co. v. Duncan & Co.* (1).

[HIS LORDSHIP found that the umpire was entitled to assess the damages, as he did, on the basis of the hire claimed by the shipowners for the period of twenty-six days by which, it was agreed, the period of delay had been prolonged by the refusal of the Egyptian authorities in refusing repair facilities, and affirmed the award.]

E

Award affirmed.

Solicitors: *Thomas Cooper & Co.* (for the charterers); *Holman, Fenwick & Willan* (for the shipowners).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

R. v. ROBINSON.

[COURT OF CRIMINAL APPEAL (Hallett, Streatfeild and Donovan, JJ.), June 8, 1953.]

Criminal Law—Appeal—Appeal on question of law and also on further grounds involving questions of fact or mixed law and fact—Need for leave to argue further grounds—Criminal Appeal Act, 1907 (c. 23), s. 3 (a), (b).

By s. 3 of the Criminal Appeal Act, 1907, a person convicted on indictment may appeal against conviction (a) without leave on any ground of appeal which involves a question of law alone, and (b) with leave on a question of fact alone or of mixed law and fact.

Per curiam: If an offender has appealed without leave on a ground involving a question of law alone, he is not thereby entitled to argue further grounds which involve questions of fact alone or of mixed law and fact without obtaining leave from the court to appeal on those further grounds.

The practice followed by the registrar (under the direction of the court) where a notice of appeal contains a mixture of questions of law and questions of fact alone or of mixed law and fact has been to put the case in the list as an application for leave to appeal.

FOR THE CRIMINAL APPEAL ACT, 1907, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 928.

APPEAL against conviction.

The appellant, Frederick Robinson, was convicted before LORD GODDARD, C.J., at the Central Criminal Court on charges of robbery with violence and robbery with aggravation and was sentenced to ten years' imprisonment.

E. Clarke for the appellant.

Durand for the Crown.

HALLETT, J., delivered the following judgment of the court. There was lodged on behalf of the appellant a notice of appeal which was in very general terms and was supplemented by particulars of the grounds of appeal. Those particulars are given under three heads. In the first place, it is complained:

"That the Lord Chief Justice misdirected the jury in law by telling them that evidence against the appellant on the first count of robbery was also evidence of his guilt on the second count of robbery."

The second head is:

"That the Lord Chief Justice misdirected the jury on fact . . ."

in nine particulars which are specified, and the third head is that:

"Generally the Lord Chief Justice omitted to put the defence adequately to the jury, and, in the circumstances of a difficult case, the summing-up was improperly unfavourable to the appellant, thereby resulting in a miscarriage of justice."

There arises in connection with this matter a question of procedure with which it is desirable that the court should deal.

First, there would be neither this court nor the right of appeal to it, but for the provisions of the Criminal Appeal Act, 1907. Accordingly, if a question arises as to a right of appeal, it is the statute that one must examine to discover what right is conferred, and subject to what conditions, if any, and to what limitations, if any, and it is necessary for this purpose to look only at s. 3 by which:

"A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(a) against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who

tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal . . .”

The words of sub-s. (a), in our opinion, must be carefully observed. An offender is not given a right of appeal, as counsel for the appellant appears to be contending, to the Court of Criminal Appeal if he has a ground of appeal which involves a question of fact, though he may appeal to the Court of Criminal Appeal without leave on any ground which involves a question of law alone. It appears that the correct application of sub-s. (a) depends on the adoption of one of three views. The first view which might be taken is that the appellant only gets a right of appeal without leave if he elects to confine himself to a point of law. The second view is that by sub-s. (a) he is granted a right of appeal without leave in so far as his ground of appeal is a ground of appeal which involves a question of law alone. The third view, which is the view for which counsel for the appellant, as we understand it, contends, is that, if he has a ground of appeal which involves a question of law alone, he can appeal without leave both on that question and on questions of fact or mixed law and fact.

The first view, which is the strict view, is that which has been adopted in arriving at the practice, which has been followed under the direction of the court, that where a notice of appeal contains grounds based on law and also grounds based on fact, the case should be put in the list as an application for leave to appeal. If the strict view were taken, that an appellant has only a right to appeal without leave if he confines himself to a point of law, that would be the right procedure. On the present occasion, however, it was thought that, as the appellant had a ground of appeal which involved a question of law alone, it would not be right to say to him: “You cannot raise a further point without leave under sub-s. (b) because you have chosen in your notice of appeal to associate it with other points which clearly fall within the scope of sub-s. (b).” For that reason, directions were given that, so far as the point of law was concerned, the matter should be put in the list as an appeal to be heard without leave. On the other hand, if the third view were taken, it seems to us that it would result in sub-s. (b) being rendered inoperative in very many cases.

We think that where an appellant is entitled under s. 3 (a) to appeal to this court on a ground of appeal which involves a question of law alone, that does not entitle him also to appeal on a ground which involves a question of fact alone or a question of mixed law and fact. We recognise that the course which has been followed on the present occasion has very grave practical inconveniences, since it would be more convenient if we could deal with all the grounds raised at one and the same time. On the other hand, it would be, as it seems to us, against the spirit of what Parliament has provided by sub-s. (b), if we were to allow questions of fact or of mixed fact and law to be put forward without leave merely because one of the grounds in the notice of appeal was a ground which involved a question of law alone.

[HIS LORDSHIP considered the substance of the appeal.]

Appeal dismissed.

Solicitors: Marie L. Bundy (for the appellant); Solicitor, Metropolitan Police (for the Crown).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

SLADE AND ANOTHER v. METRODENT, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), May 11, 1953.]

Master and Servant—Apprenticeship—Benefit of infant—Arbitration clause—Action by infant—Stay of proceedings—Arbitration Act, 1950 (c. 27), s. 4.

By an indenture dated Aug. 31, 1949, the plaintiff, an infant, bound himself as apprentice to the defendants for five years to learn the craft of dental mechanics. Contained in the indenture was a clause whereby it was agreed that any questions or differences arising between the parties should be referred to arbitration by the National Joint Council for the Craft of Dental Technicians. On Feb. 2, 1953, the plaintiff issued a writ claiming damages from the defendants for breach of their obligations under the indenture, alleging that they had failed or neglected to teach or instruct him in the craft and had repudiated their obligations. On an application by the defendants to stay the proceedings under the Arbitration Act, 1950, s. 4,

HELD: an infant, even during infancy, was bound by any contract which the court considered was for his benefit as a whole; an apprenticeship deed containing an arbitration clause might be beneficial to an infant; in any event, the present deed as a whole was for the benefit of the infant, and, even assuming that the arbitration clause was not for his benefit, it was not open to him to treat the arbitration clause as an independent agreement; and, consequently, the proceedings under the writ must be stayed.

Observations of LORD ABINGER, C.B., and ALDERSON, B., in *Wood v. Fenwick* (1842) (10 M. & W. 204), *Clements v. London & North Western Ry. Co.* ([1894] 2 Q.B. 482), and *Heyman v. Darwins, Ltd.* ([1942] 1 All E.R. 337), applied.

AS TO SUBMISSIONS BY INFANTS, see HALSBURY, Hailsham Edn., Vol. 1, p. 625, para. 1073.

FOR THE ARBITRATION ACT, 1950, s. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 93.

Cases referred to:

- (1) *Clements v. London & North Western Ry. Co.*, [1894] 2 Q.B. 482; 63 L.J.Q.B. 837; 70 L.T. 896; 58 J.P. 818; 28 Digest 156, 168.
- (2) *Wood v. Fenwick*, (1842), 10 M. & W. 195; 11 L.J.M.C. 127; 152 E.R. 439; 34 Digest 41, 179.
- (3) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.

APPEAL by defendants to judge in chambers adjourned into court for judgment.

J. G. K. Sheldon for the defendants.

McKinnon for the plaintiffs.

Cur. adv. vult.

May 11. McNAIR, J., read the following judgment. This is an appeal by the defendants against the decision of Master BURNAND given on Mar. 5, 1953, by which he refused to stay further proceedings in the action pursuant to s. 4 of the Arbitration Act, 1950. In the action, which was commenced by writ dated Feb. 2, 1953, the first plaintiff, who is an infant suing by his father and next friend, and the second plaintiff, the father and next friend, sue the defendants under the terms of an apprenticeship deed dated Aug. 31, 1949, by which the infant plaintiff bound himself apprentice to the defendants to learn the craft of dental mechanics for a period of five years. The second plaintiff as the guardian joined in, and assumed obligations under, the deed.

In summary, the claim in the action is that the defendants failed and neglected properly or at all to teach or instruct the infant plaintiff or to cause him to be

taught or instructed as aforesaid and have repudiated the indenture and their obligations thereunder. Before taking any step in the action the defendants applied to the master to stay the proceedings under s. 4 of the Arbitration Act, 1950, relying on cl. 6 of the indenture which is in the following terms:

A “The parties to this indenture hereby jointly and severally agree that all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching these presents or the subject-matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to the National Joint Council for the Craft of Dental Technicians and each of the parties shall do all acts and things and execute all deeds and instruments necessary to give effect to the award to be made pursuant to this submission.”

B It being conceded or, if not conceded, established to my satisfaction, that this clause would (subject to the question of infancy) constitute a valid arbitration agreement within the meaning of s. 4, the onus lies on the plaintiffs to satisfy me that effect should not be given to it.

C Counsel on behalf of the plaintiffs argued (i) that as a matter of principle an agreement by an infant to submit to arbitration is voidable at the infant's election, and (ii) that, assuming that the arbitration agreement is binding on the infant, the court as a matter of discretion ought not to stay the action. In support of the first submission counsel relied on a passage in BACON'S ABRIDGMENT to the effect that

D “if an infant submits to arbitration, he may execute or avoid at his election as he may do all other his contracts”,

and a passage in COMYNS' DIGEST, as follows:

E “But an infant cannot submit to arbitrament; for his submission is void. Yet if an infant and a man of full age join in a submission, it is good; for though the infant cannot be obliged to stand by it, yet his submission is only voidable and he may agree or disagree to the award at his full age.”

Certain modern text-books take the same view. For example, in CHITTY ON CONTRACTS, 20th ed., p. 598, it is stated that:

F “He [the infant] is not bound by an agreement to refer a dispute to arbitration.”

Again, in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 1, p. 625, para. 1073, one finds the following view expressed:

G “With regard to infants, it would seem that a submission made by an infant could not be enforced against him during his infancy, and would be voidable by him on attaining his majority . . .”

On the other hand, in RUSSELL ON ARBITRATION, 14th ed., p. 18, after reference has been made to the passages in BACON'S ABRIDGMENT and COMYNS' DIGEST above quoted, the proposition is stated thus:

H “The result, therefore, seems to be that a submission to arbitration by an infant is voidable by him and cannot effectively be ratified, except when it relates to the supply of necessities, a reasonable contract of service, or a contract plainly for the infant's benefit, and then it is binding upon him even during infancy, and quite apart from any question of ratification.”

In my judgment, the question before me falls to be determined on two well-established principles—(i) that an infant, even during infancy, is bound by any contract which the court considers, after examining all its terms, is for the benefit of the infant, and (ii) that, if the contract as a whole is beneficial,

the infant cannot pick and choose and adopt those terms which are clearly beneficial while rejecting those terms which are not beneficial or not clearly beneficial: see *Clements v. London & North Western Ry. Co.* (1). The judgment of KAY, L.J. ([1894] 2 Q.B. 490) in that case sets out a quotation from COKE UPON LITTLETON, 172a, to the effect that there are some exceptions to the infant's inability to bind himself by contract as

"an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards."

The question for the court in any particular case of an apprenticeship deed is whether the agreement as a whole is for the benefit of the infant. In *Wood v. Fenwick* (2), the interlocutory observations of ALDERSON, B., and LORD ABINGER, C.B. (10 M. & W. 204), clearly indicate that an apprenticeship deed containing an arbitration clause might in their view be beneficial to an infant. Having examined the apprenticeship deed here in question, I am clearly of the opinion that the deed as a whole is beneficial as it provides for the instruction of the infant in the art of dental mechanics by an active practitioner at a wage and under conditions approved by certain professional and trade bodies of high standing. The deed itself requires registration with the National Joint Council for the Craft of Dental Technicians, a body on which, as I am informed, both employees and craftsmen are represented, and it is improbable that such a body would accept for registration any deed which was not beneficial to the apprentice. Even assuming, but not accepting, that the clause providing for the reference of disputes arising thereunder to the arbitrament of the joint council would, standing by itself, be considered not beneficial to the infant, he would, in my judgment, nevertheless be bound by it if the agreement as a whole was for his benefit, as I have found.

An attempt was made to meet this conclusion by the submission that the arbitration clause is to be treated as an independent agreement separate from the deed itself. The argument in support was based on decisions which have established that an arbitration clause may be effective even though the main contractual obligations have been discharged by breach or by frustration or by illegality. In my judgment, this argument is unsound and is not supported by the decision in *Heyman v. Darwins, Ltd.* (3): see, in particular, the speech of LORD MACMILLAN [1942] 1 All E.R. 347. Furthermore, in the present case, seeing that the infant is adopting the apprenticeship deed by suing on it, it is not open to him to reject the arbitration clause which forms part of it. As regards the question of discretion, I feel no hesitation at all in holding that, in my judgment, the arbitration clause should be given effect to. The nature of the dispute as shown by the statement of claim is essentially one fit to be adjudicated on, at any rate so far as concerns matters of fact and the practice of the art of dental mechanics, by a body such as the joint council. Adjudication before such a body would avoid the necessity of calling any expert evidence. Furthermore, the clause in no way involves an ouster of the jurisdiction of the court or in any way interferes with the jealous regard which the court observes for the interests of infants. In my judgment, the action should be stayed under s. 4 of the Arbitration Act, 1950, and the appeal allowed with costs.

Appeal allowed.

Solicitors: *Shaen, Roscoe & Co.* (for the defendants); *Agar-Hutton & Co.* (for the plaintiffs).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

PRACTICE NOTE.

MILLAR v. BUILDING CONTRACTORS (LUTON), LTD.

[QUEEN'S BENCH DIVISION (Slade, J.), May 15, 18, 1953.]

A Practice—Payment out of court—Application to take out money in court after final speeches, but before judgment—Indication by judge that he did not believe applicant's evidence—R.S.C., Ord. 22, r. 3.

B In an action under the Fatal Accidents Acts, the plaintiff made an application, after the final speeches had been made but before judgment had been given, to take out a sum of money which had been paid into court by the defendants. During the evidence the learned judge had indicated that he was minded to reject the plaintiff's evidence, and counsel for the plaintiff admitted that this indication had prompted the plaintiff's application.

HELD: in the exercise of its discretion under R.S.C., Ord. 22, r. 3, the court would refuse the application.

Cumper v. Potheary ([1941] 2 All E.R. 516), applied.

C AS TO PAYMENT OUT OF MONEY REMAINING IN COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 63, para. 102; and FOR CASES, see DIGEST, Practice, pp. 484, 485, Nos. 1638-1642.

For R.S.C., Ord. 22, r. 3, see the ANNUAL PRACTICE, 1953 Edn., p. 395.

Case referred to:

D (1) *Cumper v. Potheary*, [1941] 2 All E.R. 516; [1941] 2 K.B. 58; 110 L.J.K.B. 577; 165 L.T. 243; 2nd Digest Supp.

APPLICATION by the plaintiff in an action to take out money in court.

Stabb and Grieve for the plaintiff.

A. M. Lee for the defendants.

E SLADE, J.: My jurisdiction is contained in R.S.C., Ord. 22, r. 3. It is clear that I have jurisdiction to accede to the application of counsel for the plaintiff, and it is equally clear from the wording of the rule and from the judgment of GODDARD, L.J., in *Cumper v. Potheary* (1) ([1941] 2 All E.R. 520-523), that I have a complete discretion to grant or to refuse the application. That discretion must, of course, be exercised judicially. How ought I to exercise it in this case? I have no doubt whatever that I should refuse the application.

F It is obvious that the plaintiff thinks that, if I were to accede to the application, she is likely to recover more by accepting the amount in court than she is likely to recover as a result of my judgment. It is not only a question of costs; it is also one of the amount to be recovered, and I think it would be unfair to the defendants to allow the plaintiff to adopt an attitude which really, in colloquial parlance, amounts to: "Heads I win; tails I do not lose".

G If I were to accede to an application of this kind, it might encourage a plaintiff not to take the money out of court under R.S.C., Ord. 22, r. 2, not to make an application for leave to take it out at the commencement of the trial, or even in the course of the evidence, but to wait until the closing speeches, and then, if the judge should indicate that he was not impressed by the plaintiff's evidence, to say, at the eleventh hour and fifty-ninth minute: "Now is the time to make my application." I have no doubt whatever that in the exercise of my judicial discretion I ought to refuse this application.

H

Application refused.

Solicitors: *Lathom & Co.* (for the plaintiff); *Nelson Baldwin & Co.* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

R. v. ROBERTS.

[CARDIFF ASSIZES (Devlin, J.), March 23, 24, 1953.]

Criminal Law—Trial—Plea—Deaf mute—Right of defence to require general issue to be tried before issue of fitness to plead.

A defendant, who was indicted for murder, stood mute on being arraigned and was found by a jury to be mute by the visitation of God, having been deaf and dumb from birth. The Crown submitted that the issue whether or not he was fit to plead should be tried before the general issue, while the defence submitted that the general issue should be tried first.

HELD: if counsel for the defence thought that he could properly obtain for the defendant a verdict of Not Guilty, he was entitled to require that the general issue should be tried, and there could also be left to the jury the question whether the defendant was fit to plead.

Criminal Law—Evidence—Admissibility—Statements alleged to have been made by deaf mute.

The evidence for the prosecution, on an indictment for a murder, included certain statements alleged to have been made by the defendant, a deaf mute. The defence objected to this evidence on the ground that the defendant could not have made, and did not make, the statements. On the question whether the objection was to be tried by the judge or was a matter for the jury,

HELD: the judge would determine whether there was some evidence fit to go to the jury that the statements were those of the defendant, and, if he thought that there was, he would admit the statements, and let them go to the jury; if he did not think that there was, he would rule them out.

AS TO DEFENDANT STANDING MUTE ON ARRAIGNMENT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 149, 150, paras. 204, 205; and FOR CASES, see DIGEST, Vol. 14, p. 249, Nos. 2420-2434.

Cases referred to:

- (1) *R. v. Berry*, (1876), 1 Q.B.D. 447; 45 L.J.M.C. 123; 34 L.T. 590; 40 J.P. 484; 14 Digest 249, 2429.
- (2) *R. v. Steel*, (1787), 1 Leach 451; 168 E.R. 328; 14 Digest 249, 2434.
- (3) *R. v. Stafford Prison (Governor). Ex p. Emery*, [1909] 2 K.B. 81; 78 L.J.K.B. 629; 100 L.T. 993; 73 J.P. 284; 14 Digest 249, 2430.
- (4) *R. v. Pritchard*, (1836), 7 C. & P. 303; 173 E.R. 135; 14 Digest 249, 2425.
- (5) *R. v. Dyson*, (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n. (173 E.R. 135); 14 Digest 249, 2424.
- (6) *R. v. Jones*, (1773), 1 Leach 102; 168 E.R. 153; 14 Digest 249, 2421.
- (7) *Harrod v. Harrod*, (1854), 1 K. & J. 4; 23 L.T.O.S. 243; 69 E.R. 344; 27 Digest, Replacement, 67, 456.
- (8) *R. v. Turton*, (1854), 6 Cox C.C. 385; 14 Digest 250, 2458.
- (9) *R. v. Christie*, [1914] A.C. 545; *sub nom. Public Prosecutions Director v. Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 14 Digest 360, 3811.

TRIAL on an indictment for murder.

The defendant, on being arraigned, stood mute, and a jury was impanelled to try the issue whether he was mute by malice or by the visitation of God. Evidence, which was not contradicted, was called by the defence to show that he had been deaf and dumb from birth, and the jury found that he was mute by the visitation of God. Counsel for the Crown submitted that the evidence so far called raised a presumption of idiotism; that, *prima facie*, the accused was unfit to plead, and incapable of following the proceedings, of instructing counsel for the defence, or of challenging a juror; and that on the authorities these matters

(on which the Crown had further evidence to call) should be next tried. It was common ground that, if the accused were found unfit to plead, the learned judge must order his detention as a Broadmoor patient till Her Majesty's pleasure should be known. Counsel for the defence submitted that no presumption of idiotism arose, and that there was no precedent for trying the issue whether or not the defendant was fit to plead before the general issue on the application of the Crown, although such a course had been taken on an application by the defence. In reply to **DEVLIN, J.**, he intimated that there was a defence on the facts, and that he desired that the jury should try the defendant on the general issue.

Lloyd-Jones, Q.C., and J. J. Roberts for the Crown.

H. Edmund Davies, Q.C., S. J. H. Evans and Hywel ap Robert for the defendant.

DEVLIN, J.: In this case the defendant has been found to be mute by the visitation of God on the verdict of a jury, and principle and authority direct that, unless there is some reason for taking some other course, that finding should be the basis of entering a plea of Not Guilty on behalf of the defendant and the trial against him must proceed. But whether the defendant is found mute of malice or mute by the visitation of God, a question often arises at the beginning of a trial whether he is fit to plead, and it has been laid down clearly by the authorities that, if it be established that a man's mind is such that he would be incapable of understanding the nature of the proceedings, it would not be right that he should be put on his trial and convicted of the offence. Such a conviction could not stand. It is clear from the authorities that it is not merely defects of the mind which may bring about that result. Defects of the senses, whether or not combined with some defect of the mind, may do so, and the authorities are clear that, if there are no certain means of communication with the defendant so that there are no certain means of making sure that he will follow as much as it is necessary that he should follow of the proceedings at his trial, he should then be found unfit to plead.

In this case, the defendant being mute by the visitation of God, counsel on both sides are agreed, broadly speaking, that there are no certain means of communicating with him the procedure which takes place at this trial, and the question which has arisen is whether that is a matter which has to be determined by the jury in this case, as it is in most cases, at once, the jury being specially sworn for that purpose, or whether, in effect, it can be tried and determined by the jury together with the trial and determination of the general issue whether the defendant be Guilty or Not Guilty. Counsel for the defence wishes the general issue to be tried. He has not disclosed, as, of course, he is not bound to disclose, and, indeed, should not have disclosed, what the nature of his defence is. It may well be that the defence is that the prosecution witnesses do not make out a *prima facie* case, or it may be that the defence has other witnesses, not yet called, who, if believed, would destroy the case which the prosecution would otherwise have made out. Whatever it may be, it is a perfectly conceivable situation, though it never appears to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the defendant, may say: "I do not think the prosecution can make any case against the defendant. If it can, then, of course, I am in no position to defend it with his aid because he cannot instruct me and cannot tell his story. But, as the prosecution can make out no case, I am not prepared to let the matter go merely on the issue whether he is fit or unfit to plead". If that issue is tried, and is tried alone, and a verdict is returned by the jury that the defendant is unfit to plead, the court has no power except to make one order, *viz.*, that he should be detained as a criminal lunatic, or Broadmoor

patient as it is now called, until Her Majesty's pleasure be made known, which means, of course, for an indefinite period.

Counsel for the defence cannot be forced to accept that course for his client if, on a true view of the facts, he thinks that he can obtain for his client properly a verdict of Not Guilty. Nor can he be forced to elect. He must be entitled to retain his right to say that the defendant is not in a position to give him instructions and, therefore, he cannot put the defendant in the witness box to tell his own story. He cannot be forced to say to himself: "Shall I play for safety and obtain a verdict whereby the defendant is detained as a criminal lunatic, or shall I, in effect, gamble on the chance of my being able to get him off altogether, with the knowledge that if my gamble fails he will be convicted of murder and there is only one sentence which the court can pass". Though, therefore, it does not appear to be a position which has ever arisen before, and counsel have told me that they have found no authority on the matter, it seems to me that there must be a procedure which would enable counsel for the defence to have the advantage of taking both points. There cannot be any doctrine in a criminal case which compels counsel to elect, and, if there was no such procedure, I think that it would be necessary to invent one, because to insist on the issue being tried of fitness to plead or not might result in the grave injustice of detaining as a criminal lunatic a man who was innocent, and, indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or was not—and investigations which might have led to the apprehension of the true criminal would not take place.

So far from there being any authority which would compel me to require that procedure to be adopted—and it is only if there was clear authority to compel me to do it that I should be inclined to take that course—I think the authorities indicate that there is a procedure which can properly be followed in a case of this type. The earlier authorities all deal with the principles on which a jury should be charged. I have not investigated them, but counsel for the defence told me, without contradiction, I think, that in each of the earlier authorities the points had been taken by the defence, and, of course, it may very well be, and most frequently will be, that the defence were in the position of having no answer to a *prima facie* case and no ground to urge why the law should not take its course, except the ground that the defendant would be incapable of understanding the proceedings at the trial and incapable, therefore, of putting up any defence. But in *R. v. Berry* (1), which came before the Court for Crown Cases Reserved in 1876, a different course was followed. Whether it was followed designedly or not, or whether it was followed because it was thought desirable that there should be some inquiry into the general issue, I do not know. But it is plain from the case that, although a question arose whether or not the prisoner was fit to plead, that question was not submitted to the jury until the prosecution had proved their case, when it was submitted to them, they being asked for a special verdict in conjunction with the general issue. That case was also one where the jury had been sworn to ascertain whether the prisoner stood mute of malice or by the visitation of God, and they found that the prisoner was mute by the visitation of God. The trial proceeded because it was thought that a brother-in-law of the prisoner might be able to communicate with him by means of signs. The learned chairman of the quarter sessions then put two questions to the jury: (i) whether they found the prisoner Guilty or Not Guilty on the indictment, and (ii) whether, in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings. The verdict of the jury was:

"We find the prisoner Guilty on the evidence; and we also find that

he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings."

A Case was stated, and the Court for Crown Cases Reserved found on that evidence that the prisoner could not be convicted, although the jury had found him Guilty, since they had also found that he was not capable of understanding and had not understood the nature of the proceedings. On that verdict the court held that the proper course was that he should be detained under the Criminal Lunatics Act, 1800, s. 2, as the finding of the jury amounted in point of law to a finding of insanity.

I think that *R. v. Berry* (1) is the first reported case in which the two issues, the general issue and the issue of fitness to plead, were put before a jury together, and it is significant that there is nothing to be found in the judgments in *Berry's* case (1) which expresses or implies the slightest criticism of that procedure. In the course of the argument KELLY, C.B., said (1 Q.B.D. 449):

"But here the jury have found also that the prisoner was incapable of understanding what passed at the trial, and can it be contended that he might, under such circumstances, be convicted? The question which ought to have been put to the jury in *R. v. Steel* (2) was properly put in the present one."

Although KELLY, C.B., was not dealing in terms with the time when the question was put, it would be a curious observation to make if his view was that, although the question was properly put, the procedure by which it had been put was entirely wrong and the issue ought to have been tried earlier and separately. The court treated the verdict of the jury so returned as a faulty verdict because, on the question being raised whether there was any authority for detaining the accused as an insane person, KELLY, C.B., relied on the finding of the jury as justifying that course, since, he said (*ibid.*, 451), it amounted in point of law to a finding of insanity.

R. v. Berry (1) and all the earlier cases of any importance were considered by a Divisional Court in *R. v. Stafford Prison (Governor). Ex p. Emery* (3). In that case an accused person, who had been found by a jury to be unfit to plead, was detained under the Criminal Lunatics Act, 1800, s. 2, and the validity of his detention was challenged by a writ of habeas corpus, the question which the court had to determine being whether deafness and inability to read and write and, therefore, to be communicated with, was equivalent, for the purposes of the wording of the Act, to a finding of insanity, and they held that it was. LORD ALVERSTONE, C.J., reviewed the earlier authorities, viz., *R. v. Steel* (2), *R. v. Pritchard* (4) before ALDERSON, B., and *R. v. Dyson* (5) before PARKE, J., in all of which cases the issue had been put to the jury without the general issue being gone into. He then referred to *R. v. Berry* (1), and recited the facts of that case, again without any criticism of the procedure which had been followed. At the end of his judgment he followed the earlier decisions in these terms ([1909] 2 K.B. 87):

"That [*R. v. Berry* (1)] is a decision which approved of and adopted the view of the law taken by PARKE, J., and ALDERSON, B., years before; and, following and adopting those decisions, I think that CHANNELL, J., in the present case laid down the right test of insanity for the purpose of the Act of 1800 and rightly made an order for the prisoner's detention during His Majesty's pleasure."

That shows that LORD ALVERSTONE, C.J., took the view that all these authorities were laying down one doctrine, the difference between them, viz., the time when the verdict was taken, being only, I think, a difference of procedure.

In cases where the defence is not going to challenge that the prosecution has a *prima facie* case, and has no evidence which might induce a jury to reject the evidence for the prosecution, then the convenient course is to let

the issue be tried at once. I can find no authority in the cases cited which would prevent counsel for the defence, who wishes to test the prosecution's case on the general issue, from having the right to do so, at the same time preserving all those rights which flow to the defence from the fact that the defendant is a person, if it be so established, who is incapable of being communicated with or from instructing counsel for his defence. Were it otherwise, I think that the gravest mischief and injustice might follow. The defence might wish to tender a witness who, if he was believed, could prove that the defendant was ten miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, counsel for the defendant should be prevented from laying matters of that sort before the jury, and so achieving for his client, if he can, a verdict of Not Guilty.

In the course of giving this ruling, I have not concerned myself with the question whether it is right for the prosecution to begin such matters, i.e., whether the burden is on the prosecution or on the defence to establish unfitness to plead. That is a mere matter of presumption one way or the other. The issue here is the fundamental one, not whether it is right or wrong for one side to take the point first—whether the prosecution should take it or whether the defence should take it—but, in effect, whether the position of the defence can be so put that learned counsel has to choose between fighting the general issue or dealing with the issue of unfitness to plead. On that fundamental question, I think that the submission made to me by counsel for the defence is the right one. The consequence of that, therefore, is that I shall not now swear the jury to try separately the question whether or not the defendant is fit to plead. They will be sworn merely to try the general issue.

[Counsel were asked by HIS LORDSHIP whether, in the circumstances, any difference of opinion existed between them as to what matters should be put to the jury on that, and what form of verdict they should be asked to return. They both intimated that there was no objection to the form of questions to the jury, or to the form of verdict, in *Berry's* case (1). HIS LORDSHIP continued:] I do not see why I should not leave the questions to the jury in the form in which they were left in *Berry's* case (1), but, if the jury return a verdict of Guilty, I shall take the course which the Court for Crown Cases Reserved took and make the order which that court said was the proper order to be made.

The indictment was then read, and a plea of Not Guilty entered by direction of the learned judge. Leading counsel for the defence did not desire any part of the proceedings to be interpreted to the defendant and DEVLIN, J., so directed, observing that, if there were no certain means of communicating with the defendant, there was no possible advantage in embarking on a doubtful means. The trial then proceeded. The Crown conceded that, unless certain purported statements by the defendant came before the jury, they could not be asked to convict. Evidence of such statements was, therefore, called first, at the suggestion of DEVLIN, J. It was debated whether an objection to this evidence that the defendant could not have made, and did not make, the purported statements was triable by the judge or was a matter for the jury. Objections going to the voluntary character of the purported statements (such objections being always triable by the judge) were also raised.

DEVLIN, J., gave the following ruling. I shall inquire into the two questions whether the statements which are alleged to have been made by the defendant were, in fact, his statements, and, if so, whether they were made voluntarily and in accordance with the Judges' Rules, and I shall reach that conclusion of fact on the latter question in the ordinary way. On the former question, it seems to me, subject to anything which counsel for the defence may say, that it would be right that, if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and

let them go to the jury. If I do not think that there is any evidence fit to go to the jury that they are his statements, I shall rule them out.

[The Crown, with the approval of HIS LORDSHIP, offered no further evidence on the indictment. Evidence was heard on the circumstances of the defendant's detention, and the jury, by direction, found the defendant Not Guilty.]

Solicitors: *Director of Public Prosecutions* (for the Crown); *Myer Cohen & Co., Cardiff* (for the defendant).

[*Reported by HYWEL AP ROBERT, ESQ., Barrister-at-Law.*]

JONES v. JONES.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood and Karminski, JJ.), May 4, 1953.]

Justices—Husband and wife—Maintenance—Summons for maintenance on ground of desertion—Defence of reasonable and honest belief by husband in wife's adultery—Standard of proof.

C Per KARMINSKI, J.: The defence to a charge of desertion of reasonable belief in a wife's adultery is one which in most circumstances is not susceptible of easy proof. Nor should it be. It falls into the category of charges which may be easy to make and less easy to disprove. I believe it to be implicit that in cases where the defence is reasonable belief the defence should be fully and completely proved, and that, unless it is so proved, it should be rejected.

D The husband complained to the wife about her association with a police sergeant and at about 1.30 a.m. on Aug. 1, 1952, he saw her come out of a garage and run home by a circuitous route. Shortly afterwards he saw the sergeant also walk away from the garage. The husband spoke to the sergeant, but did not ask him if he had been speaking to his wife. Later that day the husband went to see a police inspector, the sergeant's superior officer, and made a statement to him. The husband thereupon left the matrimonial home on the ground that the wife had so conducted herself as to induce in him a reasonable belief in her adultery. On a summons by the wife alleging that the husband had wilfully neglected to provide her with reasonable maintenance,

F HELD: there was no evidence on which a court could find that the husband had proved that he had a bona fide and reasonable belief in his wife's adultery; the statement to the police inspector was inadmissible and could not constitute corroboration of the husband's allegation; and the wife was entitled to an order for maintenance.

Observations of SIR RAYMOND EVERSHERD, M.R., in *Allen v. Allen* ([1951] 1 All E.R. 731), applied.

G AS TO WILFUL NEGLECT TO MAINTAIN, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 701-703, Nos. 6703-6721.

Cases referred to:

- H (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest, Replacement, 367, 3040.
 (2) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest, Replacement, 84, 633.
 (3) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
 (4) *Chilton v. Chilton*, [1952] 1 All E.R. 1322; [1952] P. 196; 116 J.P. 313.

APPEAL by the wife against the dismissal by the justices for the petty sessional division of Bangor on Sept. 18, 1952, of her complaint that her husband had wilfully neglected to provide her with reasonable maintenance.

The parties were married on Aug. 26, 1939, and there were three children of the marriage. At the hearing before the justices the husband stated that he had, after the war, spent some twelve months abroad in the services and that on his return he had cause to complain of his wife's association with a police sergeant; that on one occasion he, the husband, had noticed the sergeant ring his bicycle bell as he passed in the street which led him to believe that the sergeant was trying to attract the attention of his wife; that he had seen his wife speaking to the sergeant in the street; that he had heard something from neighbours; and that on Aug. 1, 1952, about 1.00 a.m. he was awakened by a child crying and found his wife not in her room, that he went out, saw the houses of two neighbours in darkness and waited on the corner of a street near a garage, that he saw their dog run in front of the garage, that he saw his wife come from the garage door and run by a circuitous route home, and that shortly afterwards he saw the police sergeant walk away, that he spoke to the police sergeant but did not tax him with having been speaking to his wife, and that on his return home his wife was lying fully clothed on her bed, looking terrified, and that she had explained that she had taken a circuitous route home because someone had thrown something at her and frightened her. The wife in evidence stated that, on the night in question, she had taken the dog out and visited the house of one of the neighbours where she had listened to a wireless programme for over an hour, that she then discovered that the dog had escaped, that she went to look for it and found it near the garage. The neighbour was called, but the justices found that her evidence did not assist one way or the other. It was common ground that there was a quarrel when the husband returned home in the early hours of Aug. 1 and that later that day he left home. On that same day the husband also made a statement to a police inspector, the sergeant's superior officer.

On those facts the justices found that the husband had a bona fide belief, induced by the wife, that she had committed adultery, and dismissed her summons. The wife now appealed.

Mars-Jones for the wife.

B. G. Irvine for the husband.

COLLINGWOOD, J., stated the facts and continued: It is well established by *Glenister v. Glenister* (1), and a number of subsequent cases in which that decision has been approved, that if a wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, a husband becoming aware of the facts and honestly drawing that inference and leaving his wife, ought not to be held to have left her without reasonable cause. Furthermore, with reference to the question of a husband's bona fide and reasonable belief in his wife's adultery, I will refer to a short passage ([1951] 1 All E.R. 731) at the conclusion of the judgment of **SIR RAYMOND EVERSHED, M.R.**, in *Allen v. Allen* (2):

" . . . it seems to me that, if a man says: 'I bona fide and reasonably believe that my wife is an adulteress' as a defence in proceedings of this character, the result is neither irrational nor unjust if he be regarded as saying this: 'I say and allege that the evidence and materials in my possession are such that on them a court should and would find that adultery has been committed'."

Now, let me apply that criterion to the evidence before the justices in this case. I have already spoken of the association between the wife and the police sergeant so far as the conduct of the wife was concerned. Assume that she had been speaking to him in the street on one occasion (she can hardly have been held responsible for the ringing of a bicycle bell by the sergeant), and assume that on this occasion she had come at this hour of the morning from the vicinity of the embrasure by the garage door, the justices say that they

"considered that the complaint made by the husband to the police inspector on the first opportunity which he had was a material factor in his favour . . . After seeing and hearing both parties the justices accepted the husband's evidence in general and particularly his version of what he said he saw on the night of July 31, 1952. The justices came to the conclusion on the facts presented that the husband had a bona fide belief, induced by the wife, that she had committed adultery."

- A It is difficult to understand to what the first of those statements refers. These events happened in the early morning of Aug. 1, and the husband did, on Aug. 1, go to the police inspector, the superior officer of the sergeant, and somehow or other a statement was put in, which was a statement made to that officer. Clearly it was not admissible in evidence. That is conceded here today.
- B Equally clearly it was not objected to. But how the justices can have decided that that complaint, made to the police inspector on the first opportunity which the husband had, was a material factor in his favour, I must confess I am quite unable to see. It looks as though they meant that it afforded corroboration of his evidence with regard to the events of the early morning of Aug. 1. Of course, that is not even argued. It cannot possibly afford such corroboration.
- C I can only think that they are confusing the matter with a quite different class of case in which the fact that a complaint is made to a suitable person at the earliest opportunity after an offence has been committed is admissible as showing consistency of conduct on the part of the complainant, but what that has to do with this case I am quite unable to see. Taking the evidence of the husband at its highest, in my opinion, it is quite impossible to say that it comes anywhere near the test laid down by the Master of the Rolls in the passage to which I have referred ([1951] 1 All E.R. 731). Further than that, according to LORD MERRIMAN, P., in *Glenister v. Glenister* (1) ([1945] 1 All E.R. 518):

- E " . . . the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

In his cross-examination in the present case the husband was asked a number of questions bearing on his state of mind, and he said in answer to those questions:

- F "I am contesting the case because I caught her out with Sergeant — at twenty to two in the morning, and, in my opinion, that is an offence. I left home because she ran away and there was a person whom I had continually told her about. I cannot say whether he had committed adultery with her."

- G He does not there suggest that he entertained a suspicion of his wife's adultery. What he is saying is: "I had warned her about not talking to this man before, and I found that she was disobeying me, and disobeying me at this hour in the morning, and I think that is an offence". In my opinion, it is quite impossible to say that the wife had given reasonable grounds for belief in her adultery, even if the husband had gone to the length of saying that he entertained such a belief.

- H In my opinion, the justices here have misdirected themselves as to the requirements to comply with the decision in *Glenister v. Glenister* (1), and they have misdirected themselves with regard to the statement to the police inspector. I am not losing sight for one moment of the oft-repeated principles laid down by the House of Lords in *Watt (or Thomas) v. Thomas* (3). I think this case falls clearly within the third of the principles enunciated by LORD THANKERTON in that well-known judgment, and for that reason the finding cannot stand. We have not the material before us on which to decide the amount of maintenance which should be awarded to the wife, and, therefore, it will be necessary

for the matter to be remitted to the justices for them to ascertain that amount. We do find, however, wilful neglect to maintain.

KARMINSKI, J.: I agree. This is a case where the justices expressed a preference for the version of the facts given by the husband over that given by the wife, and I agree with my Lord that their conclusions on that finding are unsatisfactory. They found that there was a material factor in favour of the husband, viz., the fact that his complaint about the behaviour of his wife and the police sergeant was made to the police inspector at Bangor on the first available opportunity. The statement made by the husband to the police inspector seems to have been put in in re-examination, no objection was taken to it, and it reached the file of this court. But how that statement can in any way be a material factor in the husband's favour, I am unable to understand. Be that as it may, it appears, on reading the justices' reasons, to have influenced them, and if that is right, and I believe it is, then we are not precluded, as my Lord has pointed out, from questioning, and, indeed, dissenting from, the justices' finding on the facts. But even if the facts as found by the justices were right, I am satisfied that they misdirected themselves seriously as to the requirements of the law in cases of this kind. In their reasons they say

"The leading case of *Glenister v. Glenister* (1) was cited by the husband's solicitor in his closing address . . . The justices retired and traversed the evidence. They called in their clerk and asked for his guidance regarding the authority quoted. He read out the headnote and the judgments, and also read out the case of *Chilton v. Chilton* (4), which he advised was relevant to the present case."

I do not know from that what advice the clerk gave, or whether such advice was accepted or not. The principle of law is clear enough, and has often been stated both in this court and in the Court of Appeal. I have considerable doubt whether the justices really understood it, or how, if they did, they could have come to the conclusion at which they arrived.

I desire to add one cautionary note about cases of this kind. Adultery is a defence to charges of desertion and of wilful neglect to provide reasonable maintenance. So is a reasonable belief, honestly maintained, by a husband in his wife's adultery. In this case, no affirmative defence of adultery was raised. The omission is not, perhaps, surprising, since, on the evidence before the justices, it would appear to have been quite impossible to have presented even a *prima facie* case of adultery. The husband, therefore, was driven to rely on the defence of reasonable belief in his wife's adultery. In my view, the defence of reasonable belief in a wife's adultery is one which in most circumstances is not susceptible of easy proof. Nor should it be. It falls into the category of charges which may be easy to make and less easy to disprove. Here the husband produced virtually no evidence on which a charge of reasonable belief could be founded. Nevertheless, before the justices he succeeded. I believe it to be implicit that in cases like this, where the defence is reasonable belief, the defence should be fully and completely proved, and that unless it is so proved it should be rejected.

I agree with my Lord that this appeal must be allowed, that the husband be found to have wilfully neglected to provide his wife with reasonable maintenance, and that the matter be remitted to the justices to establish the amount of maintenance to be awarded.

Appeal allowed.

Solicitors: *Rhys Roberts & Co.*, agents for *Price White & Co.*, Bangor (for the wife); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PRACTICE NOTE.

RASPIN v. RASPIN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 6, June 8, 1953.]

Divorce—Adultery—Evidence—Hotel bill and register—Evidence of hotel witness.

A The husband stated to the wife that he had committed adultery and showed her a hotel bill, and on Mar. 3, 1953, the wife filed a petition for divorce on the ground of the husband's adultery at the hotel with a woman unknown. At the hearing the hotel register was produced and a waiter gave evidence that he had seen the husband in bed with a woman who was not the wife. The suit was adjourned for further inquiries to be made, and it was discovered that after the date of filing the petition the husband had committed adultery with a married woman.

B HELD: where there was no evidence of a background of an adulterous association the court was not always prepared to make a finding of adultery where a hotel bill and a hotel register were produced and a hotel witness was called to give evidence, but in the circumstances of the present case C the court was satisfied that the husband had committed adultery and the wife was entitled to a decree.

AS TO DIVORCE ON THE GROUND OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-665, paras. 972-978; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 311-332, Nos. 2591-2758.

D UNDEFENDED PETITION by the wife for dissolution of the marriage.

The parties were married in 1937, and there were two children of the marriage. In January, 1953, the wife left the husband after he had stated to her that he had committed adultery and had shown her a hotel bill. On Mar. 3, 1953, the wife filed a petition for divorce on the ground of the husband's adultery at the hotel with a woman unknown, and prayed for the discretion of the court to be exercised in her favour. On May 6, 1953, the petition, which was E undefended, was heard by KARMINSKI, J., the hotel register was produced, and a waiter from the hotel gave evidence that he had seen the husband in bed with a woman who was not the wife. KARMINSKI, J., adjourned the case for further inquiries to be made by the wife's solicitors, and, as a result, it was discovered that after the presentation of the petition the husband had F committed adultery with a married woman. On June 8, 1953, the hearing of the petition was resumed.

Sheen for the wife.

In the course of the proceedings,

G KARMINSKI, J.: Where there is no background of an adulterous association I am not always prepared to make a finding of adultery where a hotel bill has been produced and a witness from the hotel is called to say that two people were in the bedroom together. I am speaking only for myself, but where solicitors want to get a decree in that sort of case they have to satisfy me of a background. In this case, until I showed signs of anxiety, nothing was done. Then steps were taken to find out what was the true position. H I then discovered that the husband had committed adultery with a married woman—on one night at Scarborough and on a subsequent occasion he spent the night with her in his own home. He may be living with her openly. I do not know, and I am not concerned with that, but when one comes to examine the case, the realities seem to me to be entirely different from the case as originally presented to me.

Sheen: These allegations are of adultery with the married woman after the date of the petition. At that date the wife's solicitors, although they did make

inquiries, were not in a position to name a woman. They then had no evidence other than the hotel evidence. According to the wife's evidence, she had no reason to suspect anything before that time, and one would assume, in the normal course of things, that the association between the husband and the married woman would probably take a little time to develop into one in which adultery was committed.

KARMINSKI, J.: I repeat that this case has given me some anxiety A
because all the facts as we now know them were not available at the last hearing. I appreciate that some of them may have come into existence not very long before the first hearing of the suit. Sometimes when a cause is presented in this way the suspicions of the court are aroused that the adultery, so called, committed at a hotel is merely a cover to screen what I may term the real adulterous association with a known woman. I have little doubt that that is B
what the husband wanted in this case. I am prepared to exercise my discretion in the wife's favour, and I shall grant a decree nisi because I am satisfied now that the husband has committed adultery.

Decree nisi.

Solicitors: *Blundell, Baker & Co.*, agents for *Wright, Atkinson & Pearson*,
Keighley (for the wife). C

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

Re ABERCONWAY'S SETTLEMENT TRUSTS. McLAREN *v.* ABERCONWAY (BARON) AND ANOTHER. SAME *v.* SAME. D

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
May 15, 18, 19, 1953.]

Settlement—Powers of tenant for life—Limitation tending to discourage exercise of powers—Application of income under personalty settlement for benefit of settled land—Limitation over on land ceasing to be settled—Sale of settled land—Settled Land Act, 1925 (c. 18), s. 106 (1) (b). E

A settlor, by a settlement (the Bodnant settlement) dated Sept. 15, 1921, settled the Bodnant estate (except Bodnant Hall and the gardens, pleasure grounds and demesnes usually occupied therewith) on trust for A. for life with remainder to his issue. By a further settlement, dated Feb. 22, 1926, the settlor directed the trustees to hold certain shares on trust for sale and to invest the proceeds and to hold the shares and investments on the trusts of the Bodnant settlement, but provided that, if the gardens at Bodnant should be settled on, or acquired by the trustees on, the trusts of the Bodnant settlement, then "during so much of the lives of the children and grandchildren of the settlor living at the date of this indenture and the lives and life of the survivors and survivor of them and the period of twenty-one years from the death of such survivor as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee (which portion of the said period of lives and years is hereinafter referred to as 'the prescribed period') the trustees or trustee shall with the consent of the person or persons for the time being beneficially entitled to the possession or receipt of the rents and profits of the freehold hereditaments settled by the Bodnant settlement of 1921 apply F
the income of the premises hereby settled and of the investments and property from time to time representing the same (all of which are together hereinafter referred to as 'the settled fund') in or towards securing and assisting and developing the use of the said gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest . . ." It was further declared that as from the expiration of the prescribed period the settled fund should be held on G
H

other specified trusts. On Jan. 4, 1933, the settlor died, and by her will directed that Bodnant Hall and the gardens, pleasure grounds and demesnes forming part of the Bodnant estate not settled by the Bodnant settlement should be held on substantially the same trusts as were declared by the Bodnant settlement. On Nov. 11, 1949, the tenant for life sold five-sixths of the gardens to the National Trust.

A HELD: on the sale to the National Trust of the greater part of the gardens at Bodnant it could no longer be said that "the said gardens at Bodnant" remained settled on the trusts of the Bodnant settlement within the meaning of the settlement of 1926, and the "prescribed period" then ceased; (DENNING, L.J., dissentiente) as the Settled Land Act, 1925, s. 106 (1) (b), did not operate to render void directions which determined provisions which were neither for the benefit of any cestui que trust nor in strictness ancillary to the enjoyment by the cestui que trust of the trust property, the provisions terminating the prescribed period in the event which had happened were not void; and, therefore, the shares should be held on the trusts operative on the cesser of the prescribed period.

B *Re Simpson* ([1913] 1 Ch. 277) and *Re Patten* ([1929] 2 Ch. 276), approved.

C Decision of DANCKWERTS, J. ([1952] 2 All E.R. 981), reversed.

AS TO PROHIBITION AGAINST EXERCISE OF SETTLED LAND ACT POWERS, see HALSBURY, Hailsham Edn., Vol. 29, p. 697, para. 976; and FOR CASES, see DIGEST, Vol. 40, pp. 743, 744, Nos. 2736-2752.

Cases referred to:

D (1) *Re Simpson*, [1913] 1 Ch. 277; 82 L.J.Ch. 169; 108 L.T. 317; 40 Digest 752, 2819.

(2) *Re Patten*, [1929] 2 Ch. 276; 98 L.J.Ch. 419; 141 L.T. 295; Digest Supp.

(3) *Re Burden*, [1948] 1 All E.R. 31; [1948] Ch. 160; [1948] L.J.R. 631; 2nd Digest Supp.

APPEAL by the second defendant, one of the trustees of a settlement made on Oct. 28, 1909 (called "the Prestatyn settlement"), and CROSS-APPEAL by the first defendant, the tenant for life under a settlement dated Sept. 15, 1921, from an order of DANCKWERTS, J., dated Nov. 5, 1952, reported [1952] 2 All E.R. 981, made on an originating summons issued to determine whether on the true construction of a settlement dated Feb. 22, 1926, made by Lady Aberconway, and in the events which had happened, (i) the period therein defined as "the prescribed period" had expired, and, if so, on what date it expired; and (ii) the declaration therein contained providing that after the expiration of the prescribed period the settled fund should be held on the trusts declared by the Prestatyn settlement of 1909 was deemed to be void under the Settled Land Act, 1925, s. 106. DANCKWERTS, J., held that the prescribed period had come to an end, but that the limitation over tended to discourage the sale of the gardens by the tenant for life and was, therefore, void.

G *C. Montgomery White, Q.C.*, and *Burnett-Hall* for the second defendant, a trustee of the Prestatyn settlement.

Sir Lynn Ungood-Thomas, Q.C., and *H. E. Francis* for the first defendant, the tenant for life in possession, Lord Aberconway.

Rawlence for the plaintiff, a trustee of the settlement of 1926.

H SIR RAYMOND EVERSHED, M.R.: The problem to which this appeal gives rise is one of considerable difficulty and springs certainly from most unusual circumstances. It relates to certain settled property in Wales, which may be called for present purposes the Bodnant estate, of which the present Lord Aberconway is the tenant for life. The first settlement, however, that it is material to note does not relate to the Bodnant estate and has been called the Prestatyn settlement, which was made on Oct. 28, 1909. The settlor in that case, as in the case of all the subsequent settlements, was Lady Aberconway,

the mother of the present Lord Aberconway. The trusts of the Prestatyn settlement have not been stated, and for the purposes of this appeal they are irrelevant. It is sufficient that on the date I have mentioned that settlement was made, certain land being conveyed to trustees on trust for sale. The second defendant and the appellant in this court, Raymond Patrick Johnson-Ferguson and the first defendant, Lord Aberconway, are the present trustees of that settlement.

I pass to the next settlement, which has been called the Bodnant settlement, made on Sept. 15, 1921, again by Lady Aberconway. That was a realty settlement of the Bodnant estate of which (as I have earlier stated) Lord Aberconway, the first defendant, is the present tenant for life in possession. It is, however, of the essence of the present case that the subject-matter of that settlement excluded from its scope the mansion house itself and certain other property, including the gardens and park-land which were occupied therewith. It does not appear that the extent of those exclusions was precisely defined in the settlement.

I now come to the third settlement, which has been called the Garden settlement, the construction and effect of which is the matter which the court has to determine. That third settlement was again a settlement made by Lady Aberconway, and was dated Feb. 22, 1926. Its subject-matter was a number of shares, but for present purposes it may be conveniently referred to as a settlement of a capital sum of £20,000. I shall come back later to examine more closely the exact language of the settlement, but putting it briefly the settlement was directed to these purposes. It was stated that until the gardens, pleasure grounds and certain other property mentioned in the settlement should become subject to the trusts of the Bodnant settlement of 1921, or to trusts having the like effect, the £20,000 should be held by the trustees of the settlement as though they were capital moneys which had arisen under the Bodnant settlement. So far, then, and until the event contemplated occurred, the tenant for life of the Bodnant settlement (now Lord Aberconway) would be entitled to receive the income of the £20,000. But on the happening of the stated event, viz., that of the gardens, etc., becoming subject to the trusts declared by the Bodnant settlement, a trust of a very particular character came into operation. The father of Lady Aberconway was a Mr. Pochin, who had been an ardent and expert horticulturist, and whose tastes had been inherited by his daughter. In truth, the gardens at Bodnant had by that time become what may be called show gardens, in that plants and shrubs of beauty and rarity had been grown, and from time to time horticulturists and others were accustomed to visit these gardens. The particular trust to which I have alluded was a trust whereby Lady Aberconway hoped that the income of the £20,000 could be applied in promoting the continuity of these gardens as a horticultural exhibit (if I may use that phrase) of notability. Such a purpose is not, I assume (and the settlor obviously assumed), a charitable object, and, therefore, the trusts for promoting the continuity of that enterprise were limited, first by reference to a period which would be within the so-called rule against perpetuities. There was, however (though I do not now pause to state it), a limitation on the extent of that period. At the end of the period so limited the settlor provided that the £20,000 should not revert to the Bodnant settlement as capital moneys, but should go over so as to become part of the subject-matter of the first (1909 or Prestatyn) settlement.

I have said enough to show that it was the settlor's intention, plainly expressed, that from the time that the gardens became settled property thenceforward the tenant for life of the Bodnant settlement should, in no circumstances, be entitled to enjoy the income of the settled £20,000 as part of the subject-matter of the Bodnant settlement. It will have been appreciated from what I have already said that at the date of the Garden settlement in 1926 these gardens and the

mansion house itself were not settled property; they were the absolute property of Lady Aberconway. By her will, made on Dec. 2, 1931, she settled the mansion house and these gardens and the other properties excluded from the Bodnant settlement. There is no question but that, subject to certain provisions relating to a mausoleum (which I need not further mention), the terms of her will were such as to be for material purposes identical with the terms of the Bodnant settlement of 1921.

- A** Lady Aberconway died on Jan. 4, 1933, and in the result the gardens and the mansion house then in effect became part of the Bodnant settled estates, and at the same time the special trust specified in the third (or Garden) settlement came into operation. To make the narrative complete, it should be stated that, at the time when Lady Aberconway died, the first Lord Aberconway was still alive. He died in January, 1934, and the present Lord Aberconway
- B** thereupon succeeded as tenant for life. In fact, in October, 1934, Bodnant Hall and the gardens and the rest of the Bodnant settled estates became vested in the first defendant (the present Lord Aberconway) as tenant for life. The next event, and the only other event which need be stated, is that in 1949, in the exercise of his statutory powers of sale, the tenant for life sold to the National Trust the greater part (approximately five-sixths) of the gardens which
- C** had been cultivated and developed in the way I have already stated. The result has been to leave subject to the Bodnant settlement trusts only a relatively small part of the whole of what had originally been these show gardens. But it is quite clearly proved in evidence that, owing to increasing costs, the whole income of the £20,000 is required and is usefully spent in maintaining only the retained part of these gardens.

- D** The problem which has arisen is this: first, according to the construction of the third (or Garden) settlement of 1926, has the prescribed period come to an end as a result of the sale of the bulk of the gardens to the National Trust? If it has, then, according to the language of the settlement, the result will be that the £20,000 will go over so as to be held by the Prestatyn settlement trustees on the trusts of the Prestatyn settlement. If it has not come to an end, then
- E** *prima facie* the particular or special trust continues, and the trustees will, no doubt, apply the income of this fund, or so much of it as they think fit, towards the cultivation and otherwise in regard to the retained part of these gardens. But a second point has been taken, viz., that, if according to the true construction of the Garden settlement the effect of the sale to the National Trust is to terminate the "prescribed period" in the Garden settlement, then the
- F** relevant provision of the settlement is a provision or disposition which offends against the terms of the Settled Land Act, 1925, s. 106, and must, therefore, be treated as void. On that view, it is argued, the result is either that the trustees of the Garden settlement continue to apply the income of the £20,000 for the retained part of the gardens, or that the £20,000 will again become part of the Bodnant settlement funds, the income of which will be enjoyed by the
- G** present tenant for life, Lord Aberconway.

- DANCKWERTS, J., came to the conclusion on the first question that, according to the true construction of the Garden settlement, the "prescribed period" had come to an end as a consequence of the sale, but (on the second question) he thought that the provision of the Garden settlement which caused it so to do was offensive to s. 106, and concluded in favour of the first alternative
- H** consequence which I have mentioned, viz., that the trustees continued to be entitled to the possession and the disposition of the income of the £20,000. In his view, they were entitled to apply the income of the fund to the retained part of the gardens, and, perhaps, also (though he did not so decide) towards the cultivation of that part of the gardens which had been sold to and was the property of the National Trust. Against that decision the second defendant (one of the trustees of the Prestatyn settlement, as I have indicated) has appealed.

I must now refer in detail to the terms of the Garden settlement, but I will preface my references by saying that, in my opinion, the view of its construction taken by DANCKWERTS, J., was correct. The settlement first recited the existence of the Prestatyn settlement, and next the existence of the Bodnant settlement, using as regards the latter this phrasing:

"Whereas by an indenture dated Sept. 15, 1921, [and then the parties to it are stated] certain hereditaments in the counties of Denbigh and Carnarvon known as the Bodnant estate (except the messuage or mansion house known as Bodnant Hall with the gardens pleasure grounds and demesnes usually occupied therewith and the home farm adjoining or near thereto) were settled . . . And whereas the settlor [Lady Aberconway] is seized in fee simple of the said mansion house known as Bodnant Hall with the gardens pleasure grounds and demesnes usually occupied therewith And whereas the late Henry David Pochin the father of the settlor and the settlor herself encouraged the use of the gardens at Bodnant aforesaid for the cultivation of a large collection of plants and flowers of home and foreign countries of botanical and horticultural interest and for experiments in the production and hybridization of plants and of flowers of all kinds and it is the settlor's desire that the gardens at Bodnant should continue to be used for the cultivation production and hybridization of foreign and domestic flowers and plants and the continuance of such experiments and the development of the results therefrom and the settlor is of opinion that it may be necessary for the furtherance of such objects that money should be expended in the erection and heating of greenhouses for the growth of rare plants and in other directions hereinafter more particularly mentioned And whereas the said gardens at Bodnant aforesaid are visited by a large number of visitors many of whom are specially interested in horticulture . . ."

The next following recitals relate to the sum settled, and I come, accordingly, to the operative part of the deed. The first few lines may be passed over, because they consist of directions as to selling the shares transferred and as to re-investment. The first operative trust is in these terms:

"the trustees shall hold the investments from time to time representing the same . . . upon the same trusts and with and subject to the same powers and provisions as capital moneys subject to the Bodnant settlement of 1921 are or might be held . . ."

Then follows in the form of a proviso this all important language:

"Provided always that if the said gardens at Bodnant shall be settled upon or shall be acquired by or become vested in the trustees or trustee upon the trusts declared by the Bodnant settlement of 1921 concerning the freehold hereditaments thereby settled or substantially upon the same trusts . . . then during so much of the lives of the children and grandchildren of the settlor living at the date of this indenture and the lives and life of the survivors and survivor of them and the period of twenty-one years from the death of such survivor as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee (which portion of the said period of lives and years is hereinafter referred to as 'the prescribed period') the trustees or trustee shall . . ."

with the consent of the tenant for life for the time being of the Bodnant settlement apply the income of the settled property

"in or towards securing and assisting and developing the use of the said gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest and for

experiments in the production and hybridization of foreign and domestic flowers and plants of all kinds and the continuance and making of experiments in connection therewith and the development of the results thereof and for the purposes aforesaid the trustees or trustee may with such consent as aforesaid . . .”

(i.e., of the tenant for life) expend certain sums in the erection of greenhouses.

A There is a provision that they are not to be used for the purpose of growing certain fruits, and then the trust goes on,

“and the trustees or trustee shall have the complete and uncontrolled discretion as to the portion or portions of the said gardens in which the income of the settled fund shall from time to time be applied and as to the time of such application and as to the mode of such application . . .

B and the trustees or trustee shall have power at their or his discretion to impose as a condition of the application of the income of the settled fund or any part thereof for any of the purposes aforesaid that the person or persons for the time being entitled to the possession or receipt of the rents and profits of the said Bodnant estate under the Bodnant settlement of 1921 shall permit visitors either of a class specially interested in horticulture or possessing any special qualification in connection with horticulture

C or at their discretion all visitors to visit and inspect the said gardens under such reasonable conditions . . . as the trustees or trustee may approve and if at any time the [tenant for life] shall decline to allow the said income to be applied for the purposes aforesaid or to permit such persons as aforesaid to visit and inspect the said gardens then and so often as the same shall happen the trustees or trustee shall apply the income of the settled fund as if the same were income of the property settled by the Prestatyn settlement . . .”

D

Finally comes the ultimate limitation:

E “And it is hereby agreed and declared that from and after the expiration of the prescribed period the settled fund shall be held upon the trusts and with and subject to the powers and provisions declared by the Prestatyn settlement of 1909 . . .”

It is conceded that the gardens at Bodnant became settled on the trusts of the Bodnant settlement on the death of Lady Aberconway and on the coming into operation of the trusts of her will.

F First of all let me apply myself to the construction of the Garden settlement. Nowhere is it stated either in this document or (as I have already said) in the Bodnant settlement of what exactly the gardens at Bodnant consisted. The phrase is used which I have already read, “gardens pleasure grounds and demesnes usually occupied therewith”, that is, with Bodnant Hall. Counsel for the tenant for life suggested it might mean “from time to time occupied therewith”, but I do not think it does so signify, and if it did it would create the difficulty that if Bodnant Hall itself were sold then automatically none of the gardens would be occupied therewith, so that in that event the special trust would automatically come to an end. But I think that the court is entitled,

G and, indeed, bound, in order to discover what was meant by “the gardens”, to take note of the evidence of what in fact were the “gardens” which were described in this settlement, being gardens (as the settlor states in her recital) which had been applied towards the cultivation of rare flowers, shrubs, etc. There is before the court, as an exhibit to one of the affidavits, a map showing the Bodnant gardens at the date of the settlement and as they have since been maintained, and, for my part, I think it is reasonably clear that the subject-matter which is referred to as “the gardens at Bodnant” in the Garden settlement means the gardens illustrated on this plan, and I shall proceed in the rest of my judgment so to assume.

H

From this plan, it appears that the total area of these gardens was, in 1926, approximately sixty-eight acres, and of that area some fifty-three acres were sold in 1949 to the National Trust, leaving fifteen acres unsold. It is, I think, not open to doubt that a sale of an unsubstantial part of these gardens could not affect the problem which we have to consider. What, however, has occurred is that fifty-three out of sixty-eight acres have been sold, and the question, therefore—and this is the first question of construction—is whether it can now be said that the gardens (what is described as “the said gardens at Bodnant”) are still settled under the terms of the Bodnant settlement. A

The matter is obviously not one which permits of much elaboration. The learned judge, as I have earlier indicated, decided that, as a matter of the construction of the deed, it could no longer be said that “the said gardens” were and remained subject to the settlement, when in truth and in fact fifty-three out of sixty-eight acres of them had been sold, and I, for my part, agree with that conclusion. It seems to me, in other words, that construing this settlement so as to extract from it its own definition of terms, “the said gardens at Bodnant” meant the subject-matter which is illustrated on this plan and which the settlor had described in the earlier recitals. It follows, therefore, that (unless the Settled Land Act, 1925, s. 106, applies so as to alter the result) the prescribed period has come to an end, for the period (it will be remembered) was only that part of the perpetuity period as the “said gardens” did remain settled according to the terms of the Bodnant settlement. B Prima facie, therefore, and apart from the effect of the section with which I am now going to deal, the last provision in the Garden settlement will come into operation, and, the prescribed period having expired, the settled fund should be held on the trusts of the Prestatyn settlement. C

I come now to the Settled Land Act, 1925, s. 106. Its terms are familiar, and it is (so far as relevant) a re-enactment without alteration of the Settled Land Act, 1882, s. 51. It will be convenient for me to read sub-s. (1): D

“If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted—(a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life or statutory owner to exercise any power under this Act, or his right to require the settled land to be vested in him; or (b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him; that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.” E

Of those two paragraphs, (a) and (b), it is clear that para. (a) refers to a direction in express terms which seeks to forbid the tenant for life to exercise any of his statutory powers, whereas para. (b) relates to provisions which may obliquely have a similar effect. There is no question but that we are not concerned with para. (a) in this case, because there is no direction or similar provision within the meaning of that paragraph. The question is whether the very generous language of para. (b) is such as to affect some, and, if so, what, of the dispositions in this settlement so as to render them void. F

In approaching this matter, certain things may, in my judgment, be stated as clear. It cannot, I think, be a relevant consideration to consider the particular personality or the particular inclinations of the tenant for life for the time being. Obviously a tenant for life who has particular interests or particular hobbies G

may have his mind affected so as to deter him from doing one thing or another, whereas another tenant for life with dissimilar tastes would be quite unmoved by similar considerations. Equally, as it seems to me, it must be quite irrelevant that, in the events which have happened here, the sold part of the gardens is now vested absolutely in the National Trust. As things now are it appears that the National Trust are continuing the upkeep of the gardens. In point of fact, Lord Aberconway has provided them with an endowment of £36,000 to that end. But in testing whether the provisions of para. (b) operate so as to render void any part of this settlement, I think the problem has to be considered objectively, and counsel for the tenant for life did not contend to the contrary. Any other view, it seems to me, would produce absurd results, because the same provision would be held void at one moment and fully effective at another, according to the particular circumstances and characteristics of the particular tenant for life.

It is necessary, in my judgment, to consider this matter having regard to the fact that the sale might well have been, not to the National Trust, but, say, to a farmer who would be using the land for agricultural purposes, or an industrialist who might be using it for mining or other industrial purposes. But before I examine the deed to inquire what are the provisions which are said to be struck at by para. (b), I note that DANCKWERTS, J., who concluded that s. 106 did render void that part of the settlement which caused the limitation over to the Prestatyn trusts to take effect, expressed the view (as I have already stated) that as a consequence the trustees of the Garden settlement were entitled to apply the income of the £20,000 exclusively to the retained part of the gardens—for which, indeed, it is required, as is shown by the evidence—though he thought also that it might be (though he expressed no conclusion) that they could apply the income of the £20,000 towards the upkeep of that part of the gardens which was now vested in the purchasers, the National Trust. It seems to me that that part of the judge's conclusion is open to the objection that it involves construing for the purpose the words, "the said gardens at Bodnant", in a sense quite different from the sense in which the learned judge construed them for the purpose of deciding whether, according to the terms of the trust, the prescribed period had come to an end. That does not seem to me to be legitimate. If the judge was right (and I think he was) in saying that "the said gardens" no longer remained settled as aforesaid, then it seems to me to follow that the phrase, "the said gardens" must equally mean substantially the whole of the said gardens, when used in the later part of the particular trust,

"in or towards securing and assisting and developing the use of the said gardens at Bodnant for the cultivation of plants."

Counsel for the tenant for life argued that, assuming that the earlier phrase (which cut down the perpetuity period) must be treated as void, then since the words "the said gardens" must mean the same throughout, the special trust had, therefore, become impossible of performance, with the result that (in the absence of any provision covering that event) the original or first trust persisted, and, accordingly, that Lord Aberconway was now entitled as tenant for life of the Bodnant settlement to enjoy the income of the £20,000. No doubt he would (as far as I know he certainly would) apply it towards the upkeep of the gardens, but still he would be entitled beneficially to the income. The trustees would, on this view, have no further control or interest in the matter. If that view is right, then it follows that the one thing would have happened which, it seems to me, the settlor made quite clear she did not wish to happen, viz., that after the settlement of the gardens the Bodnant beneficiaries should have any claim to any part of the £20,000 or its income. But the argument is not without serious force, for if it is the fact that these trusts have become incapable of performance, then there is nothing in the deed which,

so far as I can see, makes provision for that event, so that *prima facie* the original or primary trust would take effect. But the argument seems to me to have a strong bearing on the determination of the question: Does s. 106 apply in this case at all?

An argument was put forward by counsel for the trustee of the Prestatyn settlement (though not, I think, strongly pressed) that s. 106 could not apply in the circumstances of this case on the ground that if a provision is to be deemed to be void, then it must be deemed to be void *ab initio*, and since this settlement was executed in 1926 but had no truly effective operation until 1933, that condition could not here be satisfied. I hope I have properly apprehended the argument, but I do not myself accept it, and I hope that counsel will forgive me if I say no more about it but pass on to what seems to me to be the main question to be decided.

There is no doubt that the language of s. 106 (1) (b), which I have already read, is of very wide import, but some limitation, I think, plainly must be placed on it, for it cannot have been the intention of Parliament to put an almost unlimited restriction on the powers of persons desiring to make settlements of their own property in the way they think best. Indeed, in the cases which have been decided on this section and on its predecessor (to which I shall briefly refer in a moment) a limitation clearly does emerge, and that limitation is in addition to the limitation which follows from what I have already said, viz., that the section must, in my view, be construed objectively and not by reference to the particular idiosyncrasies of particular tenants for life.

The first thing, of course, to determine—the obvious thing which must be determined—is which is the limitation in this settlement which is said to have this deterrent effect? It may be, I venture to think, a criticism of the argument on behalf of the tenant for life that there is no clear agreement between leading and junior counsel which is the power or disposition or limitation in this settlement in which they say is the vice which renders it void. I think they are inclined to favour the words “as the said gardens at Bodnant shall be and remain settled as aforesaid”. In other words, they would treat the prescribed period as covering the whole perpetuity period without the further limitation imposed by the words which I have quoted. I think that view involves them in a difficulty, which I have already adumbrated, and it seems to me to be serious. Suppose that the whole gardens were sold, then, according to this view, still the prescribed period would continue, yet beyond any question the special trust limited to operate during that period would have come to an end. That would leave the deed with a serious lacuna in it, for it would have made no provision whatever in the event I have supposed for the disposition of the income of the £20,000 during the remainder of the perpetuity period. Counsel can only escape from that difficulty by praying in aid the overriding operative effect of the primary trust, or, possibly, by having resort to a resulting trust in favour of the settlor. An alternative view put forward on behalf of the tenant for life is that the final limitation is void, or, perhaps, that the final limitation and the provision already quoted are together void, or void to some extent. It may be that a difficulty in discerning the precise provision which is avoided is not fatal to an argument based on s. 106. On the other hand, I think it is a serious objection to it, for *prima facie* s. 106 cannot, in my judgment, be invoked if the result is to require the substantial re-drafting of the main operative parts of a settlement or other instrument, or otherwise to alter substantially its expressed purpose and effect.

Of course, the argument as now presented by counsel for the tenant for life is made attractive by the particular circumstances of the present case. One cannot be unmoved by the considerations which now affect the mind of Lord Aberconway as counsel has presented them to us. The £20,000 or its income

has not been for many years sufficient, so to speak, to endow the whole sixty-eight acres. It is all required by the retained part on which, as he says, the core of the garden enterprise is situated, for it is there that the breeding of the plants and the greatest exercise of horticultural skill is to be found. It is natural to feel sympathy for Lord Aberconway if the effect of this settlement in the events which have now happened is to deprive him of the means (at any rate) of influencing the use of the income of this £20,000 towards this garden enterprise, and if one only had to look at the events as they have now happened, it might be possible to pick out or excise from the settlement such words only as would be necessary to meet the present situation. But, in my judgment, it is a mistaken approach to place too much emphasis on the particular circumstances as they have now arisen. What may be thought very just and reasonable now might turn out to be very unjust and unreasonable in ten years' time when conditions might be quite different. In any event, as it seems to me, the argument of counsel for the tenant for life, or at any rate one aspect of it, leads to a conclusion which is so patently in conflict with the settlor's intention that I, perhaps, find less difficulty than I otherwise might in putting aside emotional considerations and applying myself to what I conceive to be the duty of the court, namely, to construe the terms of this deed as they have been written, and also to construe, according to the ordinary sense of the language, s. 106 of the Settled Land Act, 1925.

I have already done my best to perform the first part of that task, and, fortunately, in applying myself to the second part, I am not without guidance in authority. Two cases seem to me to be of great assistance to the court in this matter: *Re Simpson* (1), which was decided by SWINFEN EADY, J., in 1913, and *Re Patten* (2), which was decided in 1929 by ROMER, J. In my judgment, neither s. 51 of the Settled Land Act, 1882, nor s. 106 of the Act of 1925 (which has replaced it) should be taken as operating to render void directions in a settlement operating to determine other provisions in the settlement which are neither for the benefit (properly speaking) of any cestui que trust, nor even, in strictness, ancillary to the enjoyment by a cestui que trust of the trust property. In this case, the provisions of the Garden settlement during the prescribed period of what I have called the special trust may, no doubt, be regarded as indirectly for the benefit of the tenant for life, at any rate so long as the tenant for life happens to enjoy the amenities of a good garden or happens to be an amateur of horticulture. But it is important to bear in mind that the application of the income is wholly in the discretion of the trustees. It is true that the trustees were required to obtain the consent of the tenant for life, and that was natural enough. But to that observation must be added another, viz., that if the tenant for life (for reasons however good to him) did not give his consent to what the trustees proposed, then the whole fund went over, until he should change his mind, to the Prestatyn settlement. It was said in argument that, if the trustee of the Prestatyn settlement were right, then the tenant for life could allow the whole gardens to go to rack and ruin without incurring the risk of causing the prescribed period to determine, whereas that result would immediately follow on a sale by him of any substantial part of the gardens. But, in my judgment, the argument involves a misconception, a failure to apprehend that the management of the gardens is a matter for the trustees in their discretion. The tenant for life is not entitled to touch a penny of the income of the £20,000 nor to direct its application. True, he may decline to consent to any application which the trustees may propose, but in that event, by virtue of the later provisions of the deed (unless they are somehow said also to be void, which was not suggested), the fund goes over to the Prestatyn trustees. This trust is for a very special and particular object, not, as I assume, a charitable object, but a public object of somewhat similar character. Provisions, therefore, which have the effect of putting an end to it,

seem to me to be very far removed from provisions which have the effect of putting an end to some trust under which a cestui que trust did, until he exercised a statutory power, in a true sense of the phrase, himself benefit independently.

That distinction is, I think, inherent in the first of the two cases I have mentioned, the decision of SWINFEN EADY, J., in *Re Simpson* (1). The question there related to a bequest of a leasehold house to the testator's widow for occupation during her widowhood, together with a provision that during her occupation the rent, rates and outgoings, including repairs, should be paid for out of the general estate. The question was raised whether that limitation of the trustee's obligation to pay rent, and so on, during the widow's occupation could be said to be something which was a deterrent to the tenant for life's exercise of her statutory power of sale. The learned judge gave a negative answer to that question. He said ([1913] 1 Ch. 282):

"In my judgment the provision for payment of rent and outgoings does not fall within s. 51 [of the Settled Land Act, 1882] at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51."

That decision was in 1913. Its effect was to put a limitation on the very broad language of what was then s. 51 (1), to the effect that the deterrents contemplated in the section did not comprehend amenities and extra benefits of the kind to be found in *Re Simpson* (1), which, however much they might obliquely affect the mind of a tenant for life (for she would not get them if she sold the testator's house and bought herself another), did not serve to bring into operation the language of the section so as to enable the tenant for life to require the continued payment of a sum equivalent to the previous outgoings after exercise by her of her powers of sale—a result which would have required (as in the present case) a substantial re-casting of the beneficial trusts. Parliament, knowing (as we must assume that it knew) of that limitation put on s. 51 of the Act of 1882 by the courts, re-enacted the section in the same terms in 1925. Prima facie, therefore, the courts must construe s. 106 of the Act of 1925 in the way in which the previous section had been construed before it was re-enacted. But in any case ROMER, J., in *Re Patten* (2), in 1929 expressly approved the language and reasoning of SWINFEN EADY, J. In my judgment, that reasoning applies a fortiori to the present case. My conclusion, therefore, with all respect to DANCKWERTS, J., is that the provision putting an end to the trustees' discretionary power to apply the income in furtherance of this very special (what I have called quasi-public) trust is not a deterrent, and not a provision tending to induce the tenant for life not to execute any of his statutory powers, of the kind contemplated by para. (b) of s. 106 (1), and, therefore, that no part of the relevant terms of this Garden settlement ought to be deemed to be void within the meaning of that section.

The result, in my opinion, is that this settlement should take effect according to its terms, and, if I have construed those terms correctly, the result will be that the £20,000 must now be held on the trusts of the Prestatyn settlement. For these reasons, though I acknowledge the difficulty of the case and (if I may say so) the force of the argument of counsel for the tenant for life, I think this appeal ought to be allowed.

DENNING, L.J.: There are some fine gardens at Bodnant in North Wales covering sixty-eight acres of land, which are famous, not only for their beauty, but also as a centre of botanical and horticultural research. In

February, 1926, Lady Aberconway settled twenty thousand shares on trust to provide an income to go towards developing the gardens for experiment and research. Twenty-three years later her son, the present Lord Aberconway, found that with the high rates of taxation now prevailing he could not afford to keep up the whole of the gardens, so he came to a very sensible arrangement. He conveyed the pleasure part of the gardens, some fifty-three acres, to the National Trust and endowed it with a capital grant of £36,000, and he retained the rest of the gardens, some fifteen acres, in his own hands so as to carry on experiments and research. By so doing his mother's wishes would be fulfilled, visitors would be able to go into the pleasure part of the gardens as they always had done, and the money from the shares would go towards development and research. All seemed well until someone suggested that as a result of this arrangement the money from the shares was forfeited. It was said that the money could not be used for the retained part of the gardens at all, but had to go to some members of the family under an earlier settlement called the Prestatyn settlement. In order to resolve the difficulty the parties applied to the court, and DANCKWERTS, J., has held that the money can be used for the retained part of the gardens.

It is apparent that all this discussion has come about because the person who drew up the settlement in 1926 did not foresee what would have to be done twenty-three years later in order to keep the gardens in being; he did not foresee that part of them might have to be conveyed to the National Trust. Speaking for myself, I would forgive him for such a mistake, because I do not think that draftsmen of deeds can be expected to foresee everything any more than draftsmen of Acts of Parliament can be expected to do so. In those circumstances, I would myself have liked, if it could have been done, to have moulded the language of the settlement of 1926 so as to give effect to what I feel were the wishes of Lady Aberconway by making it apply, not only to the gardens as they stood in 1926, but also to any substantial part thereof, and the retained part is certainly a substantial part of them. But I am afraid that our strict rules of construction—and here I agree with DANCKWERTS, J.—do not permit of such a moulding. However, I agree with him that the same result can be reached by resort to the Settled Land Act, 1925, s. 106.

In approaching s. 106, I first ask myself what is the “provision” which is in question in this case? It is, I think, the provision by which the court is bound, on a strict construction of the settlement, to say this to Lord Aberconway: “If you sell a part of the gardens in the exercise of your powers as tenant for life, the income allocated to the gardens will cease altogether.” By way of contrast, it should be noticed that, if Lord Aberconway should allow a part of the gardens to fall into disuse, no such forfeiture would be incurred. The whole income would continue to be available for the gardens. In those circumstances, if a provision to the effect I have stated were inserted in the settlement in plain terms, it would, I think, obviously tend to induce Lord Aberconway to abstain from exercising his power to sell a part. It would mean that, rather than do the sensible thing of selling a part of the land, he would hold on to the whole and neglect a part. That seems to me to be the very thing which s. 106 was designed to avoid. The provision which I have stated is not expressed in plain terms in the settlement, but it is the construction which the court feels bound to put on it. It cannot make any difference, however, whether the provision is expressed in plain terms or in obscure terms. By the statute it is deemed to be void.

Then comes the most difficult question in the case. When the provision is avoided, what is to happen to the trusts of the settlement? They cannot remain intact. The settlement says that the income is to be applied to “the said gardens”, i.e., to the whole gardens. After part is sold, that trust cannot

be fulfilled to the letter, but we ought not, on that account, to let the trust fail absolutely. It would be most unfortunate if, when Parliament has enacted that a provision for forfeiture is to be avoided, the courts were to re-establish it by saying that you must still fulfil the letter of the original trust. By so doing, the courts would indirectly insist on the forfeiture which Parliament had abolished. Parliament must have intended that the trusts should be modified, so far as necessary to meet the new situation, or, in other words, to such an extent as is necessary to avoid the forfeiture. The words "as far as" in the section support this view, and I find nothing in the cases to deny it. A

In *Re Patten* (2) ROMER, J., modified the trusts so as to let Mrs. Patten have the use of the furniture even after she left the house. I recognise that, in some cases, no modification will be of any avail and the trusts will fail for want of any content. That is what happened about the money for rates and repairs in *Re Simpson* (1), *Re Patten* (2) and *Re Burden* (3). After the house was sold, the money could not be spent on rates or repairs to it at all, and so the trust failed altogether. Those cases would be applicable in the present case if Lord Aberconway had sold the whole of the gardens. The income would not then be spent on the gardens at all. The objects of the settlement would cease and the income would fall back into the Prestatyn settlement. But Lord Aberconway has not sold the whole. He has only sold a part, and the objects of the settlement can be well carried out in the part that he retains. B C

In his affidavit Lord Aberconway says:

"To continue the work which has in the past been, and is still being, carried on in the retained part of the gardens will, in my opinion, require an annual expenditure equivalent to the whole of the income of the Garden settlement fund. The continuance of such work is essential if the area as a whole is to continue to fulfil the purposes indicated in the recitals to the Garden settlement as being the 'objects' for which the gardens were endowed. Such work can only be carried on effectively in the retained part of the garden." D

It seems to me, on that evidence, that the trusts which were originally intended by the Garden settlement can be carried out now in the retained part. The only modification necessary in the trusts is to make them apply to the retained part instead of the whole gardens. That is, I think, quite permissible. E

I find myself, therefore, in agreement with DANCKWERTS, J., and I would dismiss the appeal. F

ROMER, L.J.: The judgment which the Master of the Rolls has just delivered expresses my views on this appeal so precisely that there is little that I can add to what he has said.

It seems to me that to accept the argument which was presented to us on behalf of the tenant for life involves our disapproving the reasoning of SWINFEN EADY, J., in 1913 in *Re Simpson* (1), to which my Lord has referred. The decision in that case was the law until 1925 when the provisions which existed in 1913 under the Settled Land Act, 1882, s. 51, were re-enacted without any relevant alteration by the Settled Land Act, 1925, s. 106, from which I gather that the legislature did not think it necessary or proper to disturb the law as so laid down by SWINFEN EADY, J. In 1929 ROMER, J., in *Re Patten* (2) expressly approved the reasoning of SWINFEN EADY, J., in *Re Simpson* (1). I myself in the Chancery Division in 1948, in *Re Burden* (3), in addition to recognising that I was bound by these previous decisions, expressed my belief that they were right, and I take the opportunity in this court of affirming that view. G H

The case before SWINFEN EADY, J., *Re Simpson* (1), was one in which indirect benefits of a substantial character were conferred on the tenant for life of the leasehold dwelling-house which was the subject-matter of the specific bequest

which the testator made in favour of his widow. Under that bequest there was a direction that she should have the right to occupy the dwelling-house during her life, and that the trustees should pay the ground rent and all rates, taxes and outgoings payable in respect of the said dwelling-house and do all necessary repairs, it being his wish that his wife should be personally relieved from the payment of the ground rent, rates, taxes and outgoings, cost of repairs, and the observance and performance of certain covenants.

A Now, notwithstanding the considerable degree of benefit which derived from that bequest to the widow, SWINFEN EADY, J., in the passage to which my Lord referred in giving judgment, said ([1913] 1 Ch. 282):

B " . . . the provision for payment of rent and outgoings does not fall within s. 51 at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51."

C If that view be right (which I believe it to be), it is much clearer, in my opinion, that the provisions in the present settlement are not within s. 106 of the Act of 1925. As I have already pointed out, in *Re Simpson* (1) the benefits attaching to the house—and I say "to the house" with deliberation, because they were not attached to the income of the life tenant as an accretion to such income or, indeed, to the life tenant at all; they were attached to the property—were considerable benefits and such as might be expected to operate on a person's mind in deciding whether to sell or not, because if he did sell he would lose those benefits. Nevertheless, as I say, it was held (and I think rightly held) that they were outside the Act.

I turn to the provisions which were attached by Lady Aberconway's settlement to the gardens. The trustees were to have (in the words of the settlement)

E "the complete and uncontrolled discretion as to the portion or portions of the said gardens to which the income of the settled fund shall from time to time be applied and as to the time of such application and as to the mode of such application."

Therefore, the management of the gardens so far as this income was concerned was being taken out of the hands of the tenant for life and vested in the control of the trustees. Then in addition to that the trustees were to have power F "at their . . . discretion to impose as a condition of the application of the income of the settled fund" that visitors of categories to be selected by the trustees and nobody else should be entitled to visit and inspect the gardens. It was further provided, in connection with that, that, if the tenant for life declined

G "to allow the said income to be applied for the purposes aforesaid or to permit such persons as aforesaid to visit and inspect the said gardens",

then the income was to be diverted elsewhere. It might suit some people to have gardens under the control of other people who had the sole right to say whether visitors should be allowed in, whether the public should be allowed to wander about, and to have no say themselves as to the manner in which the gardens should be run, but such persons, I venture to think, would have to be ardent horticulturists and persons who were prepared to accept with philosophy the views of other people as to the manner in which the gardens should be managed rather than their own.

H Now, it is the income with all those fetters attaching to it which is the subject of this disposition, and the loss of which it is suggested would operate so as to deter the tenant for life from exercising the statutory power of sale. If that be so, it is plain that SWINFEN EADY, J., was wrong in *Re Simpson* (1).

I am quite satisfied that this provision in regard to the income and the gift over of the income if the gardens ceased to be carried on in the way that was contemplated is not within s. 106 of the Settled Land Act, 1925, at all, and, accordingly, that the effect of the sale which the tenant for life carried out was in no way interfered with by the section, notwithstanding the fact that the income would no longer be applicable to the gardens.

I am, therefore, of opinion that s. 106 is outside this case altogether. If that be so, the rest follows as a matter of course. The tenant for life sold five-sixths of the gardens. DANCKWERTS, J., held (and, in my opinion, quite rightly held) that if five-sixths of gardens of this character are sold, then it is impossible to say the gardens still remain, and, inasmuch as the gardens no longer remain settled or vested in the trustees, then, on the very language of the final provision in the settlement, the income goes over to the trustees of the Prestatyn settlement for whom the appellant appears, and, accordingly, they now, in my opinion, are entitled to this income, and the appeal should be allowed.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Farrer & Co.* (for the plaintiff and the first defendant); *Field, Roscoe & Co.* (for the second defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HAWKINS v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Pearson, J.), May 13, 14, 15, June 4, 1953.]

Negligence—Licensee—Need to prove knowledge by licensor of facts constituting danger—Reasonable appreciation of risk—Accident in dark—Risk obvious in daylight—Defective steps of requisitioned house—Liability of requisitioning authority.

On Oct. 5, 1951, the plaintiff, after visiting an occupier of part of a house which had been requisitioned since 1946 by the defendants, fell and broke her leg while descending the steps from the front door after dark. One of the steps was broken, a fact of which the defendants had knowledge, but the learned judge found that the defect was not obvious to the plaintiff and was not reasonably to be expected by her.

HELD: a licensee moving in the dark did not in all cases take the risk of any danger which in daylight would be obvious; to entitle the plaintiff to succeed it was enough for her to show that the defendants knew the facts constituting the danger and that a reasonable man, having that knowledge, would have appreciated the risk involved, and she need not show that the defendants in fact appreciated that risk; the plaintiff had discharged the burden which was on her; and, therefore, she was entitled to judgment.

Cooke v. Midland Great Western Ry. of Ireland ([1909] A.C. 229) and *Latham v. Johnson (R.) & Nephew, Ltd.* ([1913] 1 K.B. 398), applied.

AS TO OCCUPIER'S DUTIES TO LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 609-612, paras. 859-863; and FOR CASES, see DIGEST, Vol. 36, pp. 45-49, Nos. 282-306, and Digest Supps.

Cases referred to:

- (1) *Hounsell v. Smyth*, (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 141 E.R. 1003; 36 Digest 47, 291.
- (2) *Wilkinson v. Fairrie*, (1862), 1 H. & C. 633; 32 L.J.Ex. 73; 7 L.T. 599; 158 E.R. 1038; 36 Digest 13, 38.
- (3) *Huggett v. Miers*, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 31 Digest, Replacement, 102, 2477.

- (4) *Lewis v. Ronald*, (1909), 101 L.T. 534; 31 Digest, Replacement, 102, 2478.
- (5) *Mersey Docks & Harbour Board v. Procter*, [1923] A.C. 253; 92 L.J.K.B. 479; 129 L.T. 34; 36 Digest 15, 59.
- (6) *Coleshill v. Manchester Corpn.*, [1928] 1 K.B. 776; 97 L.J.K.B. 229; 138 L.T. 537; 92 J.P. 37; Digest Supp.
- (7) *Caseley v. Bristol Corpn.*, [1944] 1 All E.R. 14; 2nd Digest Supp.
- A (8) *Rochman v. Hall (J. & E.), Ltd.*, [1947] 1 All E.R. 895; 31 Digest, Replacement, 105, 2492.
- (9) *Baker v. Bethnal Green Borough Council*, [1945] 1 All E.R. 135; 109 J.P. 72; 2nd Digest Supp.
- (10) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; [1950] 2 K.B. 353; 114 J.P. 214; 2nd Digest Supp.
- B (11) *Bolch v. Smith*, (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 158 E.R. 666; *sub nom. Bolett v. Smith*, 6 L.T. 158; 36 Digest 47, 293.
- (12) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd. Ex.Ch.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (13) *Southcote v. Stanley*, (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest 208, 1702.
- C (14) *Gautret v. Egerton. Jones v. Egerton*, (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; *sub nom. Gantret v. Egerton. Jones v. Egerton*, 16 L.T. 17; 36 Digest 36, 209.
- (15) *Corby v. Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 140 E.R. 1209; 36 Digest 49, 304.
- D (16) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest 70, 450.
- (17) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 39, 223.
- (18) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.
- E (19) *Addie (R.) & Sons (Collieries), Ltd. v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (20) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, 213.
- (21) *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746; 94 L.J.K.B. 113; 132 L.T. 83; 36 Digest 41, 246.
- F (22) *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; Digest Supp.
- (23) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; Digest Supp.
- (24) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- G (25) *Sutton v. Bootle Corpn.*, [1947] 1 All E.R. 92; [1947] K.B. 359; 177 L.T. 168; 111 J.P. 81; 2nd Digest Supp.

ACTION for damages for negligence and/or breach of duty.

H In 1939 a house, No. 2, Valley Road, Kenley, Surrey, belonging to Mrs. Anne Elizabeth Jane Reddish, was requisitioned for civil defence purposes and was used as a first aid post. During the war it sustained war damage from bomb-blast, and was de-requisitioned. A war damage claim was made and some repairs were carried out. In August, 1946, the house was requisitioned by the defendants, the urban district council of Coulsdon and Purley, under the Defence (General) Regulations, 1939, reg. 51, for housing persons who were inadequately housed, and a schedule of condition was prepared by an independent architect on behalf of the defendants, which was signed by the defendants' surveyor on their behalf and by Mrs. Reddish as owner. The schedule referred, *inter alia*, to the fact that the three stone steps of the front porch were worn

and that one of them was broken at the corner. Between 1946 and 1951 the house was re-decorated and minor alterations and repairs were carried out in accordance with standards of repair laid down by the Ministry of Health, but nothing was done to the steps. No complaints were made to the defendants by the occupiers of the house about the condition of the steps. On Oct. 1, 1951, although the property was still requisitioned, the defendants allowed Mrs. Reddish to enter into occupation of the upper floor of the house. On the evening of Oct. 5, 1951, the plaintiff, Mrs. Eva Lilian Hawkins, came to visit Mrs. Reddish. She had visited the house before the war, but had not been there since its end. She left the house at about 8 p.m., when it was dark. As she was coming down the steps from the front door, she put her foot on the broken step which gave way beneath her and she fell and broke her leg. On the pavement outside the house there was a street lamp, but between the lamp and the front door there was a fir tree and on the night in question it was very dark and misty so that the lamp was not effectively lighting the doorway.

The plaintiff claimed damages from the defendants, contending that by virtue of the requisition they were in occupation and/or control of the porchway, steps and approaches to the house; that she used them on the evening in question as the defendants' licensee, being on a visit to the person occupying the upper floor of the house under an agreement with the defendants; that the defendants owed her a duty to take reasonable care to prevent her from suffering damage on the occasion of that visit from any hidden danger or trap in the porchway, steps, or approaches of which they were aware; that the porchway and/or steps and/or approaches constituted at all material times a hidden danger or trap; that, as the defendants well knew, they were unlit, the surface was worn, and a large portion of the lowermost step had been previously broken off and was missing; and, in breach of their duty, and/or negligently, the defendants had failed to take reasonable care to prevent injury to persons using the steps. The defendants denied the allegations and contended that the plaintiff used the steps with full knowledge of their condition (as to which they made no admissions), and/or without keeping a proper look-out, and/or without due care for her own safety.

F. Whitworth for the plaintiff.

Van Oss for the defendants.

Cur. adv. vult.

June 4. **PEARSON, J.**, read a judgment in which he stated the facts and continued: I make the following findings of fact or of mixed fact and law:—

(a) The defendants were in possession and control of the steps. (b) The plaintiff was using the steps as a licensee of the defendants. (c) The bottom step had been badly broken for at least a year and was dangerous, being likely to cause an accident, especially to a person descending the steps at night. The south end of the steps would be more frequently used, but the north end would be sometimes used, for instance, if two persons went down the steps together, or if one person intended to walk round the bonnet of a waiting car to the near side front passenger's seat. (d) Even if the lamp was lit, as I think it probably was, there was not enough light to enable a normally careful person, coming out of a well-lighted room and descending the steps on a dark night, to see that the bottom step was broken. (e) The badly broken step was a concealed danger to the plaintiff, who was using the steps by night and did not know that one of the steps was broken. (f) The plaintiff was not careless of her own safety either in failing to notice the broken step when she walked up on the other side of the steps shortly before lighting-up time on the same day, or in walking down the steps in the dark without waiting for a torch to be brought or for the headlights of the car to be turned on, or in any other way. Although she was not entitled to assume that the steps were in good condition, she could, in my opinion, reasonably assume that she would be

treading on a step and not into a hole or on to loose and movable fragments of a broken step. (g) The accident was caused by the concealed danger constituted by the badly broken step and the deficiency of light. (h) The physical facts constituting the danger, namely, the badly broken step and the deficiency of light, were known to the defendants through their officers concerned with the condition of the requisitioned property. (i) A reasonable man, having the defendants' knowledge of the physical facts, would have appreciated the risk involved. (j) It was not proved, and I do not consider there are sufficient grounds for inferring, that the defendants appreciated the risk involved. If they had, they would, presumably, have incurred the small expense necessary to remove the danger by cementing in the broken pieces.

With regard to the position of a licensee walking in the dark there are numerous reported cases, including *Hounsell v. Smyth* (1) (relating to an open quarry on waste land); *Wilkinson v. Fairrie* (2) (relating to a staircase in a passage); *Huggett v. Miers* (3) (relating to an unlighted staircase in an office building); *Lewis v. Ronald* (4) (relating to an unlighted staircase); *Mersey Docks & Harbour Board v. Procter* (5) (relating to dock premises); *Coleshill v. Manchester Corpn.* (6) (relating to a trench on a road in course of construction); *Caseley v. Bristol Corpn.* (7) (relating to an unfenced dock); *Rochman v. J. & E. Hall, Ltd.* (8) (relating to an unlighted lift). The subject is discussed in SALMOND ON TORTS, 11th ed., at p. 573, and in WINFIELD ON TORTS, 5th ed., at pp. 582, 583; and (in relation to invitees) in CHARLESWORTH ON NEGLIGENCE, 2nd ed., at pp. 194-196. The principle to be applied is stated by LORD SUMNER in *Mersey Docks & Harbour Board v. Procter* (5) as follows ([1923] A.C. 274):

"A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it."

Applying that principle, I find that this badly broken step in an apparently ordinary short flight of front door steps was not obvious to the plaintiff, descending at night, and was not to be expected there in the circumstances, and was a danger, the existence of which a reasonable man, using reasonable judgment and conduct in the circumstances, would not have expected or suspected. In my judgment, there is no absolute rule of law that in all cases a licensee moving in the dark takes the risk of any danger which in daylight would be obvious.

Another question arises, which is one of law and presents considerable difficulty. To be entitled to recover, the licensee must show that the danger was known to the licensor. Is it enough for the licensee to show that the licensor knew the physical facts constituting the danger and that a reasonable man, having that knowledge, would have appreciated the risk involved? For convenience, I will call that "the objective test". If that is the right test to apply, the plaintiff succeeds on my findings set out above. Or is it necessary for the licensee to show, directly or by inference, that the licensor appreciated the risk involved? I will call that "the subjective test". If that is the right

test to apply, the plaintiff fails. Interesting arguments on this question were presented by counsel for the defendants and by counsel for the plaintiff. The question was expressly left open by the Court of Appeal in *Baker v. Bethnal Green Borough Council* (9) ([1945] 1 All E.R. 140), and in *Pearson v. Lambeth Borough Council* (10) ([1950] 1 All E.R. 685). I, therefore, reserved judgment in this case and have investigated the earlier decided cases in search of guidance on this question.

In *Bolch v. Smith* (11) WILDE, B., made some observations on the liability of a licensor in respect of traps. He said (7 H. & N. 742):

"If A gives B permission to cross his yard in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night it being uncovered B falls into it, I can understand that A would be liable. But if the hole has always been uncovered, and B in broad day walks into it, would A be liable?"

and then he said (*ibid.*, 746):

"That disposes of the case; but I will add that I do not mean to say that if the defendant had made a hole in the yard, and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable. But here there was nothing of that character. The danger was open and visible; there was nothing which could be called a 'trap'."

Those observations are consistent with "the objective test", but were not necessarily intended to be a full statement of the facts required to be proved in order to establish the liability. In any case, they were obiter dicta.

In *Indermaur v. Dames* (12), which is the leading case on the liability of an invitor to an invitee, the judgment of the court (consisting of ERLE, C.J., WILLES, KEATING and MONTAGUE SMITH, JJ.) was delivered by WILLES, J., and contains the following passage (L.R. 1 C.P. 286):

"It is observable, that, in the case of *Southcote v. Stanley* (13), upon which much reliance was properly placed for the defendant, ALDERSON, B., drew the distinction between a bare licensee and a person coming on business, and BRAMWELL, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver."

That was an obiter dictum, but of the whole court, and the judgment was approved in the Court of Exchequer Chamber (L.R. 2 C.P. 311).

In *Gautret v. Egerton. Jones v. Egerton* (14) there was a demurrer to the declaration and the declaration was held to be insufficient. WILLES, J., in his judgment said (L.R. 2 C.P. 374):

"The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were

possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations."

Then he said (*ibid.*, 375):

"Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby v. Hill* (15), that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair."

G KEATING, J., was of the same opinion.

WILLES, J., in his judgment in *Gautret v. Egerton. Jones v. Egerton* (14) and also in the earlier judgment delivered by him on behalf of the court in *Indermaur v. Dames* (12) was plainly using "the subjective test" and considered that it was necessary to apply "the subjective test". But that is not the end of the inquiry, because, since those judgments were given, there have been a number of cases in the House of Lords and the Court of Appeal on the subject of the liability of a licensor to a licensee, and these will have to be considered carefully.

The decision of the House of Lords in *Cooke v. Midland Great Western Ry. of Ireland* (16) gave rise to discussion and was authoritatively interpreted as based on findings or inferences that the children had access to the turntable with the leave and licence of the railway company, and that the turntable was a trap for the children: *Latham v. R. Johnson & Nephew, Ltd.* (17) ([1913]

1 K.B. 418-420, per HAMILTON, L.J.); *Glasgow Corpn. v. Taylor* (18) ([1922] 1 A.C. 50, per LORD BUCKMASTER; per LORD ATKINSON (ibid., 53, 54); per LORD SHAW, ibid., 63; *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (19) ([1929] A.C. 366, per LORD HAILSHAM, L.C.). The finding or inference of leave and licence will be found in the report of *Cooke's* case (16) per LORD MACNAGHTEN ([1909] A.C. 236); per LORD ATKINSON (ibid., 240); per LORD COLLINS (ibid., 241), where the word "invitation" is evidently not used in the technical sense of a common business interest but rather as meaning a licence coupled with allurement. The important feature of *Cooke's* case (16), for the present purpose of ascertaining what degree or kind of knowledge of the danger must be shown to have been possessed by the licensor, is that LORD MACNAGHTEN (ibid., 234), LORD ATKINSON (ibid., 238) and LORD COLLINS (ibid., 241) applied what I am calling "the objective test" as part of the reasoning leading to the conclusion in favour of the appellant. LORD MACNAGHTEN said (ibid., 234):

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?"

It will be seen that the test applied there is to consider whether a private individual of common sense and ordinary intelligence, placed in the company's position and possessing that knowledge which must be attributable to the company, would have seen the likelihood of injury. Then LORD ATKINSON said (ibid., 238):

"The right may be only the restricted right of a bare licensee, or it may be the more extended right of a person invited. The principle that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant and could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious. The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

LORD COLLINS said (ibid., 241):

"I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it . . ."

It seems to me, therefore, that *Cooke's* case (16) includes a decision of the House of Lords in favour of "the objective test", in a case where there was a licence and a trap for children.

Next, there is a passage in the judgment of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (17) reading as follows ([1913] 1 K.B. 415):

"Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement'. A trap is a figure of speech, not a formula. It involves the

idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. 'Allurements', too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object."

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The last sentence of that passage, referring to the standard of the reasonable man, was expressly cited with approval in *Glasgow Corpn. v. Taylor* (18) ([1922] 1 A.C. 50, per LORD BUCKMASTER and per LORD SHAW OF DUNFERMLINE (ibid., 63)). There is also, in the speech of LORD SHAW, the sentence (ibid., 61):

"Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise."

D

In *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (19) LORD HAILSHAM, L.C., referred to the judgment of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (17) as ([1929] A.C. 367): "a judgment with which I find myself in full agreement".

E

It thus appears that in the case of a child licensee the "objective test" is to be applied in deciding whether the licensor had knowledge of the danger. Is there any reason for applying a different test in the case of an adult licensee? There are possible differences between a child licensee and an adult licensee with regard to the inference of leave and licence, the existence of a trap, and the sufficiency of the warning. But I cannot see any reason why any different test should be applied in deciding whether the licensor had knowledge of the danger. Moreover, there is at least some indication of the "objective test"

F

applying to the case of an adult licensee in the passage which I have already cited from LORD SUMNER's speech in *Mersey Docks & Harbour Board v. Procter* (5), containing the words ([1923] A.C. 274):

"As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen."

G

In *Fairman v. Perpetual Investment Building Society* (20), LORD ATKINSON (ibid., 86, 89), and LORD WRENBURY (ibid., 96), said that a licensor is liable in respect of dangers of which he knew or ought to have known. In *Sutcliffe v. Clients Investment Co.* (21), in the Court of Appeal, it was said that the words "or ought to have known" in the above-mentioned passages from the speeches in *Fairman's* case (20) should be regarded as inserted per incuriam. In *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (19) LORD HAILSHAM, L.C., said ([1929] A.C. 365) that a licensor is liable in respect of dangers of which he knew or ought to have known. But the Court of Appeal again said in several cases that the words "or ought to have known" were inserted per incuriam:

H

Coates v. Rawtenstall Borough Council (22) ([1937] 3 All E.R. 606); *Ellis v. Fulham Borough Council* (23) ([1937] 3 All E.R. 456); *Haseldine v. Daw & Son, Ltd.* (24) ([1941] 3 All E.R. 181); *Sutton v. Bootle Corpn.* (25) ([1947] 1 All E.R. 96).

With regard to this apparent conflict of opinions, LORD GREENE, M.R., said in *Baker v. Bethnal Green Borough Council* (9) ([1945] 1 All E.R. 140):

"Counsel for the respondent put forward what I must confess at first sight appears to me to be a very attractive explanation of that difficulty. What he said was that, if a licensor knows of the existence of what in fact is a trap or a hidden danger, that is sufficient, because he cannot be heard to say that although he knew the physical facts which constituted the danger from a purely objective point of view, the fact that it was a danger did not occur to his mind. In other words, that when the phrase 'or ought to be known' was used, it was directed to that view of the position, and refers, not to the physical objective facts, but to the circumstances that those facts constitute a danger. That appears to me to be a very attractive view, but much though I should like to do so, I do not find it necessary to consider whether it is correct or not. It would be necessary to explore with some care the earlier authorities on the subject of licensor and licensee before accepting it. I am prepared to deal with this case on the hypothesis that in order to fix a licensor with liability it is necessary to bring home to him not merely knowledge of the facts which constitute the danger, but his own knowledge that those facts do constitute a danger."

In *Pearson v. Lambeth Borough Council* (10) (in the Court of Appeal), the question was again discussed ([1950] 1 All E.R. 683-685) and left undecided. I should, of course, have been glad if it had been possible still to leave it undecided in this case, in view of the conflict of opinions which has been revealed by the examination of the previously decided cases. But for the purposes of the present case a decision on this question cannot be avoided. Having regard to the findings of fact which have been set out above, my conclusion, from examination of the previous cases, is that there is sufficient House of Lords authority in favour of "the objective test" to justify and require its application here. The licensor is not liable if, through lack of adequate inspection, he has failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved.

Applying that principle here, on the findings of fact which I have set out above, I hold that the plaintiff is entitled to succeed against the defendants for the agreed sum of damages, which is £1,000, and there will be judgment for the plaintiff for that sum.

Judgment for the plaintiff.

Solicitors: *Speechly, Mumford & Craig* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

HAR-SHEFI (orse. COHEN-LASK) v. HAR-SHEFI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), June 15, 1953.]

Nullity—Jewish bill of divorcement—Declaratory judgment sought that marriage dissolved—Parties domiciled in Israel—Divorce recognised by law of Israel.

A The wife, a Jewess, was born in England and domiciled there before her marriage. The husband, a Jew, was domiciled in Israel. On Jan. 10, 1950, the parties were married at the Chief Rabbinate at Tel Aviv. In October, 1950, the wife returned to England, and in February, 1951, the husband came to this country. On Sept. 6, 1951, in the presence of the Beth Din, in London, the husband handed to the wife a bill of divorcement. In December, 1951, the husband was deported to Israel, where he married again. On a

B petition by the wife for a declaration that the marriage had been validly dissolved on Sept. 6, 1951,

C HELD: the divorce on Sept. 6, 1951, was a valid divorce according to Jewish Rabbinical law and, therefore, valid according to the law of the parties' domicile, namely, Israel; the wife had resumed her English domicile after that divorce; and, accordingly, the court had jurisdiction to make, and now made, the declaration sought.

Observations of LORD DUNEDIN in *Sasson v. Sasson* ([1924] A.C. 1009), applied.

AS TO DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 168-181, Nos. 192-292, and Digest Supps.

D AS TO JURISDICTION OF ENGLISH COURTS IN NULLITY SUITS, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926, and Digest Supps.

Cases referred to:

- E (1) *Preger v. Preger*, (1926), 134 L.T. 670; 27 Digest, Replacement, 388, 3205.
- (2) *Spivack v. Spivack*, (1930), 99 L.J.P. 52; 142 L.T. 492; 94 J.P. 91; 27 Digest, Replacement, 69, 470.
- (3) *Sasson v. Sasson*, [1924] A.C. 1007; 94 L.J.P.C. 13; 132 L.T. 163; Digest Supp.
- F (4) *R. v. Hammersmith Superintendent Registrar of Marriages. Ex p. Mir-Anwaruddin*, [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882; 81 J.P. 49; 27 Digest, Replacement, 57, 348.
- (5) *Le Mesurier (otherwise Gordon) v. Le Mesurier*, (1930), 99 L.J.P. 33; 142 L.T. 496; 27 Digest, Replacement, 554, 5046.

G PETITION by the wife for a declaration that her marriage had been validly dissolved on Sept. 6, 1951, by a Jewish bill of divorcement before the Beth Din in London.

On May 16, 1952, the wife, who was resident in England, filed the petition. On July 2, 1952, the husband, who was resident and domiciled in Israel, purported to enter an appearance, but was unable to provide an address within the jurisdiction, and the wife applied ex parte by summons for leave to proceed

H with the petition. On Oct. 29, 1952, BARNARD, J. ([1952] 2 All E.R. 821), dismissed the summons. The wife appealed, and on Mar. 6, 1953, the Court of Appeal allowed the appeal ([1953] 1 All E.R. 783), holding (i) that under R.S.C., Ord. 25, r. 5, the court had jurisdiction to make a declaratory order even though no other relief was sought, and, therefore, it had jurisdiction to entertain a petition which sought only a declaration that a foreign decree of divorce was valid, and (ii) that the English courts could hear evidence of the law of Israel, on which the validity of the divorce, and, consequently, the domicile

of the wife, depended, and so determine whether or not the divorce was valid by that law.

John Mortimer for the wife.

The husband did not appear.

PEARCE, J.: This is a petition by a wife for a declaration that her marriage was validly dissolved on Sept. 6, 1951, by a Jewish divorce before the Beth Din in London. The wife, a Jewess, is an Englishwoman born in England, and domiciled there before her marriage. The husband, a Jew, has at all times been domiciled in Israel. They met in 1949 when she was on a visit to Israel, and on Jan. 10, 1950, they married according to Jewish law at the office of the Chief Rabbinate at Tel Aviv. In October, 1950, she came to England, and there had a child in December, 1950. The husband followed her in February, 1951. The marriage broke down, and on Sept. 6, 1951, there was a Jewish divorce between the parties whereby in the presence of the Beth Din the husband handed to the wife a bill of divorcement. This divorce was duly entered in the records of the Beth Din. In December, 1951, the husband was deported to Israel where he married again. The wife wishes for a declaration that the divorce was valid in order that she may marry again in this country.

It was originally held ([1952] 2 All E.R. 821) by the judge on summons that this court had no jurisdiction to make a declaration as to matrimonial status unattached to any other claim for relief, and, further, that, as the husband was domiciled in Israel, this court had no jurisdiction to consider the validity of the husband's divorce. But the Court of Appeal by a majority held ([1953] 1 All E.R. 783) that this court has declaratory jurisdiction even though no other relief is sought. It also held that this court has jurisdiction to hear the petition, notwithstanding the fact that the husband is domiciled in Israel, if the wife is domiciled in England. The answer to the question whether she is domiciled in England must depend on the validity of the divorce, since, if it is valid, the wife may have resumed her English domicile. It is, therefore, necessary for the court to investigate the validity of the divorce by the law of Israel in order to decide whether the wife is domiciled here and whether there is jurisdiction in this court.

It has been proved before me that the wife was domiciled in England before her marriage. Once she establishes that that marriage has been dissolved it becomes possible for her to resume her English domicile and no very cogent evidence is needed to establish that resumption. The time that she spent in Israel was short. She insisted on coming back to England before the birth of her child, and when after the divorce her husband was deported from England she remained in England and has made her life here. On the evidence it seems to me that, provided that the validity of the divorce is proved, she has resumed her English domicile.

I am satisfied on the evidence of the senior ecclesiastical judge of the Rabbinical Court of the Beth Din in London that the divorce duly took place before that body on Sept. 6, 1951, and that it was a valid divorce according to the Jewish Rabbinical law although it was in no sense a judicial investigation. I am satisfied by the evidence of an expert in the law of Israel that the civil courts of that country are prohibited from granting a decree of divorce and that exclusive jurisdiction is given to the Rabbinical courts on matters of marriage and divorce concerning members of the Jewish faith domiciled in Israel. Divorces made in the Rabbinical courts are recognised as valid, and this particular divorce would be regarded as valid according to the law of Israel.

In my view, this court must recognise the validity of that divorce. In *DICEY'S CONFLICT OF LAWS*, 6th ed., p. 371, it is stated:

"There is also no authority which has any direct bearing on the question whether English courts will recognise as valid divorces which are effective

under the law of the domicile of the parties although they are not the outcome of judicial proceedings, or of legislation preceded by a judicial inquiry. In *Preger v. Preger* (1) and *Spivack v. Spivack* (2) the invalidity of Jewish religious divorces was taken for granted, but in each case the domicile appears to have been English. In *Sasson v. Sasson* (3) the Privy Council held that the divorce of Jewish British subjects domiciled in Egypt effected through the Grand Rabbinate at Alexandria was valid under the relevant ordinances, while the *Hammersmith Marriage Case* [*R. v. Hammersmith Superintendent Registrar of Marriages. Ex p. Mir-Anwaruddin*] (4) contains dicta which suggest that a monogamous marriage must be dissolved by the decree of a court in order that the divorce should be recognised in England. In these circumstances, the question whether the English courts would recognise divorce by consent or unilateral declaration of a type which was at one time possible under the law of the Soviet Union, even if it is effective under the law of the domicile, is a matter of pure conjecture. In view of the paramount importance of the law of the domicile in questions of status, it is submitted that if such divorces are recognised as valid in the country of the domicile, they should be recognised as valid in England. If the cause for divorce is immaterial so ought the method to be . . . It is therefore submitted that, provided the divorce is of a type appropriate to a monogamous union, it ought, on principle, to be recognised in England if it is valid under the law of the domicile, whatever be the method by which it was obtained."

Sasson v. Sasson (3) is a guide to the case now before me. In that case the parties were British subjects of the Jewish religion resident in Egypt. They were divorced by the Grand Rabbinate at Alexandria in accordance with the Jewish religion. The appeal was from His Britannic Majesty's Supreme Court at Alexandria and the appellant was asking for a declaration that the divorce was valid. Under the statute governing that court it had no power of divorce, but it had a duty in all matters relating to marriage or other questions involving religious law and custom to recognise and apply the religious law or custom of the person concerned. The Privy Council made the declaration asked for. LORD DUNEDIN said ([1924] A.C. 1009):

"The situation, therefore, was this. The court had no jurisdiction itself to dissolve a marriage. It had, however, jurisdiction to declare rights and, in matters relating to marriage (which obviously include divorce), it was bound in the case of persons not belonging to Christian communities to recognise and apply the religious law and custom of the persons concerned. It is not necessary to cite the various cases in which the power of courts to divorce a vinculo has been discussed. The case of *Le Mesurier* (otherwise *Gordon*) v. *Le Mesurier* (5) finally settled that the proper and only court is the court of the domicile."

In the case before me the marriage has been validly dissolved by the only form of divorce which is open to a Jew domiciled in Israel. To hold that a marriage, which has been legally dissolved according to the law of the domicile, continues binding in this country is to create confusion and hardship, and is, in my opinion, contrary to the principle laid down in *Le Mesurier* (otherwise *Gordon*) v. *Le Mesurier* (5), and the principles of international law. I make the declaration as asked.

Solicitor: *G. Parry-Jones* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

RICH AND ANOTHER v. LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Singleton, Hodson and Morris, L.JJ.), April 22, 1953.]

Negligence—School—Duty of education authority to pupil—Pupil injured on school premises—Liability of authority.

The infant plaintiff was a pupil at a school under the care and management of the defendants. An unfenced heap of coke lay in one of the school's playgrounds and the infant plaintiff was injured by a piece of coke thrown at him by another boy. In an action for damages for negligence it was found that the school authorities had exercised adequate supervision over the boys.

HELD: the duty owed by the defendants to the boys was to take such care of them as a careful parent would exercise in like circumstances; they were under no obligation to prevent the boys having access to the coke by erecting fencing or other similar means; their supervision of the boys had been held to be adequate; and, therefore, they were not liable to the plaintiff.

Jackson v. London County Council & Chappell (1912) (76 J.P. 37, 217), distinguished.

Principle stated by LORD ESHER, M.R., in *Williams v. Eady* (1893) (10 T.L.R. 42), applied.

AS TO GENERAL PRINCIPLES OF LIABILITY FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 19, p. 556, Nos. 17-20.

Cases referred to:

- (1) *Jackson v. London County Council & Chappell*, (1912), 76 J.P. 37, 217; 28 T.L.R. 66, 359; 19 Digest 557, 21.
- (2) *Williams v. Eady*, (1893), 10 T.L.R. 41; 19 Digest 606, 315.

APPEAL by the defendants from an order of SLADE, J., dated Dec. 2, 1952.

The plaintiffs were Derek Anthony Rich, an infant pupil at the Montem Street School, Tollington, London, N.4, and his father, Sidney Leonard Rich. The defendants, the London County Council, as education authority, had many schools under their care and management, including the school attended by the infant plaintiff. Owing to the difficulties during and after the war in obtaining regular supplies of fuel, it was essential for the school authorities to keep at the school quantities of fuel in hand in excess of the amount that could be stored in the storage places provided, and at the material time there was an unfenced heap of coke in the senior playground amounting to some three tons. On Feb. 16, 1950, the infant plaintiff was hit by a piece of coke thrown by another pupil as a result of which he lost his left eye. In an action against the London County Council for damages for personal injuries, the plaintiffs alleged that the defendants had been negligent in that "the defendants their servants or agents failed to provide adequate or proper supervision while the children were playing in the said playground. The defendants their servants or agents failed to fence in or safeguard against interference by children the said heaps of coke, well knowing that the said children were in the habit of playing on the heap of coke and using pieces thereof as missiles." SLADE, J., found, *inter alia*, that in the circumstances the defendants were obliged to keep the heap of coke in the playground and that there was adequate supervision of the children by the school staff. He held, however, that the defendants had been negligent in failing to take any steps to protect the coke or to prevent the boys from having access thereto, and gave judgment for the plaintiffs.

Lloyd-Jones, Q.C., and *F. H. Lawton* for the defendants.

Berryman, Q.C., and *S. I. R. Craig* for the plaintiffs.

SINGLETON, L.J., stated the facts and continued: Counsel for the defendants has submitted that the judgment of **SLADE, J.**, is wrong, that it goes too far, and that it places too high a duty on those who manage and conduct a school such as this was. Counsel on behalf of the plaintiffs has submitted that this was a question of fact for the decision of the learned judge, and that there was evidence on which he could come to the conclusion at which he arrived. I need hardly say that a finding of fact by the judge of first instance based on the evidence of witnesses whom he sees and hears will always receive full consideration in this court, and it is only if this court is satisfied that the conclusion of the judge is wrong that it will interfere. Counsel is right to a large extent in describing this question as a question of fact, but before a proper decision can be reached on that question of fact it is necessary to ascertain the measure of duty owed to a child by those responsible for the management of a school.

The learned judge was of the opinion that the defendants were obliged to store additional coke somewhere, and, as there was no place under cover in which they could put it, they put it in the senior boys' playground. The fact that there was this heap of coke in the senior boys' playground was an anxiety and a burden to the teachers and to the school authorities. The head mistress had complained and reports had been made from time to time. It was known that children often throw missiles at one another. The little boy who lost his eye was asked about it, and he said that he knew that things should not be thrown and that he would be punished if he did throw things. The school keeper said, in his evidence, that whenever he found boys playing on the coke he chased them away. They were a little out of hand until January, 1950, when a new headmaster came.

As I have said, **SLADE, J.**, found that there was no practical alternative for the county council to adopt. They had to have a heap of coke in the yard. Further, he found that the infants were supposed to keep to their own part of the playground, and not to go into the playground which was for older children. He found that there was adequate supervision, and he accepted the evidence of the head mistress and of the other mistresses and helpers who were called that there was adequate supervision and that no supervision would have prevented this accident, for children will do some things at a time when the teacher's back is turned. He found, further, that the boys knew that they would be punished if they threw missiles, and he said:

"The question resolves itself into whether something ought to have been done physically to prevent access to these dumps of coke so long as they remained in playgrounds accessible to children, and to as many as two hundred and seventy children in the infants' school alone."

The judge referred to the case to which our attention has been directed, *Jackson v. London County Council & Chappell* (1). The facts in that case were that a contractor, who was to carry out certain repairs at a public elementary school, left a quantity of rough material composed of sand and lime in a truck in a corner of the school playground. The head master of the school gave instructions to the school caretaker to have the material removed, as he considered that it was dangerous, and the caretaker telephoned the contractor asking him to remove it. When the boys came out of school the material had been left unguarded, and one of the boys threw a portion of it at the plaintiff, who was also a scholar at the school, injuring his eye. In an action by the plaintiff against the education authority and the contractor for damages, it was held that there was evidence on which the jury could find both the education authority and the contractor guilty of negligence. When the facts are examined, it would appear that the head master's anxiety was lest a boy should play with the truck itself and tip it up in some way. That in fact happened, and, after the truck had been tipped and the mixture in it was strewn about, the

boys threw pieces at each other. The contractor had failed to do what the head master had asked him to do. Thereafter it was difficult for the head master to say that he did not think it was dangerous, and it could be said that he owed a duty to the boys to have the danger removed, if danger there was. The action was against both the contractor and the London County Council, as the education authority. After verdict the question was raised whether there was evidence to go before the jury, and BRAY, J., in giving judgment, said that he had grave doubt whether there was any evidence of negligence in the case fit to go to the jury. He told the jury that they must be reasonably satisfied that the accident which happened was one which might reasonably have been anticipated by the defendants and guarded against. The real question was whether there was any evidence as to that. It was so much a question of degree that it was difficult to say when near the boundary line on which side the case fell. It was more a question of fact than of law. After giving judgment for the amount awarded by the jury, £50, his Lordship added that he had so much doubt about the case that there would be a stay of execution without any terms in order to give the defendants an opportunity of appealing. There was an appeal which came before a court consisting of VAUGHAN WILLIAMS, FARWELL and KENNEDY, L.JJ. VAUGHAN WILLIAMS, L.J., having read the questions that had been left to the jury and their answers, said (76 J.P. 218) that the effect of them was that the jury must have found that the barrow was a dangerous thing to leave where it was. He did not know whether the jury were influenced by sentimental sympathy in favour of the boy. The evidence against the schoolmaster was that he recognised the barrow as a source of danger, and with regard to the contractor it was clear from the evidence that he was told to take some steps to remove the barrow, but that he had not acted sufficiently. In his judgment, the appeal failed and must be dismissed, and FARWELL and KENNEDY, L.JJ., agreed. It appears that in both the court of first instance and in the Court of Appeal grave doubt was felt as to the result. It is not clear whether there was a submission before the case went to the jury that there was no evidence fit for the consideration of the jury. The matter was argued after verdict, and BRAY, J., although he was in very considerable doubt, thought that there was sufficient evidence to go before the jury, and the Court of Appeal held that the jury's verdict could be supported. That is as far as the case goes. I venture to point out that the case differs on its facts from this case in that something unusual had been brought on to the school premises, viz., a laden truck, and the head master's fear was that the boys might play with that truck and cause some damage or hurt themselves. In this case there was a heap of coke, as there had been since about 1941, for until 1950 the difficulties of getting regular supplies of coke had not been overcome even by the London County Council.

We have to consider whether or not the judgment of SLADE, J., can be supported on the facts proved before him and accepted by him. Perhaps the most important of his findings is that there was adequate supervision. There was a large number of pupils in the infants' side of this school, but there were plenty of people to supervise them, and they were properly supervised during their playtime. That is the finding of the learned judge. Having considered the authorities, he adopted the test stated by LORD ESHER, M.R., in *Williams v. Eady* (2). That was an action by a boy against a schoolmaster for an injury alleged to have been caused by his negligence in leaving a bottle of phosphorus about. LORD ESHER, M.R., said (10 T.L.R. 42):

" . . . as to the law on the subject there could be no doubt; and it was correctly laid down by the learned judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a school-master."

That test has been the one adopted ever since. SLADE, J., continued:

A “I feel sympathy with the London County Council for the position in which they found themselves, with adequate reasons for storing the coke where they did, no practical or practicable alternative, adequate supervision (as I have found), adequate exhortation and instructions (as I have found). But with the knowledge that they had, and, if they did not have it, with the knowledge that they ought to have had (and I am satisfied that they did have it), what should they have done, bearing in mind their duty to which I have already referred? It seems to me that there were only one of two things that they could have done to discharge that duty, and that is: (i) remove the coke from the playgrounds, or B (ii) take steps to ensure that it was no longer accessible to the boys. If they could not do (i), then they could have done (ii). They need not have put up a wire fence in case it had the risk which Dr. Topping envisaged. What they could have done was to put up some form of fence or wooden structure which would have, for all practical purposes, prevented the boys from having access to the coke . . . Posing the question to myself: What C would a careful father have done towards his own son, with knowledge of that risk which his son was running being pointed out to him over and over again; would such a father have left the coke there unprotected, with the consequences which the father knew might ensue and which, in due course, did ensue? I answer the question by saying that no careful parent would so have acted, and I accordingly find that the defendants were negligent in not taking steps to protect the coke or prevent the boys from D having access to the coke.”

E I cannot accept that. It seems to me that it is putting much too high a burden on the education authority, and, in my view, it is stating the way in which a father would approach the duty to his children in too general a way. I wonder how many yards in private houses or attached to public buildings have been without some fuel in the yard or yards in recent years. One who looks from a window in this building can see coke or some other fuel in the yard. It has F to be kept there, I assume, because of the difficulty in getting regular supplies. That difficulty may be resolved. As the learned judge pointed out, it is regarded as a temporary difficulty, but he says that a careful father, looking on a matter of this kind, would say: “I must have this fenced for the safety of my children.” What expense would be incurred in the small back yard of a private house or what it would be in the case of one school in the London County Council area I do not know. I do know, however, from the evidence that no one said that an accident of this kind, arising from the throwing of coke, had ever happened before, and no one said that any infant was known to have taken a piece of G coke and thrown it at another child in this school before. Yet it is said that the duty of the education authority is either not to have the heap of coke there or to put up some form of fence or wooden structure which would, for all practical purposes, have prevented the boys from having access to the coke. That would mean putting up some structure over which boys could not climb, for, if it were something over which boys could climb, it would not, for all practical purposes, prevent the boys from having access to the coke. I cannot H accept that as the duty in these circumstances.

SLADE, J., found that the supervision at this school was adequate. The school keeper said that there had been no trouble in regard to the coke since the new head master came in or about January, 1950, approximately a month before this accident. An accident of a most unfortunate kind occurred, but I do not see that the defendants can be blamed for it. If this be a question of fact, I am bound to say that I take a different view from that of the learned judge, but I am not sure that it is wholly a question of fact. It is necessary

to look at the test which SLADE, J., laid down. He found that in the circumstances the duty on the London County Council was to do one of two things: either to remove the coke or to take steps to ensure that it was no longer accessible to the boys. I do not agree with that. If their supervision was adequate, it was not necessary that they should take steps to ensure that the coke was no longer accessible to the boys. Their duty was to exercise the care which a careful parent would exercise in the like circumstances. On the evidence in this case I do not find that they failed in that duty. For those reasons I am of opinion that this appeal should be allowed and that judgment should be entered for the defendants.

HODSON, L.J., stated the facts and continued: The learned judge, in a very careful judgment, directed himself perfectly accurately as to the law when he said, quoting LORD ESHER, M.R., in *Williams v. Eady* (2), that a master was bound to take such care of his pupils as a careful father would take of his children, and he sought to apply that standard to this case. In doing so, he first considered the question of supervision and said:

"First, I am satisfied that there was adequate supervision of the infants during the breaks and on this occasion. Miss Price (the teacher in charge) was there the whole time actually standing in the bay where the infants were supposed to remain except for the purpose of going to the lavatory. If they went to the lavatory, there was Mrs. Logan, the infants' helper, again to shepherd them and to prevent them from going astray, that is to say, where they were not supposed to be. It so happened that another boy had chosen, about the same moment, to run his head into a wall, and Mrs. Logan's attention was temporarily taken up with attending to that boy, as, indeed might always happen whatever degree of supervision she could exercise. It is sufficient for me to leave it at that and to say that I am satisfied that the supervision was adequate, and I am satisfied, moreover, that no supervision, even if more than adequate, would have prevented this accident. One can supervise as much as one likes, but one will not stop a boy being mischievous when one's back is turned. That, of course, is the moment that he chooses for being mischievous. Secondly, I am satisfied that Miss Camburn [the head mistress of the infants' school] did everything that she possibly could in the way of instruction, exhortation, and threat of punishment, and I am further satisfied that Malcolm, when he threw this piece of coke, and Derek, when he was about to throw it back again, knew perfectly well that they were doing wrong and that they would be punished or would be liable to be punished if they were caught."

Having arrived at that finding of fact and having found that it was reasonable for the London County Council to have coke stored on the premises, the question is whether the learned judge was right in going further and demanding of the defendants something more than the supervision which he had already said was adequate. With all respect to him, I think that in that the learned judge fell into error. In his judgment he said:

"But with the knowledge that they had, and, if they did not have it, with the knowledge that they ought to have had (and I am satisfied that they did have it), what should they have done, bearing in mind their duty to which I have already referred? It seems to me that there were only one or two things that they could have done to discharge that duty and that is: (i) remove the coke from the playgrounds, or (ii) take steps to ensure that it was no longer accessible to the boys. If they could not do (i), then they could have done (ii) . . . What they could have done was to put up some form of fence or wooden structure which would have,

for all practical purposes, prevented the boys from having access to the coke."

A The impracticability of keeping children from access to missiles by the
erection of physical barriers has only to be stated to be reasonably obvious,
in my view, and one would have thought that on this footing this case was
very difficult to argue. One has only to envisage the difficulties of a master
taking a party of children to the seaside—an argument which, we are told,
is led when one considers means which might have to be employed to prevent
children picking up missiles. I think that the only crumb of assistance which
the plaintiffs have been able to obtain in this case is derived from the fact
that in *Jackson's* case (1), to which my Lord has referred, an accident occurred
B in circumstances not wholly dissimilar from those in this case and the plaintiff
succeeded. I would draw attention to the fact that the only decision there
was that there was some evidence on which the jury could arrive at the
conclusion at which they did arrive and that, so far as the short report of the
case goes, it does not appear that any steps were taken to supervise the children
or to guard against the accident which did occur. On the contrary, in this
C case the evidence was strong, and it was accepted by the learned judge, that
so far as supervision was concerned the steps taken were adequate, and so
far as exhortation and instruction were concerned again adequate steps were
taken directed to this particular point, namely, the throwing of missiles. In
my judgment, therefore, treating this matter as an exceptional case in which
this court is taking a different view of the facts from that taken by the learned
D judge who carefully examined them in the first instance, this appeal must be
allowed.

MORRIS, L.J.: I have reached the same conclusion. It is common
ground between the parties in this case that it was the duty of the London
County Council, as the education authority, to act as a reasonable, careful and
solicitous parent would have acted in the circumstances. The learned judge
E towards the end of his judgment poses for himself the question how a careful
parent would have acted and whether such a parent would or would not have
left the coke unprotected. Counsel for the plaintiffs has emphasised before us
the consideration that Miss Camburn appreciated that there were risks attendant
on the accessibility, within the area of the school premises, of the pile of coke.
F Not unnaturally Miss Camburn, as a careful head mistress, desired to protect
herself in every possible way, and she called the attention of those above her
to the possibility that the presence of the coke might lead to some unfortunate
circumstances. The question that is raised in this appeal is whether it can
be said to be negligent in a reasonable, careful and solicitous parent to permit
the accessibility to a child of something that may conceivably be used as a
missile if every reasonable supervision is exercised over the child.* In my
G judgment, such a question must be answered having regard to the facts and
circumstances of each case. It is of great consequence in this case to have in
mind that the learned judge has found that there was nothing lacking in the
supervision of the children and in the measure of exhortation that was given to
them. But he came to the conclusion that on the facts of this case a careful
parent would not have left the coke unprotected. As this is a question which,
H in my judgment, can be determined equally well by this court, having all the
evidence and the findings of fact before us, as it could have been determined
by the learned judge, I feel free to form my own conclusion, which differs
from that reached by the learned judge. This was a case where everything
reasonably possible that could be done was being and had been done to look
after the children. It is true that there is a propensity in children to throw
things. Their ingenuity in finding things to throw may be difficult to circumvent.
It seems to me that it cannot be said that it is the duty of a reasonable, careful,

and solicitous parent to endeavour to put a child into a straight jacket or to seek to remove from his reach anything that may conceivably be used by him to indulge his mischievous propensity, always provided that reasonable, proper, and adequate supervision over the child is exercised. I do not consider that it has been shown that in this case the defendants fell short in the fulfilment of the duties which lay on them.

Appeal allowed.

Solicitors: *J. G. Barr* (for the defendants); *Mark Lemon* (for the plaintiffs).
[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

SHELDON v. BROWN BAYLEY'S STEEL WORKS, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Barry, J.), June 15, 1953.]

Writ—Service—Service after more than twelve months from date of issue—Unconditional appearance by defendants—R.S.C., Ord. 8, r. 1.

By R.S.C., Ord. 8, r. 1, "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

A widow, whose husband had been killed in an accident, commenced an action against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, by a writ which was not served on the defendants until more than twelve months after the date of issue. The defendants entered an unconditional appearance.

HELD: the service of a writ after the expiration of the time prescribed by the rule was not an irregularity which could be rectified by waiver; a writ so served was ineffectual for all purposes; and, therefore, the service on the defendants was a nullity and they were entitled to have it set aside.

Dictum of LORD GODDARD in *Battersby v. Anglo-American Oil Co., Ltd.* ([1944] 2 All E.R. 389), applied.

Lloyd v. Great Western Dairies Co. ([1907] 2 K.B. 727), distinguished.

AS TO RENEWAL OF WRIT, see HALSBURY, Hailsham Edn., Vol. 26, p. 26, para. 35; and FOR CASES, see DIGEST, Practice, pp. 311-313, Nos. 358-377, and pp. 845, 846, Nos. 3924-3926.

Cases referred to:

(1) *Re Kerley, Son & Verden*, [1901] 1 Ch. 467; 70 L.J.Ch. 189; 83 L.T. 699; Digest, Practice, 312, 371.

(2) *Lloyd v. Great Western Dairies Co.*, [1907] 2 K.B. 727; 76 L.J.K.B. 924; 97 L.T. 384; Digest, Practice, 383, 906.

(3) *Fry v. Moore*, (1889), 23 Q.B.D. 395; 58 L.J.Q.B. 382; 61 L.T. 545; Digest, Practice, 969, 5047.

(4) *Re Orr Ewing*, (1882), 22 Ch.D. 456; 52 L.J.Ch. 529; 48 L.T. 555; Digest, Practice, 381, 888.

(5) *Smurthwaite v. Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; Digest, Practice, 972, 5066.

(6) *Battersby v. Anglo-American Oil Co., Ltd.*, [1944] 2 All E.R. 387; [1945] K.B. 23; 114 L.J.K.B. 49; 171 L.T. 300; 2nd Digest Supp.

(7) *Holman v. Elliot (George) & Co., Ltd.*, [1944] 1 All E.R. 639; [1944] K.B. 591; 113 L.J.K.B. 459; 170 L.T. 373; 2nd Digest Supp.

APPEAL by plaintiff to judge in chambers from an order of a master setting aside the service of a writ, adjourned into open court for judgment.

- A On Oct. 12, 1950, the plaintiff's husband, Leslie Sheldon, was killed in an accident. On Oct. 3, 1951, the plaintiff commenced an action against the first defendants, Brown Bayley's Steel Works, Ltd., and the second defendants, Dawnay's, Ltd., by the issue of a writ claiming damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff's solicitors alleged that service of the writ on the second defendants was effected within twelve months after the date of the issue of the writ, as required by R.S.C., Ord. 8, r. 1, by the posting of a copy of the writ and of the statement of claim to the second defendants' registered office on Oct. 1, 1952. The second defendants contended that the writ was not received at their registered office till Oct. 7, 1952, by which date the period of twelve months had expired. On Oct. 13, 1952, however, they entered an unconditional appearance, and on Nov. 25, 1952, they issued a summons to set aside the service of the writ. The master set aside the service of the writ on the ground
- C that the writ had been served after the expiration of twelve months from the date of its issue. The plaintiff appealed against this order, contending that, even if service was not effected on the second defendants within twelve months of the date of issue, that irregularity had been waived by the second defendants by their unconditional appearance to the writ and it was now too late for them to ask for the service of the writ to be set aside.
- D The first defendants also alleged that the writ had been served on them more than twelve months after the date of its issue. They entered a conditional appearance, and service on them was subsequently set aside. The plaintiff did not appeal against this order.

Lloyd-Jones, Q.C., and *Hayman* for the plaintiff.

N. Lawson for the second defendants.

Cur. adv. vult.

- E **BARRY, J.**, read a judgment in which he stated the facts, found that the writ was not served on the second defendants within twelve months from the date of its issue, and continued: R.S.C., Ord. 8, r. 1, provides:

- F "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ . . ."

After dealing with the procedure for renewal the rule concludes with these words:

- G " . . . and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons."

- H In the present case the plaintiff made no application for the renewal of the writ within twelve months from its date. Under Ord. 64, r. 7, the court has power to enlarge this time and to renew a writ at some later period. Counsel for the plaintiff, however, very rightly conceded that in all probability, to put it at its lowest, the court would not have exercised this jurisdiction in the plaintiff's favour (had it been asked to do so) in respect of the cause of action under the Fatal Accidents Act, 1846, as any enlargement of time would have deprived the defendants of their accrued right to rely on the period of limitation imposed by s. 3 of that statute. Counsel for the plaintiff relies on Ord. 70, r. 1, which provides that non-compliance with the Rules of the Supreme Court does not render any proceedings void, and argues that, by entering an unconditional

appearance, these defendants have done for the plaintiff what the court would not have done, and have, in effect, precluded themselves from questioning the validity of the writ served on them. Counsel for the second defendants concedes that, if the defect in the writ had been a mere irregularity falling within the terms of Ord. 70, r. 1, such defect would have been waived, and so cured, by the defendants' unconditional appearance. In the present case, he says the writ was not merely irregular or defective—it was a nullity and void, or, at least, entirely ineffective as a means of commencing an action, and cannot be made effective by unconditional appearance or by any other step taken by the defendants: *ex nihilo nihil fit*. It is thus necessary for me to consider the true effect of Ord. 8, r. 1, and, in particular, whether an unrenewed writ, served more than twelve months after the date of its issue, is one which is defective only on account of irregularity or is wholly inoperative and void.

In support of his argument, counsel for the plaintiff placed considerable reliance on the decision of the Court of Appeal in *Re Kerley, Son & Verden* (1) and on the note to Ord. 8, r. 1, on p. 59 of the ANNUAL PRACTICE, 1953, which purports to be founded on this decision. The note says that the words “ ‘No . . . writ . . . shall be in force’, etc.”, means “ ‘shall be in force for the purpose of service for more than twelve months’”, not that the writ ceases to be efficacious for any purpose whatever. If, he argues, the writ remains efficacious after twelve months for all purposes except service, and the defendants, in fact, accept service and enter an unconditional appearance, its sole disability has been remedied by waiver. Counsel for the plaintiff also relied on *Lloyd v. Great Western Dairies Co.* (2), in which the Court of Appeal held that failure to obtain the leave of the court before joining other causes of action with a claim for possession of land and mesne profits amounted only to an irregularity which could be, and had been, waived by the defendants. The court pointed out that the joinder of a cause of action for the recovery of land with some other separate claim was a form of action recognised by the Supreme Court of Judicature Act, 1873, and the rules, and was one which might be adopted by the leave of the court or a judge which could be given either before or after the issue of the writ. In seeking to apply this authority to the present case, counsel for the plaintiff points out that the plaintiff could have obtained an order for the renewal of the writ if she had applied within twelve months from its date, and the court would have had jurisdiction to renew after that period, albeit, as a matter of discretion, that relief would probably not have been granted in respect of any part of her claim that was already statute-barred. Thus, says counsel for the plaintiff, the defect in the present writ is confined, as in *Lloyd's* case (2), to a failure to obtain an order from the court demanded by the rules. In this, as in *Lloyd's* case (2), the defect amounts only to an irregularity, which has been waived by unconditional appearance. Counsel for the plaintiff also relied on *Fry v. Moore* (3) and *Re Orr Ewing* (4), but in neither of these cases was the validity of the writ in question, and they certainly do not carry his case any further than the two authorities to which I have already referred.

Counsel for the second defendants submitted that the matter was concluded in the second defendants' favour by the decision of the House of Lords in *Smurthwaite v. Hannay* (5) and the comparatively recent decision of the Court of Appeal in *Battersby v. Anglo-American Oil Co., Ltd.* (6). In the former case, separate and distinct causes of action of several plaintiffs were joined on the same writ. On an application by the defendants to stay or dismiss the action the plaintiffs contended, *inter alia*, that, if their joinder was unwarranted by the rules, this was a mere irregularity of which it was too late for the defendants to take advantage. LORD HERSCHELL, L.C., dismissed this contention by saying ([1894] A.C. 501):

“ If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.”

LORD RUSSELL OF KILLOWEN dealt with the same question and said (*ibid.*, 506):

"In my judgment, such joinder of plaintiffs is more than an irregularity: it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process."

A In *Battersby's* case (6), which related to the renewal of a writ after the period allowed for service had expired, LORD GODDARD used words which are directly applicable to the present problem. In discussing *Holman v. Elliot (George) & Co., Ltd.* (7), which the court refused to follow, LORD GODDARD said ([1944] 2 All E.R. 389):

B "Acceding to an argument advanced by the plaintiff, MAC KINNON, L.J., is reported as saying ([1944] 1 All E.R. 640): 'Mr. Fox-Andrews, for the plaintiff, points out, and I think with reason, that this is not a case where the order of the learned judge, in extending the period for the service of the writ, deprives the defendants of an accrued right of defence under Lord Campbell's Act. The right of defence by the limitations section . . .

C would arise if the writ had not been issued before Oct. 9, 1942. It was, in fact, issued on Oct. 7, 1942, two days before the expiry of the twelve months from the date of the accident.' With all respect, we are unable to agree that the issue of a writ which has become a nullity by reason of non-service within the prescribed time satisfies the section. If the writ has ceased to be in force the position is the same as if it had never been issued; otherwise we see no reason for the concluding words of Ord. 8, r. 1, which provides for a renewed writ preventing the operation of statutes of limitation. These words would be unnecessary if a writ which had expired and had not been renewed would answer that purpose. A new writ, issued more than twelve months after the date, would clearly be out of time, so either the writ originally issued must be renewed or the action is barred."

D

E

Counsel for the plaintiff submitted that these words were obiter dicta, as it was unnecessary for the court to decide that the writ became a nullity unless served within the prescribed period. In a sense I think that this is so. The passage from the judgment of MAC KINNON, L.J., to which LORD GODDARD referred, was itself unnecessary for the decision in *Holman's* case (7), and it seems clear

F from the authorities cited that the Court of Appeal in *Battersby's* case (6) had ample authority for deciding that, in the circumstances under consideration, the writ should not be renewed without also deciding that the writ itself had become a nullity or that the position was the same as if it had never been issued. I am, however, bound to give weight to this clear expression of opinion, although it may not, in strictness, be binding on me. Indeed, be it binding on me or not,

G I am satisfied that it correctly represents the law in relation to this question. I find it impossible to hold that the service of a writ which is no longer "in force" is a mere irregularity which can be rectified by waiver. Whether or not the term "a nullity" describes the situation with complete accuracy, I am satisfied that, if not served within twelve months, a writ is dead and ineffectual for all purposes. It is true that the court has jurisdiction to infuse

H fresh life into the corpse, but, until that jurisdiction is exercised, what was a writ is no longer a writ and is wholly ineffectual. It is, I think, no more a writ than a document in the form of a writ which could become a writ when properly sealed and issued in the Central Office of the court. The service of such a document could in no circumstances be effective, and it would be idle for a plaintiff to contend that its defect was a mere irregularity because, if it had been taken to the Central Office and the appropriate fee paid, it would, as a matter of right, have been issued as a writ.

On close examination, I do not think that *Re Kerley, Son & Verden* (1) bears the interpretation for which counsel for the plaintiff contends, nor does it justify the note in the *ANNUAL PRACTICE* to which I have referred if that note is intended to mean that, without service or authorised acceptance of service by the defendant's solicitor within twelve months, a writ retains efficacy for any purpose unless and until it is renewed by the court. In *Kerley's* case (1) the writ had, in fact, been served within twelve months, in the sense that the defendant's solicitors, with the defendant's authority, had accepted service and undertaken to enter an appearance. As RIGBY, L.J., pointed out ([1901] 1 Ch. 476), an authorised acceptance of service by the defendant's solicitors waived all obligation as to service on the part of the plaintiff and was equivalent to service on the defendant. In these circumstances RIGBY, L.J., held that Ord. 8, r. 1, had no application. STIRLING, L.J., appears to have considered that this rule had still some relevance, as he was not satisfied that the solicitor's undertaking fell within the provisions of Ord. 9, r. 1. He was, however, careful to confine his decision to the particular facts then before the court, and, at most, that decision means that a writ remains in force after twelve months if within that period the solicitors for the defendant have, with his authority, endorsed on it: "We accept service and will enter an appearance in due course".

Lloyd v. Great Western Dairies Co. (2) is clearly distinguishable from the present case. There is no power in the Act or rules enabling the court or a judge to permit the service of a writ which is no longer in force. Such a power would be something wholly different from the existing jurisdiction to renew a spent writ, in proper circumstances, so as to enable it to be effectually served.

In the result, I am clearly of opinion that the service of this writ on the second defendants was a nullity, and that, in consequence, despite their unconditional appearance, the second defendants are entitled to have it set aside. I need hardly add that I have reached this conclusion with considerable reluctance as it involves the defeat of the plaintiff's major claim on what must seem to her, at least, the merest technicality. Parliament has, however, imposed a time limit for the commencement of proceedings under the Fatal Accidents Act, 1846, and hardship must necessarily arise if, through mistake or any other reason, this limit is exceeded. My duty is to administer the law as I apprehend it, and I am satisfied that the order of the master was correct. The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the second defendants).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

DAY v. HARLAND & WOLFF, LTD.

[QUEEN'S BENCH DIVISION (Pearson, J.), June 8, 9, 1953.]

Ship—Repairs—Painting with anti-fouling paint—Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133), preamble, reg. 11 (b) (i).

The painting of a ship in dry dock with anti-fouling paint constitutes the "repair" of the ship, and brings the operation within the provisions of the Shipbuilding Regulations, 1931, which, according to the preamble, "... apply to the construction and repair of ships in shipbuilding yards", and, therefore, under reg. 11 (b) (i), all staging in the dock for the purpose of the operation must be securely constructed of sound and substantial material and maintained in such condition as to ensure the safety of the persons employed.

Dredge v. Conway, Jones & Co. ([1901] 2 K.B. 42), applied.

Taylor v. Ellerman's Wilson Line, Ltd. ([1952] 1 Lloyd's Rep. 144), distinguished.

FOR THE SHIPBUILDING REGULATIONS, 1931, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 141.

Cases referred to:

(1) *Wood v. Walsh & Sons*, [1899] 1 Q.B. 1009; 68 L.J.Q.B. 492; 80 L.T. 345; 63 J.P. 212; 24 Digest 924, 165.

(2) *Hoddinott v. Newton, Chambers & Co.*, [1901] A.C. 49; 70 L.J.Q.B. 150; 84 L.T. 1; 24 Digest 923, 161.

(3) *Dredge v. Conway, Jones & Co.*, [1901] 2 K.B. 42; 70 L.J.K.B. 494; 84 L.T. 345; 24 Digest 924, 166.

(4) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.

(5) *Taylor v. Ellerman's Wilson Line, Ltd.*, [1952] 1 Lloyd's Rep. 144.

(6) *Moon (Lambeth Revenue Officer) v. London County Council. Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

ACTION for negligence and/or breach of statutory duty.

The plaintiff, Victor Frederick Day, who was employed by the defendants as a painter, was engaged in painting a ship with anti-fouling paint in a dry dock.

A staging covered with planks had been erected in order to facilitate the painting, and on Sept. 26, 1951, the plaintiff, while painting, slipped on some of the planks which were oily. He fell to the bottom of the dock, and was injured. It was contended, inter alia, on behalf of the defendants that the painting of a ship with anti-fouling paint did not constitute "repair" of the ship, and, therefore, that there was no breach of statutory duty under the Shipbuilding Regulations, 1931, which "apply to the construction and repair of ships in shipbuilding yards."

R. Geraint Rees for the plaintiff.

R. E. Hopkins for the defendants.

PEARSON, J., stated the facts and continued: A question for decision is whether the ship was being "repaired" at the time. Was the work of painting the bottom plates of the ship with anti-fouling paint work of repair within the meaning of the Shipbuilding Regulations, 1931? On that question I have been referred to certain decided cases, viz., principally, the decision of the Court of Appeal in *Wood v. Walsh & Sons* (1); a decision of the House of Lords in *Hoddinott v. Newton, Chambers & Co.* (2); the important case of *Dredge v. Conway, Jones & Co.* (3), a decision of the Court of Appeal; the House of Lords case of *London & North-Eastern Ry. Co. v. Berriman* (4); and a recent decision of ORMEROD, J., in *Taylor v. Ellerman's Wilson Line, Ltd.* (5).

In the end, no doubt, the dividing line between work of repair and work of that kind of maintenance which is not repair is not easy to draw, and there is an element of degree in the matter. So far as the authorities are concerned, the Court of Appeal decision in *Dredge v. Conway, Jones & Co.* (3) that white-washing an internal ceiling constituted repair within the meaning of the Workmen's Compensation Act, 1897, s. 7, is an important authority in favour of giving a wide meaning to "repair" in a somewhat similar case. That decision and its reasoning, in my view, have not been overruled by anything said in *London & North-Eastern Ry. Co. v. Berriman* (4). I was referred to certain passages in that authority. LORD PORTER said ([1946] 1 All E.R. 267):

"The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong. It does not include the mere keeping in order by oiling, brushing or cleaning something, which is otherwise in perfect repair and only requires attention to prevent the possibility of its going wrong in the future."

LORD SIMONDS said (*ibid.*, 270):

"It is probably irrelevant, for I do not understand that any argument was founded on cleaning as distinct from oiling. The work upon which he was engaged was a matter of routine and did not arise out of any defect which he was instructed to put right."

So, very broadly speaking, I think that to repair is to remedy defects, but it can also properly include an element of the "stitch in time which saves nine". Work does not cease to be repair work because it is done to a large extent in anticipation of forthcoming defects or in rectification of merely incipient defects, rather than the rectification of defects which have already become serious. Some element of anticipation is included.

There has not been evidence of an expert character as to what is involved in the operation of applying anti-fouling paint and whether the ship when it first sails the seas has anti-fouling paint on its bottom plates, but one has to draw inferences and take a reasonable common-sense view of the matter. It seems to me that one must suppose that the anti-fouling paint on the bottom plates of the ship is part of the ship: the ship is not complete without its anti-fouling paint. It was explained to me, I have no doubt correctly, that the object of anti-fouling paint is to prevent marine barnacles and other objects from adhering to the bottom of the ship. It must be either that, or it is by way of protection and preservation of the bottom plates. It seems to me reasonable to suppose that a ship is not complete without its anti-fouling paint.

A shipowner finds it necessary or considers it worth while to pay to have the anti-fouling paint on the bottom of his ship renewed, and he presumably does not do that unless there is some reasonable need for it and for the cost to be incurred. I think the proper inference is that the anti-fouling paint has become defective, or has been in process of becoming defective, and the object of the re-painting is to renew the defective or incipiently defective paint. It is different in kind from oiling, brushing and cleaning, and even polishing. The paint is an important part of the ship and this work is the work of rectifying defects or incipient defects. For that reason it is work of repair.

There is also the further argument—whether it is strictly a legitimate argument I am not quite sure—that the work which was being done in this case was the kind of work which needs the protection afforded by the Shipbuilding Regulations, 1931. There is no doubt about that on the facts. The staging erected ought to have been made safe, and these were operations which naturally would be done and presumably must be done in dry dock. I think that there is some proper argument to the effect that one ought to have

regard to the apparent scope and effect of these regulations in construing the word "repair" for that purpose. I hold that the work here in question is work of repair within the meaning of the regulations, and the decision in *Taylor v. Ellerman's Wilson Line, Ltd.* (5) can be distinguished on its facts.

I would add that I also considered *Potteries Electric Traction Co., Ltd. v. Bailey* (6), where a paint shop was held to be devoted to the maintenance of road vehicles, but I did not find anything inconsistent with my present conclusion, and if anything there was a passage ([1931] A.C. 164) which was slightly helpful towards it. But there the word in the relevant statute, the Rating and Valuation (Apportionment) Act, 1928, s. 3 (2) (b), was "maintenance", the context being "any place used . . . for . . . the . . . maintenance of [the occupier's own] road vehicles . . ." Of course, "maintenance" is a vague word. It is not necessarily distinguished from "repair". It may in some contexts be the same as "repair", and it may in some contexts have a wider meaning which includes repairing as well as other operations. I do not think that the case is of any great assistance. I find, therefore, that there has been a breach of the regulations, and that that breach has caused the accident.

[HIS LORDSHIP then found that the defendants were also in breach of their common law duty in that they failed to take reasonable care to see that the planks used on the staging were not oily or dangerous.]

Judgment for plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

NOLAN v. C. & C. MARSHALL, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), June 10, 1953.]

Legal Aid—Costs—Payment into court—Recovery by legally assisted plaintiff of amount less than that paid in—Liability for defendants' costs after date of payment into court—Legal Aid and Advice Act, 1949 (c. 51), s. 2 (2) (e).

In an action against his employers for negligence and breach of statutory duty by a plaintiff who was an assisted person under the Legal Aid and Advice Act, 1949, the defendants paid into court £763. On trial of the action, the plaintiff was awarded £504 ls. 11d. In the civil aid certificate the plaintiff's disposable capital and his contribution towards the costs were assessed at nil. On the question of costs,

HELD: in all the circumstances of the case, including the means of the parties and their conduct in connection with the dispute, following the ordinary rule it would be ordered that the plaintiff should recover his costs up to the date of the payment into court and the defendants their costs since that date, and the defendants would be authorised to deduct against the amount of damages awarded to the plaintiff the excess, if any, of their costs since the date of the payment in over the amount of the plaintiff's costs up to that date.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 2 (2) (e), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 535.

APPLICATION as to costs, under the Legal Aid and Advice Act, 1949.

On June 8, 1953, McNAIR, J., gave judgment for the plaintiff, an assisted person under the Act of 1949, for £504 ls. 11d. against the defendants in an action for negligence and breach of statutory duty. HIS LORDSHIP was informed that in May, 1952, the defendants had paid £763 into court. It was contended on behalf of the plaintiff that by virtue of s. 2 (2) (e) of the Act of 1949 the ordinary rule in such a case, under which the defendants would set off their

costs after payment in against those of the plaintiff up to the date of payment in and deduct any excess in their favour against the amount of the damages awarded to the plaintiff, should not apply.

M. Waters for the plaintiff.

John Thompson for the defendants.

McNAIR, J.: In this case I was informed that there had been a payment into court on May 13, 1952, of £763. Under my judgment I awarded £504 1s. 11d., and if the case had not been a legal aid case I should have thought that this was a proper case in which to apply the normal rule, viz., that the plaintiff would recover costs up to the date of payment in and the defendants their costs since the date of payment in until judgment, and that if on setting off those costs, the one against the other, there was found to be a balance in favour of the defendants, that balance would be deducted from the amount of the damages awarded and only the balance would be paid out to the plaintiff in satisfaction of the judgment. It is argued, however, by counsel for the plaintiff that, as this is a legal aid case, a different order should be made.

The plaintiff at the time of the accident was a boy of sixteen and at the date of the hearing he was aged eighteen and still in the army. From the civil aid certificate it appears that his disposable capital was nil, and his contribution towards his costs was also assessed at nil. In these circumstances it is said that the court ought, under the Legal Aid and Advice Act, 1949, s. 2 (2) (e), in considering the plaintiff's liability to bear costs, to make such order as secures that his liability does not exceed the amount, if any, which is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute. I accept that that is a direction with which the court ought to comply. It is said, too, that there has been no misconduct by the plaintiff in this case and that the only relevant conduct on his part—and I am asked to infer—that on the advice of his legal advisers he did not take out of court this £763 at, or soon after, the date of payment in. It is admitted that, so far as the defendants are concerned, their conduct in the action has been impeccable.

Certain figures were put before me by way of illustration to persuade me to make an order in this case different from that which I would make in the ordinary case. The figures given were these. The plaintiff's costs up to the date of payment in, £20; the defendants' costs after payment in, £130; so that on those figures there would be a balance in respect of costs in the defendants' favour of £110. If that is deducted from the £500 awarded, there will be £390 to go into the legal aid fund. It was further argued that of that £390 which would go into the legal aid fund £170 would be retained by the legal aid authorities to meet the plaintiff's costs, leaving him merely a balance of £220.

I am not concerned at this stage to consider whether the legal aid authorities would be entitled to deduct £170 in a case where the aided litigant's contribution has been assessed at nil. It may be so, but there is, clearly, on the wording of s. 3 of the Act, an argument to be founded to the contrary. If I accede to the plaintiff's submission in this case it would seem to me that I would be depriving the defendants of all the benefit which the rules of court afford to a defendant to pay into court at an early stage in the action, and in that way, in effect, to buy off the litigation. As there is nothing in the Legal Aid and Advice Act, 1949, or the regulations thereunder which deals specifically with the question of payment into court, I must assume that Parliament has not had in mind that in the ordinary case a defendant should, by virtue of the legal aid provisions, be deprived of that right to pay into court with the usual result.

I am fully conscious that the result of making the order which I propose to make at the end of the hearing will be in effect that the plaintiff receives an

inadequate sum, or a lesser sum than that which I have considered proper compensation for his injuries, but that result, as it seems to me, follows from the fact that he, either on advice or not—it is immaterial—refused an offer of £760 in May, 1952. In those circumstances it seems to me that if I make the ordinary order which I have indicated, I would not be making the plaintiff liable for any sum which exceeds the amount which it is reasonable for him to pay having regard to all the circumstances including the means of the parties and their conduct in connection with the dispute. There will be the ordinary order for taxation of the plaintiff's costs as between solicitor and client.

Judgment for the plaintiff, with costs up to the date of payment into court, the defendants to have their costs thereafter, the difference between the two amounts to be set off against the damages recovered.

Solicitors: Leonard Kasler (for the plaintiff); Watson, Sons & Room (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

WOODS v. DURABLE SUITES, LTD.

[COURT OF APPEAL (Singleton and Morris, L.JJ., and Harman, J.), June 4, 5, 1953.]

Master and Servant—Duty of master—Provision of safe system of working—Dermatitis contracted through use of synthetic glue—Notice of precautionary measures posted up—Instructions given to workman—Protective cream and washing facilities provided—Workman's failure to take precautions unknown to employer.

To avoid the risk of dermatitis among workmen engaged in spreading synthetic glues in their veneer department, the defendants posted near the place of work a notice specifying the precautions to be taken to avoid dermatitis, instructed workmen in the protective steps required, and made available the necessary barrier cream, soap, and washing facilities. These precautions, if observed, were found as a fact to provide reasonable protection against dermatitis. It was also found that the plaintiff, an experienced workman of fifty-six years of age, was specifically instructed by the manager in the protective measures, but, without the defendants' knowledge, he had not observed them fully, and, as a result, he contracted occupational dermatitis.

HELD: the duty of the defendants was to take reasonable care for the safety of their workmen and not to subject them to any unnecessary risk, but they were under no duty to provide a foreman, constantly watching, to ensure that a workman of age and experience such as the plaintiff took the precautions which he had been instructed to take, and, as they had given the plaintiff proper instructions and provided him with the requisite materials and facilities for his protection, they were not liable for any failure to provide a safe system of working or so to carry on operations as not to subject the plaintiff to unnecessary risk.

Clifford v. Charles H. Challen & Son, Ltd. ([1951] 1 All E.R. 72), explained and distinguished.

AS TO A MASTER'S DUTY TO PROVIDE A SAFE SYSTEM OF WORK, see HALSBURY, Halsham Edn., Vol. 22, pp. 187-190, paras. 313-317; and FOR CASES, see DIGEST, Vol. 34, pp. 194-198, Nos. 1583-1623.

Cases referred to:

(1) *Clifford v. Charles H. Challen & Son, Ltd.*, [1951] 1 All E.R. 72; [1951] 1 K.B. 495; 2nd Digest Supp.

(2) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.

(3) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

APPEAL by the plaintiff from an order of LLOYD-JACOB, J., dated Nov. 20, 1952, in which he gave judgment for the defendants in an action in which the plaintiff claimed damages for negligence and breach of statutory duty. The latter ground of action was not pursued. As regards the allegation of negligence the plaintiff pleaded that the defendants, inter alia, did not exercise any, or any sufficient, supervision over him and his work, and that they adopted an unsafe system of working, in particular, by failing to delegate to a competent person the duty of seeing that the provisions of the Factories Act, 1937, were complied with and that sufficient measures were provided for the safety of the plaintiff and were used by him.

The plaintiff was employed by the defendants in their veneer department in work which included the application of synthetic glue to pieces of wood which, glued together, had to be passed through rollers. The work involved a danger of the glue getting on the hands of the workman with the attendant risk of dermatitis, and to prevent this risk the plaintiff was provided with a pair of gloves, with his name written in them. The gloves were not convenient for the work, and, to the knowledge of the defendants, their use was impracticable, and the plaintiff and other workmen cut off the fingers to make them more convenient. A circular issued by the Stationery Office in February, 1943 (Form No. 366), was posted close to the place at which the plaintiff worked. The circular specified the practice to be followed to avoid dermatitis when synthetic glues were used. So far as material, it was in the following terms:

"Dermatitis from glues (synthetic). Cautionary notice. N.B. Glue must not be allowed to dry on the skin. Dermatitis is an inflammation of the skin starting with redness and irritation. Some of the ingredients of synthetic (chemical) glues and hardeners may cause dermatitis, but this can generally be avoided by taking the following precautions. Before starting work: (i) After washing, dry the hands and apply the special barrier preparation (skin protective) provided. Re-apply after each washing. At work: (ii) Roll the sleeves down and fasten them at the wrists; the arms are then protected. (iii) Never allow glue (especially if mixed with the hardener) to dry on the skin. Wipe it off at once with the damp swab provided. Wash using the special soap if the amount of glue on the skin is more than a trace."

Barrier cream, soap and washing facilities were provided, and at all material times the plaintiff was made aware of the danger of getting glue on his hands and of the precautionary measures to be adopted, including creaming his hands before commencing work and after every washing, and removing any adherent glue with rags and thereafter washing his hands in hot or warm water every time he was splashed. The plaintiff contracted dermatitis. LLOYD-JACOB, J., found as a fact:

"The precautionary measures prescribed by the employers were, if observed, adequate to provide reasonable protection to their workpeople, and, in particular, this plaintiff",

but that the identification of the plaintiff's ailment as occupational dermatitis indicated that the precautionary measures had not been fully observed. The manager of the defendants' veneer department, in which the plaintiff worked, accepted full responsibility for seeing that all the appropriate workpeople were acquainted with the precautions and that adequate supplies of materials were available, and he stated in evidence that he specifically instructed the plaintiff in the protective steps required. So long as the manager's brother was foreman there was a complete watching of the workmen and everything was entirely

satisfactory, but there had been a change of foreman shortly before the plaintiff entered on this branch of work and LLOYD-JACOB, J., found that:

“It may well be that the transfer of the foreman brother to another part of the country, by removing the manager’s watchdog, led to a slackening in the standard of care observed by the workpeople.”

A He held, however, that, without the knowledge of the defendants, the plaintiff had not followed the instructions himself and he gave judgment for the defendants. The plaintiff appealed.

Doughty for the plaintiff.

Stephen Chapman for the defendants.

B SINGLETON, L.J., stated the facts and continued: Counsel for the plaintiff treated the judge’s finding that the transfer of the foreman to another part of the country might have “led to a slackening in the standard of care observed by the workpeople” as a finding of fact that the defendants ceased to do their duty in encouraging their workmen to follow the precautionary measures. I do not read it as a finding that the employers were in any way negligent. The judge found that the plaintiff had been properly instructed and that while the manager’s brother was the foreman there was a complete watching of the men with everything entirely satisfactory, and I do not think that his further statement ought to be treated as a finding of fact that there was any lack of care on the part of the management of the defendants.

C Counsel for the plaintiff relied here and below on *Clifford v. Charles H. Challen & Son, Ltd.* (1). That was a case of the same nature as this, but it is of the greatest importance to note that, though the nature of the illness and the nature of the work were the same, the facts were quite different. Counsel claims that it lays down a standard to be adopted in a case of this kind. In other words, he seeks to treat that decision as deciding a question of law rather than as being a decision on the facts of that particular case.

D The duty which employers owe to their workmen is stated by LORD HERSCHELL in *Smith v. Baker & Sons* (2) in these words ([1891] A.C. 362):

E “It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.”

F That test has been followed through the years, and the commencement of the first judgment in *Clifford v. Charles H. Challen & Son, Ltd.* (1), shows that it was in the mind of DENNING, L.J., who gave it. In *Wilsons & Clyde Coal Co., Ltd. v. English* (3) LORD MAUGHAM stated the duty in this way ([1937] 3 All E.R. 645):

G “The third, which is a kind of limitation or explanation of the second, is that, in the case of employments involving risk, that rule applies only when the maxim *volenti non fit injuria* can fairly be invoked. In such employments, it was held that there was a duty on the employer to take reasonable care, and to use reasonable skill, first, to provide and maintain proper machinery, plant, appliances, and works; secondly, to select properly skilled persons to manage and superintend the business; and, H thirdly, to provide a proper system of working.”

The whole of that passage is governed by the words “to take reasonable care and to use reasonable skill.”

In *Clifford v. Charles H. Challen & Son, Ltd.* (1) a notice in the form of Form No. 366 was posted in the works, but not near the place where the plaintiff worked. There was no barrier cream available at the place where he worked, though he could get some from the store, which was not very convenient.

The facts as given by DENNING, L.J., were as follows ([1951] 1 All E.R. 74):

"In 1946 the workman went to the employers as a 'trainee'. He went into the radio cabinet shop for about six months, and then, for the remaining three years of his service with them, he was in the piano fitting shop where upright pianos were being fitted together."

In 1949 he suffered from dermatitis, and he brought his action against the employers. He alleged that the employers did not provide a special protective cream, called barrier cream, and that they did not provide in the shop where he worked running water in which he could wash. DENNING, L.J., continued (*ibid.*):

"It was common knowledge in the works that there was a danger of skin disease from the use of the glue and that it was necessary to take precautions against it. The plaintiff himself knew of this danger and knew the precautions which should be taken. Indeed, in the radio shop where he first worked the government notice was put up, and he himself read it. In that shop barrier cream was provided. Women brought it from the store for the men to use, and there were two buckets of water to wash with. In the piano fitting shop, however, where the workman went after his first six months, the notice was not up, there was no barrier cream, and there was only one bucket of water. The barrier cream was kept in the factory store. The workman and the other men in the piano fitting shop could have got the cream from the store if they had wished, but in that shop none of them used it. A significant phrase was used by the foreman of the shop. When he was asked: 'Was the barrier cream popular?' he said: 'I do not think so. I was not a great believer in it myself.' The foreman said that the one bucket of water in that shop got very dirty and he had to complain about it. He eventually got a second bucket, but the workmen used it for washing rags, and so they reverted to one bucket for washing hands."

On those facts SELLERS, J., decided in favour of the employers. He came to the conclusion that there was no breach by them of their statutory duty, nor was there any breach of their duty at common law. The workman appealed, and this court allowed his appeal. I have read a portion of the facts in order to show the difference between that case and the case now under appeal, and the danger of treating the one as governing the other. DENNING, L.J., said in that case (*ibid.*, 74):

"On those facts, the question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. To discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must, therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself."

When an action of this kind is brought the workman is endeavouring to throw the blame on the employers. DENNING, L.J., was dealing with the facts of that particular case. When he used the words:

"He must, therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness",

it must not be thought that he was saying: "If the foreman, personally, does not do that, the employers are of necessity at fault." In the present case the manager said: "I instructed this man how to do his work and what precautions he should take." The evidence of the manager was accepted by the judge. If the manager instructs the man, there is no need, perchance, for the foreman to instruct him as to the same matter. On the evidence in the present case the plaintiff knew everything that he had to do.

A Counsel for the plaintiff would have this court read the words of DENNING, L.J., as meaning that there must always be a foreman standing over the men, watching to see whether they used the barrier cream or not. I do not think that DENNING, L.J., can have meant that. Early in his judgment he said (*ibid.*, 74):

B "The standard which the law requires is that they should take reasonable care for the safety of their workmen."

Counsel sought to develop an argument of this kind: "The judge said it may well be that some slackness crept in after the change of foreman, and the new foreman was not called. DENNING, L.J., said the employer must, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. On the finding of fact the plaintiff is entitled to succeed." I do not agree. I do not believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience, every moment they are working, and every time that they cease work, to see that they do what they are supposed to do. That is not the measure of duty at common law. The employer's duty is, as LORD HERSCHELL said in *Smith v. Baker & Sons* (2) ([1891] A.C. 362), to take reasonable care and so to carry on his operations as not to subject those employed by him to unnecessary risk.

D Of course, the greater the danger the greater the precautions which are necessary. No one disputes that, but it is not right to seek to read those words of DENNING, L.J., as stating a general duty. He was dealing with the particular facts of that case. He said in his judgment ([1951] 1 All E.R. 75):

E "The foreman did not insist on it—as he said, he was not a great believer in it himself",

i.e., the use of the barrier cream. I am satisfied myself, on reading the judgments delivered in the Court of Appeal, that it was very largely because of the attitude of the foreman in that case—he did not believe in the use of barrier cream and so did not encourage his men to use it—that this court reversed the judgment of SELLERS, J., on what really was a question of fact.

F ASQUITH, L.J., said (*ibid.*, 75) that he had come to the same conclusion as DENNING, L.J., after similar hesitation. He added (*ibid.*):

G "On balance, I think that, by a small margin, and subject to contributory negligence on his part, the workman has succeeded in discharging the burden on him of showing that his injury resulted from want of a safe working system on the part of the employers."

COHEN, L.J., said (*ibid.*, 76):

H "Where an employer is making use of a dangerous process, it is not enough for him to have available somewhere in the factory the appliances necessary to minimise the danger. The system of working must be one in which the appliances are available at the place where they are needed, and the man in charge of the work should be responsible for seeing, so far as he can, that the workers make use of the appliances provided."

If there are young people or trainees employed in a factory, obviously the need for watching them is greater than in the case of skilled and experienced men. The plaintiff in the present case was fifty-six years of age at the time. He knew what was required of him. He had been instructed by the manager

what he should do. He was one added to a team. There were eight people employed on this class of work, they all knew what they should do, and the plaintiff did not do that which he knew he ought to do. LLOYD-JACOB, J., came to the conclusion that the defendants were not shown to have been at fault. I should have reached the same conclusion on the evidence, though I would not like anything that I say to be read as causing anyone to think that I do not realise the need for the observance of the precautions which are recommended when synthetic glues are used. I agree with LLOYD-JACOB, J., that negligence on the part of the employers was not proved. The fact that the plaintiff succeeded in *Clifford's* case (1) on appeal, and the judgments which were delivered in that case, may have led some to think that a new standard was laid down by the Court of Appeal. It was not. The old standard remains. It is the duty of the employer to take reasonable care so as not to subject his workmen to unnecessary risk. In my opinion, this appeal should be dismissed.

MORRIS, L.J.: I am entirely of the same opinion. Counsel for the plaintiff addressed two main submissions to the court. In the first place, he said: "Accepting the findings of fact of the learned judge, it should be held that there was a failure properly to supervise". In the second place, he criticised certain findings of the learned judge as not being warranted by the evidence, and, in particular, he submitted that the learned judge was wrong in saying that proper instructions had been given to the plaintiff. I do not find myself able to accept either of these submissions. The learned judge held that the plaintiff was made aware of the danger of getting glue on his hands and of the precautionary measures which the employers required to be observed. He was not satisfied that the supplies of barrier cream were not sufficient. He held that the precautionary measures, if observed, would have been adequate to prevent injury. He further held that when the manager transferred the plaintiff in December, 1950, to the glue-spreading operations, he specifically instructed him in the protective steps that he should take. And, lastly, he held that the defendants were never aware that there was non-observance of the requirements that they had laid down.

[HIS LORDSHIP referred to the evidence and held that there was ample material to warrant these findings and continued:] The obligation of an employer towards his servants includes an obligation to exercise due care and skill, to provide a proper system of work, and to provide effective supervision. If an employer allows safety precautions to lapse and to fade away into desuetude, it may well be that, on the facts of a particular case, there may be proof that there has been a failure to exercise due care and skill and to provide a proper system of work, but each case must depend on its own exact facts. The duty to exercise due care to provide effective supervision does not involve that an employer must provide a corps of overseers to ensure that some process, in regard to which there has been faithful and ample coaching, is at all times properly carried out. Again, each case must depend on its own facts. If a time comes when there is knowledge of the neglect of, or the rejection of, safety precautions, then, on the facts of the particular case, it may be that it can be established that there has been a failure to take reasonable care to supervise the smooth working of a safe system. On the facts of the present case, in my judgment, the learned judge came to a correct conclusion.

HARMAN, J.: I agree.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PRACTICE NOTE.

R. v. YINDRICH.

[COURT OF CRIMINAL APPEAL (Hallett, Streetfield and Donovan, JJ.), June 16, 1953.]

A *Criminal Law—Appeal—Appeal on question of law—Desirability of certificate from trial judge—Criminal Justice Act, 1948 (c. 58), s. 38 (2) (a)—Criminal Appeal Act, 1907 (c. 23), s. 3 (a).*

B Where a convicted person has a right to appeal to the Court of Criminal Appeal against his conviction under s. 3 (a) of the Criminal Appeal Act, 1907, without leave on a ground which involves a question of law alone, it is nevertheless desirable that the judge of the court of trial should grant a certificate that it is a fit case for appeal because, by s. 38 (2) (a) of the Criminal Justice Act, 1948, in the event of the appeal being dismissed, if a certificate has been granted sentence will run from the date of conviction, whereas, if there is no certificate, sentence will not run from conviction unless the court so directs.

C FOR THE CRIMINAL APPEAL ACT, 1907, s. 3 (a) and (b), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 928; and FOR THE CRIMINAL JUSTICE ACT, 1948, s. 38, see *ibid.*, Vol. 28, p. 378.

APPEAL against conviction.

D The appellant, Winifred Mary Yindrich, was convicted before the chairman at the West Kent Quarter Sessions on May 11, 1953, of embezzlement, and was sentenced to four months' imprisonment.

Sir Frank Soskice, Q.C., and Wigoder for the appellant.

D. A. Hollis for the Crown.

E **HALLETT, J.**, having delivered the judgment of the court allowing the appeal, said: There is one more matter to which I ought to draw attention. The learned chairman intimated that he was prepared to give a certificate that this was a fit case for appeal, but he did not do so as a certificate is not necessary where, as here, the ground of appeal involves a question of law alone. He has reported to this court to the same effect—that he was prepared, if necessary, to grant the certificate. There is a matter of procedure which we think has, perhaps, been overlooked. It is true that under s. 3 (a) of the Criminal Appeal Act, 1907, a person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction without a certificate on any ground of appeal which involves a question of law alone, but, none the less, we desire to point out that, if the court of trial thinks that the point indicated is such that it would be right for it to be investigated here, a certificate should be granted although under s. 3 (a) an appeal may be possible without it. The reason is that under s. 38 (2) (a) of the Criminal Justice Act, 1948, in the event of the appeal being dismissed, if there is no certificate the sentence will only run from the date of conviction if the court so directs, whereas, if a certificate is given by the learned judge, recorder, or chairman, as the case may be, time will run from conviction without the court so directing. Therefore, the existence of a certificate is a very substantial advantage to the appellant as regards the length of sentence which he has to serve.

Appeal allowed.

Solicitors: *Humphrey Razzall & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

M.M.

WARD v. MILLS.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), June 15, 1953.]

Legal Aid—Certificate—Power of court to extend time for issue of full certificate—Assessment of contribution after expiration of emergency certificate—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 10 (9), reg. 12 (1)—R.S.C., Ord. 64, r. 7.

Regulation 10 (9) of the Legal Aid (General) Regulations, 1950, provides:

“An emergency certificate shall remain in force for a period of six weeks or such longer period not exceeding three months as the local committee may allow, and unless within that period a certificate is issued in respect of the proceedings to which the emergency certificate relates, it shall at the end of that period, be deemed to have been revoked.” By reg. 12 (1): “Subject to the provisions of this regulation, a person whose certificate is revoked shall be deemed never to have been an assisted person in the proceedings to which the certificate related . . .”

On Dec. 10, 1952, the defendant applied to a local committee for and was granted an emergency certificate to enable him to appear as an “assisted person” under the Legal Aid and Advice Act, 1949, in an appeal to the Court of Appeal from a decision of a county court. The emergency certificate was extended by the local committee under reg. 10 (9), from six weeks to three months, and, therefore, it expired on Mar. 10, 1953. The National Assistance Board did not estimate the amount of the defendant’s contribution until Mar. 16, i.e., after the period of three months from the issue of the emergency certificate, and, therefore, no full certificate was issued before the expiration of that period. The appeal was heard on Dec. 12, 1952, and it was dismissed on Feb. 6, 1953, no order as to costs being made until it was ascertained whether the defendant was an assisted person. The defendant now contended that in the circumstances reg. 12 (1) did not apply and that in any case the court had power under R.S.C., Ord. 64, r. 7, to extend the time during which a valid full certificate could be issued beyond the date of the expiration of the emergency certificate.

HELD: the power under Ord 64, r. 7, was restricted to the enlargement or abridgment of “the time appointed by these rules”, that is, the Rules of the Supreme Court, for the doing of any act or the taking of any proceedings and was inapplicable to an extension of time under the Legal Aid (General) Regulations, reg. 10 (9) of which dealt exclusively with the extension of the period of validity of an emergency certificate; under reg. 10 (9) the emergency certificate must be deemed to have been revoked; and under reg. 12 (1) the defendant was to be deemed never to have been an assisted person in the proceedings.

Greenwood v. Sketcher ([1951] 1 All E.R. 750), applied.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 10 (9), reg. 12 (1), see HALSBURY’S STATUTORY INSTRUMENTS, Vol. 5, pp. 211, 212.

Case referred to:

(1) *Greenwood v. Sketcher*, [1951] 1 All E.R. 750; 2nd Digest Supp.

APPLICATION as to costs in an appeal by the defendant against an order of His Honour JUDGE GLAZEBROOK made at Southend County Court, dated July 31, 1952.

T. H. K. Berry for the defendant.

Rountree for the plaintiff.

SOMERVELL, L.J.: This application arises out of a decision of this court in an action brought in Southend County Court. The defendant appealed to this court from the decision of His Honour JUDGE GLAZEBROOK and the matter was heard on Dec. 12, 1952. Judgment was reserved and given on

Feb. 6. The case was originally to have come on at the end of October, 1952, but an adjournment was granted on the ground that the defendant was applying for legal aid. He apparently spent some time in seeking assistance from other sources, but he failed to get that assistance, and on Dec. 10 he applied for and was granted an emergency certificate. That emergency certificate was extended under the Legal Aid (General) Regulations, 1950, reg. 10 (9), by the local committee from six weeks to three months, and, therefore, expired on Mar. 10. The order was not drawn up when we delivered our judgment because there was a question concerning costs and whether the unsuccessful appellant was or was not covered by the legal aid scheme. The necessary steps which follow the granting of an emergency certificate were set in motion. The procedure is, stating it very broadly, that the litigant's means are investigated by the National Assistance Board, and if as a result of that investigation it is thought a proper case for legal aid a full certificate is issued which dates back to the time of the granting of the emergency certificate.

In the present case, the National Assistance Board had not estimated the defendant's contribution by Mar. 10, when the emergency certificate expired, and in fact they did not do so until Mar. 16. It is said, and I do not disagree, that that was no fault of the defendant, but I think, in fairness to the National Assistance Board, it is right to bear in mind that the application was not made, as one would normally expect it to be, at the time when the notice of appeal was served, but, indeed, was not made until some time after the case would normally have come on, and only two days before it in fact came on, for hearing. Counsel for the defendant admitted that there were great difficulties in the way of his submission that the defendant was, or, alternatively, ought to be, treated as if he was a legally assisted person in respect of this appeal.

Regulation 10 (9) provides:

"An emergency certificate shall remain in force for a period of six weeks or such longer period not exceeding three months as the local committee may allow, and unless within that period a certificate is issued in respect of the proceedings to which the emergency certificate relates, it shall at the end of that period, be deemed to have been revoked."

The extended period having expired and no other certificate having taken its place, it was deemed to have been revoked on Mar. 10. Regulation 12 (1) provides:

"Subject to the provisions of this regulation, a person whose certificate is revoked shall be deemed never to have been an assisted person in the proceedings to which the certificate related, and a person whose certificate is discharged shall, from the date of discharge, cease to be an assisted person in those proceedings."

The application of that rule to an expired emergency certificate came before this court in *Greenwood v. Sketcher* (1). It could have been argued that reg. 12 (1) should not be read as necessarily applying to a revocation which was merely deemed to have taken place by expiration of time under reg. 10 (9). That possible construction was rejected by this court in *Greenwood v. Sketcher* (1). It was held, in effect, that where an emergency certificate expired, as did this one, by effluxion of time, it cannot be put right again ex post facto by the granting of a full certificate at a later date. According to the headnote, it was held ([1951] 1 All E.R. 750):

"a certificate issued in respect of proceedings to which an emergency certificate related to be valid must be issued within the period during which the emergency certificate remained in force, namely, either six weeks or such longer period not exceeding three months as might have been allowed by way of extension under reg. 10 (9); the certificate in the present case had not been issued within a period of three months

from the date of the emergency certificate and so was not valid; no valid certificate having been issued, under reg. 10 (9) the emergency certificate must be deemed to have been revoked; and, therefore, the appellants were not 'assisted persons' and were liable to pay the costs of the appeal."

I think that that case covers what happened here.

Counsel for the defendant submits, in the first instance, that this court has power under R.S.C., Ord. 64, r. 7, which deals with extensions of time under the Rules of the Supreme Court, to deal with the matter by extending the time during which a valid full certificate could be issued. A notice of motion dealing with the matter is not before us, but the point was left open in *Greenwood v. Sketcher* (1), and it falls to be dealt with by this court. I am of opinion that Ord. 64, r. 7, is inapplicable. In the first place it is restricted to the doing of any act or the taking of any proceedings within "the time appointed by these rules", i.e., the Rules of the Supreme Court. I would have thought that those words did not include the Legal Aid (General) Regulations. I think also that it is a misconception to regard what is sought as an extension of time, although from one point of view it may be so regarded. Regulation 10 (9) deals with a particular subject-matter which gives the certificate force for a certain period and goes on to say that a certain body—not this court—may extend it for a further period. I think the manner in which this subject is dealt with in this regulation takes it out of any general power which this court has, under Ord. 64, r. 7, to extend the time, or which it may have for certain purposes under its inherent jurisdiction. I, therefore, think that that point fails.

In the second place counsel for the defendant asks us to exercise our discretion so as to deal with the costs in effect in the same way as if the defendant had become a legally assisted person. That, I think, must be wrong. People are either legally aided persons or they are not. If they are, the court in dealing with the costs applies the provisions of the Legal Aid (General) Regulations. If they are not assisted persons, the court must deal with the matter on that basis. Although there is a discretion, it is well known that in the absence of very special circumstances an appellant who has brought an appeal and failed has the ordinary order as to costs made against him. In my opinion, the court has no option in this case but to take that course.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Order accordingly.

Solicitors: *H. Maxwell Lewis*, Southend-on-Sea (for the plaintiff); *Flint & Co.*, Southend-on-Sea (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

H. E. DANIELS, LTD. v. CARMEL EXPORTERS AND IMPORTERS, LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), May 20, June 8, 1953.]

Arbitration—Award—Two separate disputes arising out of one contract—Validity of second award.

A By contracts dated Mar. 25 and Mar. 26, 1952, buyers agreed to buy from sellers a quantity of China Star aniseeds. By the rules of the General Produce Brokers' Association, which were incorporated in the contracts, the parties were to submit any disputes which might arise to arbitration and to be bound by any award which the arbitrators might make. In May, 1952, the goods were delivered, the buyers claimed arbitration on the grounds of quality, and arbitrators were appointed who found in their favour. B Later, the buyers having re-sold part of the goods, it was found that they were not China Star aniseeds, but a quality called "religiosum", which contained poison and was worthless. The buyers then claimed a further arbitration on the grounds that the sellers had failed to deliver the contract goods. The sellers contended that there had already been an arbitration on the condition and quality of the goods and that all disputes between C them and the buyers were res judicatae. The buyers appointed an arbitrator, and, on the sellers' refusal to appoint an arbitrator, one was appointed for them under the rules of the association. The arbitrators made an award in favour of the buyers which the sellers refused to recognise. In an action by the buyers to enforce the second award,

D HELD: there was clearly a second dispute which the parties had agreed to submit to arbitration, and, subject to their right to require the arbitrators to state their award in the form of a Special Case, they had agreed to be bound by the award; the sellers had failed to require the arbitrators to state their award in the form of a Special Case on the question whether the contractual provisions for arbitration in the event of a dispute had E been exhausted by the first submission and award; and, therefore, the award in the second arbitration was conclusive against them.

Cases referred to:

- (1) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.
- (2) *Conquer v. Boot*, [1928] 2 K.B. 336; 97 L.J.K.B. 452; 139 L.T. 18; Digest Supp.
- (3) *Brunsdon v. Humphrey*, (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 1 Digest 15, 122.
- (4) *Darley Main Colliery Co. v. Mitchell*, (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 1 Digest 15, 118.

ACTION to enforce arbitrators' award.

G By two contracts, dated Mar. 25 and Mar. 26, 1952, the plaintiffs, H. E. Daniels, Ltd., who were members of the General Produce Brokers' Association of London, agreed to purchase from the defendants, Carmel Exporters and Importers, Ltd., two parcels, each of five tons, of China Star aniseeds, c.i.f. Hong Kong for shipment in April, 1952. The purchases were made through H brokers. The contracts provided that quality should be "about as per sealed sample in selling brokers' possession", and that they should be read and construed as if there were incorporated therein the terms and conditions of the appropriate current form of contract issued by the General Produce Brokers' Association, which was standard form No. 1. This form provided that the contracts should be construed as if there were incorporated in them the rules of conditions of sale of the General Produce Brokers' Association, dated Jan. 29, 1945, and that any dispute arising out of the contracts should be settled by arbitration in London according to the rules of the association. Part II of

the rules dealt with arbitration, rr. 40-75 being headed "General" and rr. 76-84 being headed "Quality or condition of goods". Rule 49 (a) was as follows:

"A written contract containing an agreement between parties privileged under these rules to submit any disputes which may arise in the future to arbitration in accordance with the rules of the General Produce Brokers' Association of London shall be deemed to contain an implied agreement by all parties to submit to arbitration in accordance with these rules and an implied undertaking to be bound by and observe the award of the arbitrator, arbitrators or umpire and any interlocutory directions given or order made by him or them."

Rule 76 provided:

"All disputes concerning quality or condition of goods referred to arbitration in accordance with these rules shall be subject to the rules of the association in general and to the following rules in particular, provided always that where on any point there is any inconsistency then the following rules shall prevail."

Rule 80 provided:

"The arbitration shall be conducted solely on the question of quality or condition of goods and if it be found that the sample or samples have not been drawn in conformity with contract requirements or that the particulars of the goods or sample(s) do not agree with those stated in the contract . . . or should matters arise other than those concerning quality or condition, the arbitrator, arbitrators or umpire (as the case may be) shall forthwith return the appointment to the broker and shall not proceed in the arbitration unless and until they are re-appointed to act."

In May, 1952, the sellers delivered the goods to the buyers who accepted and paid for them. On May 13, 1952, the buyers claimed arbitration on the grounds of quality, alleging that the goods were "exhausted seeds and also not equal to selling sample". On May 30, 1952, arbitrators were appointed, and on June 11, 1952, they made an award on each of the contracts that the sellers should pay the buyers an allowance of 8s. 9d. per hundredweight. The buyers in due course re-sold part of the goods, and at the end of July, 1952, one of their buyers pointed out to them that the goods were not China Star aniseeds, but a bastard quality originating in Japan called "religiosum", which contained poison and was worthless. Accordingly, the buyers claimed a further arbitration on the ground that the sellers had failed to deliver contract goods. The sellers refused to admit liability on the ground that the contract had already been arbitrated once and that all disputes between themselves and the buyers were *res judicata*. On Aug. 22, 1952, the buyers appointed an arbitrator, and on the sellers' refusal to do likewise, the General Produce Brokers' Association appointed one on their behalf under r. 62. On Jan. 22, 1953, the arbitrators issued an award in which they found that the goods delivered did not conform to the contract description and awarded the buyers the whole value of the goods and damages. The sellers refused to recognise this award and moved the court to set it aside on the grounds (i) that the arbitrators had no jurisdiction to make it and (ii) that it was bad in law on its face. On Mar. 3, 1953, LORD GODDARD, C.J., refused to set the award aside on the ground that it was bad in law on its face and held that the claim that the arbitrators had no jurisdiction to make the award was not one which could be dealt with on motion. The buyers now brought an action to recover the sum awarded them in the second arbitration.

T. G. Roche for the buyers.

Duveen, Q.C., for the sellers.

Cur. adv. vult.

June 8. **PILCHER, J.**, read a judgment in which he stated the facts, and continued: Counsel for the buyers put his case as follows. He submitted that the plea of *res judicata* is based on the doctrine of estoppel. He contended that the buyers had a separate cause of action at each arbitration, although both causes of action arose out of the same contract. In the quality arbitration their cause of action arose from the failure of the sellers to fulfil their promise or warranty as to the quality and condition of the goods, and in the second arbitration their cause of action arose from the sellers' failure to fulfil the promise or implied condition that the goods would answer the contractual description. The only dispute between the parties at the time of the first arbitration being as to quality, this was the only dispute which could then be submitted to arbitration and be adjudicated on by the arbitrators. Subsequently, so counsel argued, another cause of action, dependent on a different promise not relating to quality, arose. Once again, this was a dispute between the parties which, under the rules, fell to be determined by arbitration differing procedurally from the first quality arbitration. Counsel's second point was as follows. He pointed out that the doctrine of *res judicata* is a shield, a defence which was open to the sellers at the second arbitration. Although the sellers chose not to appoint an arbitrator or to take any part in the proceedings, the fact that this was their contention was brought to the attention of the arbitrators, who none the less made an award in favour of the buyers without even appointing an umpire. In these circumstances counsel contended that the award so made is conclusive against the sellers. It is, perhaps, worth noting that the concluding sentence of r. 62, which governed the procedure in the second arbitration, is as follows:

"An arbitrator so appointed by the appointment committee shall act in the reference as if he had been appointed by consent."

Counsel submitted that the sellers should, if they wished to take what is essentially a point of law, have taken steps to see that the arbitrators in the second arbitration stated their award in the form of a Special Case for the opinion of the court. They having failed to take this course and allowed a final award to be made against them, the matter was, he submitted, concluded. The parties, he argued, agreed to refer "any dispute arising out of the contract" to arbitration and agreed, by r. 49, "to be bound by and observe the award", subject, of course, to their right to ask for a Special Case or to move to set the award aside. He submitted that the words "any dispute arising out of the contract" included all disputes except a dispute whether the parties had ever been in contractual relationship. For this proposition he cited the well-known case of *Heyman v. Darwins, Ltd.* (1).

Counsel for the sellers submitted that on the facts of this case the buyers never had more than one cause of action. This was a contract for the sale of goods and the only matters which were ever in dispute concerned the issue whether the sellers had delivered goods of the contract quality and description. He relied strongly on *Conquer v. Boot* (2), in which the plaintiff brought an action in the county court for breach by the defendant, who was a builder, of his contract to complete a bungalow in a good and workmanlike manner, setting out certain particulars of his claim. He duly succeeded and recovered a sum which was within the county court jurisdiction in respect of his first claim. He then brought another action in the county court claiming in identical terms in respect of the builder's breach of contract for a different amount, and alleging that, in addition to having failed to complete the bungalow a good and workmanlike manner, the defendant had failed to build it with proper materials, and then he gave further particulars which were of the same character as the particulars given in the first action, but related to different complaints that he had in regard to the building of the bungalow. The matter came before the Divisional Court and it was there held that the cause of action

was the same in both actions, namely, breach of contract, and that, the question having been decided in the first action, the matter was *res judicata*, and the plaintiff could not recover further damages. I propose to read a passage from the judgment of TALBOT, J. ([1928] 2 K.B. 343):

"The rule of law on which the defendant relies is thus stated by BOWEN, L.J., in *Brunsdon v. Humphrey* (3) (14 Q.B.D. 147): 'It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all', and by LORD HALSBURY in *Darley Main Colliery Co. v. Mitchell* (4) (11 App. Cas. 132): 'No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever': see the form of plea in BULLEN AND LEAKE, 3rd ed., p. 624. The defendant contends that there is here but one cause of action—namely, that the defendant having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid on completion, has failed to do what he promised, and that the particulars subjoined in the two actions are merely details of the manner in which he has failed to perform the one contract, and of the damages payable for his breach of it. The plaintiff on the other hand says that the first action was brought for the various breaches of contract specified in the particulars, that each of them is a separate breach of a separate contract and a separate cause of action, and that therefore the former judgment is no answer to the present action. It appears to me that as to this the defendant is right and that the cause of action sued on in the second action is the same as that sued on in the first. It is the same in point of form. The form is substantially that in BULLEN AND LEAKE, 3rd ed., p. 271, and the precedents there referred to. It is the same also in substance. The contract is an entire contract. No claim for payment could have been made by the defendant unless and until he had finished the bungalow. There is one contract and one promise to be performed at one time, although no doubt the defendant may have failed to perform it in one or in many respects. There may of course be many promises in one contract, the breach of each of which is a separate cause of action."

Then he continued (*ibid.*, 344):

"Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the Statute of Limitations began to run as to the whole. The plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same."

He added (*ibid.*, 345):

"No more can he [the plaintiff] recover in one action for breach of a single promise in ten respects and in another for breach in ten other respects of the same promise. The giving of such particulars as are necessary to enable the defendant to know what case he has to meet is merely incidental to the bringing of the action, and a plaintiff cannot give himself a right to bring an action which otherwise he could not bring by failing to specify all the matters which go to make up his one cause of action, or to claim all the relief to which he is entitled in respect of it."

No doubt, it is possible that a party may have more than one cause of action based on separate breaches by the other party of the same contract. An

A instance of this would be where successive breaches had taken place of a contract performed by instalments. Other instances can be thought of. The submission of counsel for the buyers that the breach of every promise, express or implied, in a contract gives rise to a different cause of action seems to me, however, to be putting the matter too high and to receive no support from the passages which I have just quoted from *Conquer v. Boot* (2). Having given the matter careful consideration I am quite unable to distinguish the present case on its facts from *Conquer v. Boot* (2). There the cause of action in each proceeding was based on the defendant's failure to build and hand over to the plaintiff a bungalow constructed in a good and workmanlike manner. Here the buyers' cause of action was in respect of the sellers' failure to make delivery of goods of the quality and description provided for by the contracts. I, accordingly, decide against the buyers on the first point argued by counsel for the buyers. This leaves for consideration the point whether any distinction can properly be drawn between the rule applicable to actions, as stated in *Conquer v. Boot* (2), and the situation which has arisen in the present case.

B The parties here have agreed to submit their disputes to arbitration under an elaborate set of rules, which, however, were well understood by the commercial gentlemen concerned. The only dispute of which the parties were aware at the time of the first arbitration was a dispute as to quality. In this connection, I draw attention to the words of r. 77:

C "The broker after satisfying himself that the dispute concerns only quality or condition shall . . ."

D I also draw attention to r. 80. It is quite clear that the rules are framed in this fashion in order that the procedure to be followed in quality or condition arbitrations shall be limited to cases in which quality or condition only are in dispute. If the dispute concerns quality or condition and any other dispute as well, for example, as to weight or sufficiency of documents, the general conditions govern procedure unless some special direction is given under r. 80. The effect of the argument of counsel for the sellers on this point leads to the result that, under the arbitration clause commonly incorporated in this well-known standard form of contract, parties who go to arbitration over some trifling difference of view as to quality can wash their hands of the whole matter and defeat, as in this case, a serious claim based on what seems to have been a fundamental misdescription of the goods. It now seems clear that the goods delivered to the buyers were not China Star aniseeds, but were aniseed E "religiosum" and, as such, worthless. It was not suggested in argument before me that either party, or the arbitrators at the first quality arbitration, had been guilty of any negligence or lack of care in not discovering this fact until F it was pointed out to the buyers by their sub-buyers. I assume that the sellers were morally innocent in the matter and that it was their sellers, or more probably the original suppliers, who first misdescribed this toxic product as G China Star aniseeds.

H Proceeding as I do on the assumption that it is impossible to distinguish this case on its facts from *Conquer v. Boot* (2), by which I am, of course, bound, I have to consider the second submission of counsel for the buyers, which I have already outlined. Here the parties have agreed to submit all disputes arising out of this contract of sale to arbitration. They have chosen their tribunal for better or for worse. They have also agreed to be bound procedurally in regard to the arbitration of any disputes arising by the appropriate rules of the association dealing with arbitrations. At the time of the first quality arbitration there was only one dispute between the parties, namely, as to the quality of the goods. A quality arbitration was, accordingly, held, and the arbitrators dealt with the only matter submitted to them on which there was any dispute, namely, quality. This was, moreover, the only matter with which the arbitrators at this quality arbitration were competent under the rules to

deal. Subsequently, a second dispute arises on description. Whether or not technically arising out of the same cause of action, there was clearly a dispute arising out of the contract of sale, and, consequently, a matter which the parties had agreed to submit to arbitration. For such a dispute the rules of the association provide a different procedure. In each case, however, what is in question is a dispute arising out of the contract of sale, and the question I have to consider is whether, when parties have agreed to submit any disputes arising out of a single cause of action to arbitration, the rule in *Conquer v. Boot* (2) applies—that is to say, whether they must submit all such disputes to one tribunal at one time. It is well known that quality arbitrations, while conducted by highly experienced business men, are often extremely informal affairs, and r. 80 of the rules of the association makes it clear that, if any dispute which does not relate to quality or condition arises at a quality arbitration, the arbitrators are to return their appointments. What then occurs is not made clear by the rule, nor was I informed as to the subsequent procedure in such a case. It may be that separate panels are appointed to deal with the quality dispute and any other dispute which does not concern quality or condition, or it may be that all disputes are then referred to a panel constituted under r. 62. I cannot help feeling, however, that the business community who use the association's rules would be somewhat surprised if they were told that in a case such as this the holding of a quality arbitration exhausted their right to submit any new dispute which might arise to arbitration. Whether this was, or was not, the intention of those responsible for drafting the association's rules when they provided for two different types of arbitrations dealing in water-tight compartments with "condition and quality" disputes and other disputes is, however, immaterial. I have to take the rules as I find them. In principle, there appears to me to be a possible distinction, which may be important on this point, between a judgment and the award of an arbitrator. If I may quote from note (a) at p. 624 of BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS, 3rd ed.:

"A judgment recovered by the plaintiff in an action merges the original cause of action in the higher security and affords a defence to a second action for the same cause."

Where arbitration is in question, the parties agree to submit all their disputes to arbitration, and it is clear that many disputes may arise out of the same cause of action. Whether or not it is proper to regard an award as the same type of higher security as a judgment of the court and as operating as a merger of all the rights of the claimant arising out of the same cause of action may be doubtful. I am inclined, however, to think that, in spite of any technical differences which may exist in this connection between judgments and awards, it might be difficult to argue successfully that, in so far as the point with which I am dealing is concerned, any valid distinction can properly be drawn between them.

For the purpose of this judgment I am prepared to assume that, if the sellers had taken steps to have the award in the second arbitration stated in the form of a Special Case raising the point which they now put forward, they might well have been held entitled to succeed under the decision in *Conquer v. Boot* (2). I propose, however, to decide this case on broader grounds which I can state quite shortly. The parties have agreed to submit all their disputes to arbitration. The words "any dispute arising out of the contract" cover every dispute except a dispute whether there was ever a contract at all, because, if there was no contract, there was no arbitration clause. In this connection I would quote a passage from the speech of VISCOUNT SIMON, L.C., in *Heyman v. Darwins, Ltd.* (1) ([1942] 1 All E.R. 343):

"If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under

A the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void. If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly."

B In the present case there was clearly a second dispute and an important one arising out of the contract between the parties. Having agreed to submit any dispute to arbitration, the parties were, in my view, bound to submit this dispute to arbitration. The sellers made it clear that they were contending that the contractual provisions for arbitration in the event of dispute had been exhausted by the first submission and award. Whether they were right or not, C there was clearly a point of law which might not be easy for lay arbitrators to determine. Subject to their right to require the arbitrators or umpire to state their award in the form of a Special Case, they had agreed to be bound by, and observe, the award of the arbitrators or umpire: see r. 49 (a). The arbitrators in the second arbitration had, therefore, to consider a question of D fact, namely, whether the goods had been misdescribed, and a question of law, namely, whether they had any jurisdiction to entertain the buyers' claim. The question of law was clearly raised on the correspondence which was before them. They decided both points in favour of the buyers. The sellers had an opportunity of ensuring that the point of law which they were raising should be considered by the court. They failed to take this opportunity and now E find themselves faced with a final award which cannot be impugned on any of the ordinary grounds. Having allowed the matter to proceed in this way, the award of the arbitrators in the second arbitration is, in my view, conclusive against them. There must, therefore, be judgment for the buyers for the sum claimed with costs.

Judgment for the buyers.

Solicitors: *Thomas Cooper & Co.* (for the buyers); *Fink, Proudfoot & Waters* (for the sellers).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

In the Estate of PARK. PARK v. PARK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 14, 15, 18, 19, June 12, 1953.]

Estoppel—Pleadings—Matters pleaded in previous proceedings—Whether confessions of truth of facts stated.

Marriage—Consent—Degree of capacity required.

On Mar. 1, 1948, the deceased executed a will. On May 30, 1949, he married the plaintiff and on the same day he executed a fresh will. He was then an old man, suffering from mental and physical weakness, and on June 17, 1949, he died. On June 23 the plaintiff entered a caveat to the will of May 30, 1949. On July 6 a warning was entered to the caveat, and on July 11 the plaintiff entered an appearance to the warning, describing herself as "the lawful widow and relict" of the deceased. On July 18 the executors of the will of May 30 issued a writ in an action in which they propounded that will, and in that writ the plaintiff was described as "the lawful widow and relict" of the deceased. Subsequently, the present defendant, who was a beneficiary and residuary legatee under both wills, was joined as co-plaintiff with the executors and adopted their pleadings. On Dec. 1, 1950, the will dated May 30, 1949, was pronounced against on the ground that the deceased was not of sound mind, memory and understanding at the date of making it. In the present action the plaintiff claimed to have the will dated Mar. 1, 1948, pronounced against on the ground that it was revoked by the marriage on May 30, 1949, and sought a grant of letters of administration as on an intestacy. The defendant alleged that on May 30, 1949, the deceased was incapable of consenting to the marriage and counterclaimed for a declaration that the marriage was null and void, and for a consequent pronouncement in favour of the will dated Mar. 1, 1948. By her reply the plaintiff contended that, as the defendant in the pleadings in the earlier proceedings had alleged that she was the "widow and relict" of the deceased, he was now estopped from disputing the validity of the marriage.

HELD: (i) at no time during the earlier proceedings was the issue of the validity of the marriage before the court, and, therefore, the statements in the pleadings in those proceedings were not to be treated as a confession by the present defendant of the truth of the facts therein stated, and the plea of estoppel failed.

Observations of PARKE, B., in *Boileau v. Rutlin* (1848) (2 Exch. 680), applied.

(ii) marriage was in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend, and consent to a marriage required a lesser degree of capacity than that required to make a will; the deceased was capable of understanding the nature of the contract into which he was entering, free from the influence of morbid delusions on the subject, and so the marriage was valid and binding; and, therefore, the will dated Mar. 1, 1948, was revoked by the marriage, and the deceased died intestate.

Observations of SIR JAMES HANNEN, P., in *Hunter v. Edney* (1885) (10 P.D. 95), applied.

AS TO ESTOPPEL IN RESPECT OF MATTERS IN ISSUE, see HALSBURY, Hailsham Edn., Vol. 13, p. 444, para. 499; and FOR CASES, see DIGEST, Vol. 21, pp. 159-169, Nos. 213-253.

AS TO CAPACITY TO MARRY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 564-569, paras. 843-854, and *ibid.*, Vol. 21, pp. 286-288, paras. 492-497; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 40-42, Nos. 168-190.

Cases referred to:

- (1) *Woodland v. Woodland (otherwise Belin or Barton)*, [1928] P. 169; 97 L.J.P. 92; 139 L.T. 262; 27 Digest, Replacement, 553, 5038.
- (2) *Boileau v. Rutlin*, (1848), 2 Exch. 665; 154 E.R. 657; 21 Digest 165, 233.
- (3) *Turner v. Meyers*, (1808), 1 Hag. Con. 414; 161 E.R. 600; 27 Digest, Replacement, 35, 127.
- A (4) *Portsmouth (Countess) v. Portsmouth (Earl)*, (1828), 1 Hag. Ecc. 355; 162 E.R. 611; 27 Digest, Replacement, 491, 4296.
- (5) *Boughton v. Knight*, (1873), L.R. 3 P. & D. 64; 42 L.J.P. & M. 25; 28 L.T. 562; 37 J.P. 598; 33 Digest 146, 234.
- (6) *Burdett v. Thompson*, (1873), L.R. 3 P. & D. at p. 72.
- (7) *Browning v. Reane*, (1812), 2 Phillim. 69; 161 E.R. 1080; 33 Digest 137, 147.
- B (8) *Durham v. Durham. Hunter v. Edney (otherwise Hunter). Cannon v. Smalley (otherwise Cannon)*, (1885), 10 P.D. 80; 33 Digest 138, 150.
- (9) *In the Estate of Spier*, [1947] W.N. 46; 2nd Digest Supp.

ACTION by the plaintiff claiming that a will dated Mar. 1, 1948, be pronounced against and for a grant of letters of administration of the estate of Robert C John Charles Park, deceased.

- The deceased had for many years been engaged in a business which had in due course become a limited company. In 1939 he withdrew from the day to day work of the company, but retained an active interest in it. In January, 1948, his wife died, and the deceased, then seventy-seven years of age, was greatly upset. On Mar. 1, 1948, he executed a will. In May, 1948, he had a stroke, and on a medical examination it was discovered that he was suffering from hardened arteries, as well as from an enlarged heart and liver and high blood pressure. In August, 1948, he was sufficiently recovered to leave his house and visit the company, but his physical condition was weak and he showed little interest in the details of the business, being sometimes confused and sometimes lucid. The deceased also became forgetful and untidy, and was quite unable to look after his financial affairs. He asked an old friend, a widow, to come to live in his flat in order to look after him and offered to marry her if she would do so, but she declined. In January, 1949, he asked his sister-in-law to come with her husband to live at his flat and to take charge of the household, and they moved in shortly afterwards and stayed until May, 1949. The sister-in-law became so worn out looking after the deceased that she had to consult a doctor. In March, 1949, the deceased became ill, suffering some physical relapse and some degree of mental deterioration. On Easter Monday, 1949, the deceased lunched at his club and afterwards began a conversation with the plaintiff who had been employed for some months as the cashier. On May 7, 1949, the deceased took the plaintiff on a motor drive, and entertained her to lunch. On May 8, 1949, the deceased told his chauffeur-valet that he was going to marry the plaintiff. On May 10, 1949, the deceased took the plaintiff for another drive during the course of which he asked her to marry him. The plaintiff was surprised and said that she would require time to consider the matter. On May 13, 1949, the plaintiff accepted the deceased's proposal and he then gave her a ring. On that or a later day the plaintiff insisted that the marriage should be free from any sexual relationship, and the deceased concurred. On May 14 the deceased gave her £500. On May 16 the deceased told a business colleague of his intended marriage to the plaintiff. On May 18, 1949, there was a meeting at the office of the deceased's solicitor to discuss a proposed ante-nuptial settlement, and the business colleague informed the solicitor of the deceased's financial position. The deceased appeared to take little interest in the discussion. On May 20 the deceased went to stay at a hotel, and during his stay he met his doctor and told him that he was thinking of marrying. The doctor, knowing the deceased's physical and mental

condition, advised strongly against marriage, but the deceased was adamant, saying that he wanted companionship and was lonely. On May 26 the deceased returned to his flat, and at about the same time the plaintiff joined him there, occupying a separate bedroom. On May 28 the ante-nuptial settlement was executed whereby the plaintiff was provided with a gross annual income of £300 from preference shares in the deceased's company. On that day the deceased was confused, and had little knowledge of what was taking place. On May 29 the deceased on rising in the morning thought the wedding was due to take place that day. On May 30, 1949, the deceased was married to the plaintiff, the ceremony having been arranged by the plaintiff at a register office. After the ceremony there was a small party at the deceased's flat, during the course of which the deceased retired in order to execute a new will, about which the deceased told the plaintiff nothing. On June 7, 1949, the deceased told his doctor that he was disappointed in the marriage and that it had not been consummated. On June 17, 1949, the deceased died.

The plaintiff entered a caveat to the will dated May 30, 1949, and on July 11, 1950, having been warned, she entered an appearance describing herself as "the lawful widow and relict of the deceased". A writ was issued by the executors propounding that will, and in their pleadings they adopted the same phrase in describing the plaintiff (i.e., the defendant in those proceedings). The deceased's nephew of the half blood (the present defendant) together with his brother, then an infant, on their own application were joined as plaintiffs in those proceedings, they both being beneficiaries under the will and not entitled to a share of the estate on an intestacy, and they adopted the executors' pleadings. That suit was heard by PEARCE, J., and a jury, and on Dec. 1, 1950, the jury found that at the date of the alleged will of May 30, 1949, the deceased was not of sound mind, memory and understanding, and, accordingly, PEARCE, J., pronounced against that will. The plaintiff now claimed as the lawful widow of the deceased to have the will dated Mar. 1, 1948, pronounced against, and claimed a grant of letters of administration of the deceased's estate. The defendant, a beneficiary and a residuary legatee under this will also, by his defence alleged that at the time of the ceremony of marriage on May 30, 1949, the deceased was of unsound mind and mentally incapable of appreciating the nature of the marriage contract and that there was not, and could not have been, any consent by him to that marriage, and by way of counterclaim the defendant claimed a declaration that the alleged marriage between the plaintiff and the deceased was null and void, and that the court should pronounce in solemn form in favour of the will dated Mar. 1, 1948. By her reply the plaintiff denied that the ceremony of marriage was a nullity and asserted that the will dated Mar. 1, 1948, was revoked by her marriage to the deceased on May 30, 1949. Further, the plaintiff contended that the defendant was estopped from alleging that the plaintiff was not the widow of the deceased. The parties cited were the daughters of the deceased's brother who had predeceased the deceased. They were residuary legatees under the will dated Mar. 1, 1948, and were entitled to the whole of the deceased's estate, subject to the life interest of the widow (and her absolute benefits), in the event of an intestacy.

The issue of estoppel was treated as a preliminary point on which KARMINSKI, J., gave judgment on May 19, 1953, as appears below.

Beyfus, Q.C., and *Marshall-Reynolds* for the plaintiff.

Salmon, Q.C., and *John Latey* for the defendant.

A. R. Ellis for the parties cited.

KARMINSKI, J.: This is a preliminary point by way of estoppel which has been raised by the plaintiff. She says that in a former action the present defendant sued her as the lawful widow and relict of the deceased. In that former litigation the question in issue was the validity of an alleged will of the deceased dated May 30, 1949, and that will, after a long hearing, was

pronounced against on the issue of incapacity. It is said in the present case that that decision was given on the basis maintained by the present defendant and others that she was the lawful widow and relict of the deceased, and she now says that the present defendant is estopped from alleging that she is not the lawful widow and relict of the deceased. I thought it desirable to hear argument on this point before dealing with the facts and merits of the present case. It is fair to counsel for the plaintiff to say that the matter was argued rather on my insistence than on his, and it was not put by him in the forefront of his defence to the allegation in the present suit that the present plaintiff was never in fact or in law lawfully married to the deceased. I am bound to say that I can understand the lack of enthusiasm shown in relying too much on this matter by counsel. I am quite unable at the moment to see how it can be said that the present defendant is estopped. The earlier proceedings were the result of a caveat to the will of May 30, 1949, entered by the present plaintiff. In due course that caveat was warned, and on July 11, 1949, there was an appearance by her to the warning in which she was described by her solicitors, who were the same firm who are acting for her now, as "the lawful widow and relict of the deceased", and one of the persons entitled to share in his estate in the event of an intestacy. The action then proceeded. A writ was issued by the plaintiffs in that action, who were the executors of the pretended will of May 30, 1949, and in their writ they described the present plaintiff as "the lawful widow and relict of the deceased", a description she had given to herself, and which was not then, and was not, indeed, at any time, an issue in that case. Later, by an order of this court, the defendant in the present action and his younger brother, then a minor, were added as plaintiffs and adopted the original plaintiffs' pleadings. It must be emphasised that at no time during the earlier proceedings was the issue of the validity of the pretended marriage between the deceased and the present plaintiff, of May 30, 1949, before the court. It is said by counsel for the plaintiff that it could have been, and ought to have been, raised, but, in my view, it was difficult for anybody to do that in the state of knowledge of the case at the moment it came to trial. It is said, and, no doubt, with force, that matters came to light during the trial of the first case, and to some extent later, which had given ground for the assertion in the present case that there was no marriage.

Authority was cited to me by counsel for the plaintiff in support of his contention, but *Woodland v. Woodland (otherwise Belin or Barton)* (1), on which he relied, was a decision on very different issues. In that case, there had been already pronounced by this court a decree of restitution of conjugal rights. Subsequently, matters came to light which gave reason for, at any rate, a belief that the wife who had obtained that decree was already married to another person at the time of the ceremony of marriage with the respondent in that case. But it was held by HILL, J., that that could not be re-opened, because, as he put it ([1928] P. 172), a decree of restitution

"is a final decree and it can only be made upon the finding of status—namely, that the husband and wife were and are lawful husband and wife."

HILL, J., then quoted from a well-known passage in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, art. 41 (ibid.):

"'Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court and appearing from the judgment itself to be the ground on which it was based: unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.'"

I regard that as a classic exposition of the law on the subject, and I think it is quite clear that HILL, J., also so regarded it. There is, it seems to me, a

vital difference between the state of affairs where matters have been in issue in previous proceedings and the state of affairs where they might have been. In an often-quoted passage in *Boileau v. Rutlin* (2), PARKE, B., said (2 Exch. 680):

"It would seem that those [bills of equity], as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated."

There, I think, is the vital distinction from the argument of counsel for the plaintiff in the present case, and I am bound to hold that this defence of estoppel fails.

HIS LORDSHIP then heard counsel and evidence on the issue whether or not, on May 30, 1949, the plaintiff and the deceased were lawfully married.

Cur. adv. vult.

June 12. **KARMINSKI, J.**, read the following judgment. The issue before me now, is this: Were the plaintiff and the deceased lawfully married on May 30, 1949? As to the form of the ceremony, there is not and never has been any dispute. What is in issue is the consent of the deceased to that marriage and whether he had the capacity to consent to that marriage at that time. On that issue it was at once accepted by counsel for the defendant that the burden lay on him to prove that a marriage regular in form was in fact invalid through the incapacity of the deceased to consent to it. Assuming that burden of proof, counsel opened the case for the defendant and called his witnesses first. Before dealing with the evidence it is desirable that I should deal first with the principle which insists that consent is an essential ingredient of a valid marriage. This principle is one of great antiquity and, indeed, derives from the Roman law where it was stated in the form *nuptias consensus non concubitus facit*. This principle was in turn embodied into the canon law of Rome: see ESMEIN, *LE MARIAGE EN DROIT CANONIQUE*, 1891, vol. 1, p. 97. The principle was adopted into the English canon law. AYLIFFE in his *PARERGON JURIS CANONICI ANGLICANI* states (p. 362):

"the principal thing required to a legal marriage, is the consent of the parties contracting; which is sufficient alone to establish such a marriage."

In *Turner v. Meyers* (3) SIR WILLIAM SCOTT spoke of consent in marriage in the following terms (1 Hag. Con. 417):

"In more modern times it has been considered, in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons."

SIR JOHN NICHOLL in *Portsmouth (Countess) v. Portsmouth (Earl)* (4) stated the law as follows (1 Hag. Ecc. 359):

"When a fact of marriage has been regularly solemnised, the presumption is in its favour; but then it must be solemnised between parties competent

to contract—capable of entering into that most important engagement, the very essence of which is consent: and without soundness of mind there can be no legal consent—none binding in law: insanity vitiates all acts.”

Counsel for the plaintiff argued that the capacity required to make a will was of a higher degree than that required to contract a marriage, and he relied on the direction to the jury given by SIR JAMES HANNEN in *Boughton v. Knight* (5) (L.R. 3 P. & D. 72):

“ . . . whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness,—I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention.”

SIR JAMES HANNEN expanded and explained this passage in *Burdett v. Thompson* (6), when he said (*ibid.*, 73 n.) speaking of the making of a will:

“ From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator’s bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will.”

I think there is force in the argument of counsel for the plaintiff, and I approach the facts of this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will. In this case, the distinction is of importance since the court has pronounced against the will of May 30, 1949, on the ground of the incapacity of the deceased. And May 30, 1949, is the date of the ceremony of marriage the validity of which is in dispute.

I now have to consider what degree of capacity is required to consent to a marriage, and, further, I must inquire into the meaning of consent in relation to the marriage contract. Marriage has been described as a contract and as the most important contract of life, the very essence of which is consent: see *Browning v. Reane* (7) where SIR JOHN NICHOLL stated (2 Phillim. 70):

“ It is not material whether the want of consent arises from ideotcy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is ideotcy, and what is lunacy; complete ideotcy, total fatuity from the birth, rarely occurs; a much more common case is, mental weakness and imbecillity, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either, or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecillity, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract.”

SIR JAMES HANNEN, P., in *Durham v. Durham* (8) (10 P.D. 82) said:

“ . . . the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as

husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into."

In that case, the ceremony of marriage was performed in October, 1882. There was evidence of symptoms of insanity from and after April, 1883, and it was admitted on behalf of the wife that at the time of the hearing of the suit in March, 1885, she was hopelessly insane. A strong body of evidence including that of two archbishops (one her grandfather) was called to show that the wife was of apparently sound mind in the period immediately preceding the ceremony of marriage, though she was described as being a lady of no great intellectual powers and exceptionally shy and reserved in her manner. In the result, SIR JAMES HANNEN, P., found on the facts that at the time of the marriage ceremony she was capable of, and did in fact, give her consent to the marriage, and he dismissed the husband's petition. In *Hunter v. Edney (otherwise Hunter)* (8), SIR JAMES HANNEN, P., had to consider a similar problem, but on very different facts. He posed the question for determination in the following terms (*ibid.*, 95):

"The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject."

It must be borne in mind, as SIR JAMES HANNEN, P., reminded himself in *Durham v. Durham* (8), that a mere comprehension of the words of the promises exchanged is not sufficient. The minds of the parties must also be capable of understanding the nature of the contract into which they are entering. The precise nature of that contract may vary with the religious beliefs which the parties practise or profess. Some people may regard marriage as a sacrament; others, while still regarding marriage as a sacred and solemn obligation, do not believe in its sacramental nature. But, as SIR JAMES HANNEN, P., pointed out, the essence of the contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It may be, in the present times, that submission on the part of the woman is no longer, as it was in 1885, an essential part of the contract, but so far as the husband is concerned there remains the duty to maintain her, which is, I think, implicit in what SIR JAMES HANNEN, P., described as the duty to protect. In recent times WILLMER, J., in *In the Estate of Spier* (9), G stated the proposition in these terms ([1947] W.N. 46):

"There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and . . . there must also be a capacity to take care of his or her own person and property."

I was told that this decision was subsequently reversed by the Court of Appeal on the facts, but that the statement of the law made by WILLMER, J., was not criticised. The decision of the Court of Appeal is not reported. It is clear, then, that marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend. I ask myself the question asked in *Hunter v. Edney (otherwise Hunter)* (8), by SIR JAMES HANNEN, P.: Was the deceased capable of understanding the nature of the contract he was entering into?

[HIS LORDSHIP stated the facts, considered the evidence and continued:] It is clear that at times in the weeks immediately preceding the ceremony of marriage the deceased was confused in that he considered himself already married to the plaintiff. On the other hand, it is equally clear that he pursued his courtship of the plaintiff with persistence and, indeed, with some degree of craft. He was obviously proud of his achievement in winning the plaintiff's consent to his proposal of marriage. In this he was, I think, actuated first and foremost by his desire to escape from the loneliness which had afflicted him since the death of his wife. His determination to go through with the marriage was made clear by him to those around him, especially to his chauffeur-valet and to his doctor who had opposed it. In the course of his argument counsel for the defendant accepted that no high intellectual standard was required in consenting to a marriage; he further accepted that the burden was on him to prove the invalidity of a marriage in form properly celebrated. If he has failed to discharge that burden of proof, then the plaintiff must succeed, but I prefer in this case to answer the question posed to himself by SIR JAMES HANNEN, P., in *Hunter v. Edney* (otherwise *Hunter*) (8): Was the deceased capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject? It is not an easy question in this case to answer. I have had to consider carefully the manifest mental weaknesses and confusions of the deceased, on the one hand, and his pertinacity and determination with regard to the marriage, on the other. I have come to the conclusion that he could and did understand the nature of the contract he was entering into, and I find that the ceremony of marriage in fact performed on May 30, 1949, between the deceased and the plaintiff constituted a valid and binding marriage between them. In the result, it must follow that the will of Mar. 1, 1948, was revoked by the marriage between the deceased and the plaintiff, and I pronounce against that will and find that the deceased died intestate. I order that all parties' costs as between solicitor and client come out of the estate.

Order accordingly.

Solicitors: *Ager & Ager* (for the plaintiff); *Lewis W. Taylor & Co.* (for the defendant); *Pritchard, Englefield & Co.* (for the parties cited).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

STOTT v. SIR WILLIAM ARROL & CO., LTD.

[QUEEN'S BENCH DIVISION (Slade, J.), May 20, 21, 1953.]

Negligence—Personal injuries—Measure of damages—Loss of earnings—Deduction of industrial injury benefits—Benefits accruing after end of period of incapacity—Law Reform (Personal Injuries) Act, 1948 (c. 41), s. 2 (1).

In an action for damages for personal injuries the plaintiff claimed special damages for the loss of five weeks' earnings while he was incapacitated from work which amounted (after deduction, under the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), of half the industrial injury benefits which he received during that period) to £41 6s. 9d. On returning to work the plaintiff received further sums amounting to £126 13s. in the nature of industrial injury or disablement benefit.

HELD: the provision in s. 2 (1) that one half of the rights accruing to the plaintiff in respect of industrial injury or disablement benefit should be taken into account in assessing damages against any loss of earnings was not confined to rights accruing during the period of the plaintiff's incapacity, and, therefore, one half of the £126 13s., viz., £63 6s. 6d., would be taken into account to extinguish the plaintiff's net claim of £41 6s. 9d. for loss of earnings.

FOR THE LAW REFORM (PERSONAL INJURIES) ACT, 1948, s. 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 365.

ACTION for negligence and breach of statutory duty.

The plaintiff, who was employed by the defendants as a steel erector, had his leg crushed by some steel bars when a stack of them was knocked over by a crane. He was incapacitated from work for five weeks and suffered a loss of wages amounting to £47 15s. 6d. During that period he received industrial injury benefits amounting to £12 17s. 6d. On his return to work he received, in addition, three sums amounting in all to £126 13s., which were admitted to be in respect of industrial injury or disablement benefits. HIS LORDSHIP found the defendants liable and awarded the plaintiff £450 general damages.

It was contended on behalf of the plaintiff that s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948 (which provides that, in assessing damages in an action for personal injuries, one half of the value of rights that have accrued or probably will accrue to the plaintiff in respect of industrial injury benefit, disablement benefit, or sickness benefit must be taken into account against any loss of earnings or profits resulting from the injuries) must be confined to the value of rights accruing during the period of incapacity. On behalf of the defendants it was contended that half of all the amounts received by the plaintiff by way of industrial injury benefit during or after incapacity should be taken into account to the extent of extinguishing the claim for loss of wages.

F. Donald McIntyre for the plaintiff.

Caulfield for the defendants.

SLADE, J.: It is agreed that the plaintiff was incapacitated from his work by this accident for a period which resulted in the loss to him of £47 15s. 6d., that between Nov. 15, 1949, and the day when he returned to work, Dec. 22, 1949, he received benefit at the rate of £2 11s. 6d. a week, amounting in the aggregate to £12 17s. 6d., and that half that sum is deductible from the £47 15s. 6d., that is to say, £6 8s. 9d. In addition to that the plaintiff received three further sums in respect of industrial injury benefit amounting to £126 13s., half of which is £63 6s. 6d. Counsel for the defendants contends that this £63 6s. 6d. can be applied to extinguish the balance of the £47 15s. 6d.,

that is, the £41 6s. 9d. He says that he is entitled to that on the true construction of the Law Reform (Personal Injuries) Act, 1948, s. 2 (1) which provides:

"In an action for damages for personal injuries . . . there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit . . ."

A It is agreed that these sums amounting to £126 13s. are industrial injury benefits, that they have accrued to the plaintiff, and that one half of them amounts to £63 6s. 6d. Translating that, therefore, into the figures of this action and leaving out probabilities which do not arise, because everything is known now having regard to the time which the action has taken to reach trial, B I read that section to say that, in assessing the damages, there shall be taken into account against the loss of £47 15s. 6d. one half of the value of any rights which have accrued to the plaintiff in respect of industrial injury benefit, that is to say, one half of a sum which we know amounts in all to £139 10s. 6d. Therefore, it seems at first sight clear that the argument of counsel for the C defendants is correct. It might be said at first sight that he is even entitled to have the whole sum taken into account as against the general damages, but he does not claim that because the excess might be said not to be taken into account against the loss of earnings. He does, however, claim that he is entitled to have half of the sum taken into account to the extent of extinguishing the claim for loss of earnings. Counsel for the plaintiff, however, contends (i) that the words are, "take into account", not "deduct the half", and so one is bound, not to D deduct a half, but merely to take into account a half, and (ii) that, in any event, the sub-section only refers to the taking into account of benefits which have accrued during the period of the incapacity, in this case during the five weeks that it took for the plaintiff to lose his £47 15s. 6d. in wages.

To give effect to the second contention of counsel for the plaintiff seems to E me to involve reading into the section some words of this kind: In an action for damages for personal injuries there shall in assessing the damages be taken into account, against loss of earnings, half of the value of any rights which have accrued or will probably accrue *during the period of the incapacity, or during the period that the losses were sustained*. I am unable to read any such words into the statute. The statute makes perfect sense as it is, and I decline F to read any such limiting words into it. What do the words "take into account" mean? Why does not the section say, "deduct half the gains from the whole of the losses"? The answer may very well be, in accordance with the argument of counsel for the defendants, that, as half the gains may exceed the losses, and if you deduct 2x from 1x that gives you a minus quantity, the words "take into account" are more appropriate than "deduct". Be that G as it may, whether that is what they mean or whether "take into account" means that, having quantified the gains, divided them by two, and arrived at a figure, one is not to deduct that figure where it is less than the amount of the losses but are merely to take it into account, which may mean deduct that figure or some less portion of the figure, I do not propose to express any opinion on that, because, whichever is the true construction, if it is a matter H of discretion, I think it perfectly right to deduct so much of the one half of the £126 13s. as is necessary to extinguish the remaining £41 6s. 9d., and I so order. The special damages are, accordingly, nil, and there will be judgment for the plaintiff for the sum of £450 general damages.

Judgment for plaintiff.

Solicitors: *Hepburns* (for the plaintiff); *Carpenters* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

BUTLER v. HUDSON

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
June 8, 9, 1953.]

Rent Restriction—Death of tenant—Sole claimant—Application for declaration under Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g)—Application by landlord to vary order of registrar—Admission of fresh evidence—Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920 (S.R. & O., 1920, No. 1261), r. 1 (d), r. 7 (b), r. 19.

County Court—Declaratory judgment—Application for declaration under Rent Restrictions Acts—Remission to registrar—Reference to expert witness—County Courts Act, 1934 (c. 53), s. 90 (1)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 17 (2).

In 1908 the applicant's father or mother became the contractual tenant of a dwelling-house to which the Rent Restrictions Acts applied, and from that time until the father's death in 1936 the applicant lived there together with them. In 1932 a rent book was issued for the first time, but it was not clear whether "Mr." or "Mrs." preceded the surname of the tenant on the face of the book. Before 1936 the tenancy had become a statutory tenancy. After the father's death the mother continued to occupy the house with the applicant. After the mother's death in 1950 the applicant commenced proceedings in the county court, by way of an originating application purporting to be under the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 1 (d) and r. 19, for a declaration that she had succeeded to the statutory tenancy of the premises on the death of her mother. The application was resisted by the landlord on the ground that the applicant's father and not her mother had been the original tenant. The application was referred to the registrar, who made a declaration in favour of the applicant. The landlord having applied to the judge to vary or rescind the order of the registrar, the applicant wished to call further evidence, but the judge treated the landlord's application as an appeal, to be dealt with on the notes of the evidence taken before the registrar, and refused to admit new evidence. Purporting to act under the County Courts Act, 1934, s. 90 (1) (d), the judge referred to a handwriting expert the question whether, in his opinion as a handwriting expert, "Mr." or "Mrs." was written on the rent book. The expert's report being in favour of the landlord, the county court judge reversed the order of the registrar. On an appeal by the applicant,

HELD: an application under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), by a member of the tenant's family on the death of a tenant was an application for the purpose of determining, where there had been failure to reach agreement, which member of the tenant's family residing with him was to be entitled to the benefit of the Act; there being no competing claims between members of the deceased tenant's family and the applicant being the only possible tenant, her application was not "under the latter part of s. 12 (1) (g) of the Act", within the meaning of r. 19 of the rules of 1920, and was not an application under r. 1 (d) and r. 19; and, therefore, the proceedings were wholly ineffective, being without jurisdiction.

Per curiam: Assuming that s. 17 (2) of the Act of 1920 gave to the county court power to make a declaratory judgment in any case, even though the declaration sought was not ancillary to any other claim, and that the application was made under that sub-section, the only way (other than under r. 19 of the rules of 1920) in which the matter could be

referred to the registrar was under the County Courts Act, 1934, s. 90 (1), but the judge's direction to the registrar to hear and decide the case was not a reference to the registrar for an inquiry and a report under any of the provisions of s. 90 (1), and, therefore, the decision of the registrar and the subsequent proceedings were, in any event, without jurisdiction and a nullity.

A On an application under r. 7 (b) and r. 19 of the rules of 1920 to vary the decision of the registrar, the judge was acting, not strictly in an appellate capacity, but as a judge of first instance, and it was his duty, particularly when the sole question before him was one of fact, to hear such fresh evidence, relevant to the question at issue, as either party might desire to bring before him.

B According to its terms, the reference to the handwriting expert merely put him in the position of an expert witness giving evidence in the case, and was not a reference to a referee for inquiry and report under any of the provisions of the County Courts Act, 1934, s. 90 (1).

C FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g), and s. 17 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 999, 1021; and FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) RULES, 1920, r. 1, r. 7 and r. 19, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 12, pp. 123, 126 and 129.

FOR THE COUNTY COURTS ACT, 1934, s. 90 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 72.

D Cases referred to:

(1) *British & Argentine Meat Co., Ltd. v. Randall*, [1939] 4 All E.R. 293; 162 L.T. 91; 31 Digest, Replacement, 633, 7421.

(2) *Gregson v. Prior*, (1925), 134 L.T. 125; 31 Digest, Replacement, 685, 7774.

E APPEAL by the applicant, Miss Dorothy Butler, from an order of His Honour JUDGE HODGSON, made at Wandsworth County Court on Mar. 16, 1953.

In 1908 a house known as No. 117, Gatton Road, Tooting, was built by one Mr. Earland, who then granted a tenancy of it either to the applicant's father, Mr. Butler, or to her mother, Mrs. Butler, and Mr. and Mrs. Butler together occupied it with their two daughters (the applicant and another daughter who later left the house on her marriage to Mr. Earland's son).

F Until 1932 no rent book was issued, and, apparently, the contract of tenancy was not evidenced in writing. In 1932 Mr. Hudson, who had acquired Mr. Earland's interest in the house, issued a rent book, but it was not clear whether he wrote on it "Mr. H. Butler" or "Mrs. H. Butler". In 1936 Mr. Butler died.

Before his death there had been increases in the rent of the house, and, therefore, if he were the original tenant, he was a statutory tenant at the time of

G his death. After his death Mrs. Butler continued to occupy the house until her death on Aug. 22, 1950, and the applicant resided with her. After Mrs. Butler's death the present landlord, Miss Vere Hudson, expressed the intention of selling the house, and the applicant thereupon commenced proceedings in the county court by way of originating application for a declaration that she

H had succeeded to the statutory tenancy on the death of her mother. The landlord was the respondent to the application and the sole issue between the parties was whether Mr. Butler or Mrs. Butler had been the original tenant.

The application, which purported to be under the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 1 (d) and r. 19, was remitted to the registrar, who made a declaration that the applicant was the statutory tenant of the premises. The landlord applied to the county court judge to vary or rescind the order of the registrar, and, on Mar. 16, 1953, the judge made

an order rescinding the order made by the registrar. From this order of the judge the applicant appealed to the Court of Appeal.

Rountree for the applicant.

Bassett, Q.C., and *H. P. B. Dow* for the landlord.

SIR RAYMOND EVERSLED, M.R.: This is a most unfortunate case. Indeed, it may, I think, be described as a chapter of misadventures. The application was by way of originating application entitled: "In the matter of the Increase of Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939", and "In the matter of No. 117 Gatton Road, Tooting", the applicant being Miss Dorothy Butler, of that address, and the respondent Miss Vere Hudson (referred to hereinafter as "the landlord"). By the application the applicant asked (a) for a declaration that on the death of her mother, Elizabeth Susan Butler, on Aug. 22, 1950, she succeeded to the statutory tenancy of the premises, and (b) for costs. It is plain that the application purported to be an application under the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 1 and r. 19. At the very first step, therefore, in my judgment, the applicant made a serious mistake, for, in my view, the application which she made was not one which it was competent for her to make under those rules. That, however, is a matter to which I shall return. The landlord has never disputed that the application fell within the rules. The question raised by the application was remitted to the decision of the registrar. It was suggested by counsel for the applicant that that order may have been made by the registrar himself, but counsel for the landlord tells us that the judge did, in fact, make it, though no written order or direction to that effect was given. Such a remission was only competent if the application was within the ambit of the rules. The matter being remitted, the registrar heard certain witnesses and came to a conclusion which he expressed, without following the form of the prayer in the application, as follows: "Declaration that the applicant is the statutory tenant of No. 117 Gatton Road, Tooting". The landlord, being dissatisfied with that decision, proceeded to avail herself (still acting on the supposition that the matter was properly within r. 1 and r. 19) of the power given by r. 7 and r. 19 to apply to the judge to vary the registrar's decision.

The Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 19, is:

"Where, on the death of a tenant intestate, a member of his family requires the decision of the court under the latter part of s. 12 (1) (g) of [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920], the judge shall give such directions as to the procedure to be followed, and the notices to be given to and the attendance of all such persons as may be interested as he shall think fit, and he (or the registrar, if so directed by him) shall consider what may be urged (either orally or in writing) by or on behalf of such persons, and thereupon give his decision: provided that the registrar's decision may be varied by the judge pursuant to r. 7."

Rule 7 provides:

"Any application under these rules may be made to the registrar, subject to the following provisions . . . (b) The judge may vary or rescind any determination or order made by the registrar, and may make such determination or order as may be just: (c) An application for such variation or rescission shall be made on notice in writing in accordance with the county court rules as to interlocutory applications . . ."

I have read r. 7 and r. 19 at this stage to draw attention to the following matters: (i) from the language of r. 19 it appears that on an application within it, i.e., an application under the latter part of s. 12 (1) (g) of the Act of 1920, the form of procedure to be followed is not thereupon laid down, but is to be

directed by the judge; (ii) the judge may direct the registrar to consider the matter and give his decision; and (iii) in the event of the judge so directing, the registrar's decision may be "varied" by the judge pursuant to r. 7. By r. 7 (b), which is not exclusively applicable to r. 19, the judge may "vary or rescind" a determination by the registrar. It may, perhaps, be a matter of inelegant drafting, but it is to be noticed that, according to r. 19, the judge has power to vary but not to rescind the order of the registrar made under r. 7.

- A Counsel for the landlord suggested that in r. 19 variation should be treated as including variation of so far-reaching a character as to amount to rescission. I am not satisfied that that is right. Indeed, I think that the language of r. 19, speaking only of variation, lends some support to the view which I have taken that this case is not within r. 19 at all. However that may be, it is to be noted (and this is one of the items in the chapter of misadventures) that what the judge proceeded to do was not to vary but to rescind the registrar's order.

B The form, however, of the landlord's application to the judge has also given rise to some difficulty. It reads:

"Take notice that the respondent intends to appeal to His Honour the judge for an order varying or rescinding the order made by the registrar."

- C The significance of the fact that, by the form of the notice, the landlord intended to appeal is this. When that application came on before the learned judge, Miss Butler, the original applicant, asked for a direction about calling further evidence. That matter was debated at some length on Dec. 11, 1950, and the judge has made a note, which is a kind of interlocutory judgment, in which he deals with his powers and duties as regards fresh evidence when a case originating under r. 19 finds its way back to him on an application to vary under the same rule. As the judge gave careful consideration to the matter, and as he indicated, on a later date, that he would be glad to have the guidance of this court on the point, it may be convenient for me to say a few words on it, although, in the events which I have already indicated, it does not strictly arise in the present case. In his note, the learned judge, influenced, it may well be, by the form of the landlord's notice, said:

- E "A party must put forward his whole case at once. He must not add to it to meet objections arising on the way, or present his case piecemeal. There must be some finality. I find no such provisions [as those in R.S.C., Ord. 58, r. 4] in the County Court Rules, but s. 100 of the County Courts Act, 1934, authorises the adoption and application of the Rules of the Supreme Court in all cases where there is not special provision in the county court rules. Accordingly, I propose to follow the usual procedure. I shall hear and consider the evidence already given orally before the registrar as set out in his careful note, and I shall then come to my own decision thereon after hearing the submissions of the parties. I shall not consider myself bound by the findings of fact of the registrar. But, except for very good and sufficient cause, I shall not receive any further evidence."

- H The learned judge was of opinion that, when an application was made under r. 19 to vary a decision by the registrar, it was, in effect, an appeal, and the question what evidence he should receive, other than the evidence recorded by the registrar, was to be decided on the same principles as those on which this court decides whether or not to admit fresh evidence on the hearing of an appeal. In my judgment, that is not a correct view. It seems to me that, although the application is to vary the registrar's decision, the judge is, nevertheless, acting as a judge of first instance. I think, therefore—and particularly is this so when the sole question before him is one of fact—that the duty of the judge is (subject to the limits imposed by a proper exercise of judicial discretion) to hear such evidence as either party may desire to lead before him. He may not feel bound to hear, at first hand, the whole of the evidence that has been given before the

registrar—though, again, if the question is whether the registrar has reached a correct conclusion on a matter of fact, *prima facie* the judge would not interfere with that conclusion unless he heard the witnesses himself—but I think, as I have already said, that, since the judge is dealing with the matter as a court of first instance, he should hear such fresh evidence, relevant to the question at issue, as either party may desire to bring before him. We were referred to *British & Argentine Meat Co., Ltd. v. Randall* (1), a decision of the Court of Appeal, and *Gregson v. Prior* (2), which was cited to the learned judge. Neither of those cases directly covers the question with which I am now dealing in the present case, but I think, as a matter of principle, that they lend support to the view which I take and which I have already expressed, namely, that on an application under r. 7 (b) and r. 19 to vary a registrar's decision, the judge is not acting strictly in an appellate capacity but is acting as a judge of first instance. I have thought it right to express my views on this matter because of the care taken by the county court judge and his expressed desire for guidance. I hope, therefore, that what I have said may be of assistance in similar cases. A

On Jan. 8, 1951, when the case came again before the county court judge, counsel for the landlord suggested that Mr. Gurrin, the handwriting expert, should be invited to assist the court, since, in the opinion of the registrar, much turned on the question whether "Mrs." or "Mr." had been written on a rent book in 1932. There was some discussion about the propriety of having any further evidence, particularly in view of what the judge had said on Dec. 11, 1950, but, on counsel for the landlord stating that the landlord would, in any case, pay Mr. Gurrin's expenses, the applicant's solicitor agreed to the suggestion. The form of order which the judge made was as follows: B

"Refer to Mr. Gurrin under s. 90 [of the County Courts, Act, 1934] for inquiry and report on three documents [viz., illustrations of handwriting] whether, in the opinion of Mr. Gurrin as a handwriting expert, the said Mr. Hudson [the landlord in 1932] wrote 'Mr. H. Butler' or 'Mrs. H. Butler' on the face of the rent book." C

In my judgment, here was another misadventure, for that form of reference was not within the ambit of s. 90 of the Act of 1934. Section 90 (1) provides: D

"Subject to county court rules, the judge may refer to the registrar or a referee for inquiry and report—(a) any proceedings which require any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the judge, conveniently be made before him; (b) any proceedings where the question in dispute consists wholly or in part of matters of account; (c) with the consent of the parties, any other proceedings; (d) subject to any right to have particular cases tried with a jury, any question arising in any proceedings." E

It is said that the reference to Mr. Gurrin was under s. 90 (1) (d), as being a question arising in the existing proceedings, namely, the question whether Mr. Hudson had written "Mr." or "Mrs." Butler on the rent book, but, unfortunately, the reference was not, according to its terms, to a referee for inquiry and report. It was a reference to Mr. Gurrin whether in his opinion as a handwriting expert the vital word was "Mr." or "Mrs." That was, therefore, an invitation by the judge to an expert witness to give him a piece of evidence. I have not mentioned this matter with any wish to criticise the county court judge, as I think that in this instance what he did was plainly done with the concurrence of the parties. In any case, it seems clear that at some stage an offer was made by the landlord to produce Mr. Gurrin in the county court so that the applicant could cross-examine him, and that offer was not accepted. It was said on the applicant's behalf that, as there had been a reference under s. 90 (1) of the Act of 1934, it did not seem useful, F G H

or even, perhaps, appropriate, to suggest cross-examination, all of which goes to show that it is highly desirable to adhere properly to the words of the Acts and the rules which are being invoked. I think that the consent of the parties to what was done explains the technical error that was made, but it is, undoubtedly, one other misadventure in this calamitous chapter of accidents.

On Mar. 16, 1953, two and a half years after the initiation of the proceedings, the solicitor for the applicant applied to the judge for leave to call another witness, viz., the applicant's sister who was living with her parents when the original contract of tenancy was made, and who later became the daughter-in-law of the original landlord. It was pointed out that the applicant and her advisers had not thought of calling that witness when originally they had asked to call another witness in December, 1950. The judge, no doubt recollecting what he had then said, rejected the application to call this further evidence, which might have been important. The judge then made the order which I have already mentioned, and in which, in terms going outside the rule under which he was purporting to act, he "rescinded" the order made by the registrar. It is from that order of rescission that this appeal comes to this court.

[HIS LORDSHIP summarised the facts which led to the litigation, and continued :] As to the law applicable, there is, I gather, no dispute. If Mr. Butler was the original tenant, then, since there had been increases in rent before his death, it is conceded that he was a statutory tenant at his death. It is, therefore, clear that, in that case, Mrs. Butler's continued occupation must have been in right of her claim to be the tenant within the meaning of the Acts, by virtue of s. 12 (1) (g) of the Act of 1920, and it is further conceded that, on that hypothesis, when Mrs. Butler died the utility of s. 12 (1) (g) to the Butler family was exhausted and the applicant can no longer invoke its provisions to protect her occupation. If, on the other hand, Mrs. Butler was the original tenant, then the applicant, it is again admitted, having satisfied s. 12 (1) (g) in all other respects, is entitled to rely on that section as qualifying her to be called the tenant within the meaning of the Rent Restrictions Acts. The only question is one of fact, simple to state, but, as this litigation, which has gone on for two and a half years, shows, difficult to determine: Who was the tenant of 117 Gatton Road when the contract of tenancy came into existence?

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), as amended by the Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1:

"... the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

Those last words make it plain, to my mind, that, where there is more than one member of the tenant's family so residing, there is express jurisdiction in the county court to decide, in default of agreement, which one of the family is to be entitled to the continued protection of the Act. The reference to "as may be decided ... by the county court" obviously contemplates that application may have to be made to the county court to decide that matter in the circumstances which I have mentioned.

The Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, which were made pursuant to s. 17 (1) of the Act of 1920, deal, inter alia, with applications which might have to be made under one or other of the sections of the Act in which such applications were contemplated. To take other examples, s. 2 of the Act deals with increases of rent which are permissible, and sub-s. (1) (a) contains a proviso that the tenant may apply to the county court for an order suspending or reducing an increase on the grounds stated. Similarly, s. 6 and s. 9 contain other instances in which, by the Act, express provision is made empowering one or other party to the tenancy to apply to the county

court for a specific purpose. The rules of 1920 were made under s. 17 (1) for the purpose of giving effect to those provisions. Section 17 (1) of the Act provides:

"The Lord Chancellor may make such rules and give such directions as he thinks fit for the purpose of giving effect to this Act . . ."

Above r. 1 of the rules of 1920 appears the heading:

"Applications under s. 2; s. 9; s. 12 (1) (g) or (3); s. 6; or s. 5 (6)."

Rule 1 is:

"An application to the county court under the Act . . . (d) by a member of the tenant's family under s. 12 (1) (g) . . . may be made . . . to the court in the district of which the premises are situate."

I have already read r. 7 and r. 19, and pointed out that, in the case of applications under s. 12 (1) (g) by a member of the tenant's family, the procedure is to be determined by the judge, who will decide, among other things, on whom such an application will be served.

An application under s. 12 (1) (g) is, to my mind, quite plainly an application for the purpose of determining, where there has been failure to reach agreement, which member of the tenant's family residing with him is to be entitled to the benefit of the Act. Such an application is expressly provided for in the latter part of s. 12 (1) (g) itself. An application such as was made in this case by the sole claimant after a parent's death to be entitled to the benefit of the statutory tenancy is not, properly speaking, an application under s. 12 (1) (g) at all. Section 12 (1) (g) is a definition section. If the applicant is right in what she alleges, then she is a tenant within the meaning of the Rent Restrictions Acts and, as such, is entitled to the protection against eviction which is given, for example, by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3. I think that the significance of that point is exemplified by the form which the order took and, indeed, by the form of the application itself. The applicant asked for a declaration that she succeeded to the statutory tenancy. That, in a loose way, might be described as an application under s. 12 (1) (g), if by it is meant an application that she was the tenant within the meaning of the definition section. It is to be noted that the registrar made his order, no doubt in a form which he thought really met the point in the case, as follows: "Declare that the applicant is the statutory tenant of No. 117 Gatton Road." An application to be declared a statutory tenant is not, to my mind, an application under s. 12 (1) (g), which, as I have already said, is a definition section only. I, therefore, have come to the conclusion that where, as in this case, there is no question of competing claims between members of the family, there being only one possible tenant, the matter is not, within the meaning of r. 19, "an application under the latter part of s. 12 (1) (g)," with the result that all the proceedings which took place on the footing that it was, including the judge's direction to the registrar to decide the matter and the later application to the judge to vary his decision, seem to me to have been without the necessary foundation or jurisdiction.

One other matter may be mentioned to emphasise the view which I have expressed. The point taken by the landlord has nothing to do with the question which member of the family is entitled to the occupation of this house. The landlord's point—and it is the only issue in the case—is that Mr. Butler and not Mrs. Butler was the original tenant. That is the issue which the court is asked to determine, and it does not arise under s. 12 (1) (g), the application of which paragraph is not in dispute between the parties. I refer finally to the point which I noted earlier, namely, that by the terms of r. 19 an application to the judge following a decision by the registrar is limited to the purpose of "varying" the registrar's decision and not "rescinding" it. If the question be which one of two or more competing claimants is within the definition of s. 12 (1) (g)

of the Act of 1920, "variation" is the appropriate, and the only appropriate, word. But if the question be, as it is here, whether or no the sole claimant is within the terms of the paragraph, then the application to the judge would be, not to vary, but to rescind the order made by the registrar, which was what the learned county court judge did on Mar. 16, 1953.

- A For those reasons, therefore, I come to the conclusion that the whole proceeding, from its inception onwards, was not properly within the rules under which the applicant purported to bring it and the landlord was content to debate it. When parties have travelled for two and a half years along a particular litigious road, I should be very sorry to tell them that the road which they have chosen was the wrong one and that they must start all over again, but there are other grounds on which, as it seems to me, the present decision of the county court judge could not be regarded as satisfactory, and,
- B on any view of the case, therefore, I think that the matter would have to be re-tried or re-considered. I have already referred to the view which, as I think, with all respect, the learned judge mistakenly took in rejecting applications for further evidence and to the misfortune in the form of the direction to Mr. Currin to give his opinion as an expert. The result then would be inevitably much the same, even though the technical difficulty of jurisdiction
- C was out of the way, but the misfortunes which have befallen the present case and the litigants involved in it, do, I venture to think, well illustrate the troubles which may arise if parties do not follow the rules but attempt to steer a course of their own devising for the determination of disputes between them.

- The view, however, that I have expressed about r. 1 and r. 19 is not the end of the case, for, alternatively, it has been suggested by both parties that, though
- D the matter was not within r. 1 and r. 19 and was not, properly speaking, an application under s. 12 (1) (g) at all, still the application was one which the court could competently decide as falling within the general language of s. 17 (2) of the Act of 1920, which reads:

- "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."
- E

- F It is, I think, plain that that sub-section is directed, primarily at any rate, to giving to the county court jurisdiction over all matters arising under the Rent Acts even though, by reason of the value of the property or for other reasons, the High Court would have had jurisdiction. Had it not been for the two words "or otherwise", it would, in my judgment, have been impossible to contend that the present application for a declaration that, on the death of
- G Mrs. Butler, the applicant succeeded to the statutory tenancy was within the terms of s. 17 (2). Counsel on both sides, however, contended with considerable force that the county court's powers to make declaratory judgments are limited by the County Courts Acts so as only to be available when such declarations are ancillary to other relief, and that, therefore, the words "or otherwise", in s. 17 (2) of the Act of 1920, have the effect of giving to a county court jurisdiction—admittedly discretionary—to make a declaratory judgment in any
- H case, even though the declaration sought is not ancillary to any money or other claim. I do not think it necessary to express any concluded view whether that submission is right, and I am anxious not to do so, because if s. 17 (2) of the Act of 1920 gives to the county court power to make declaratory judgments, it is obvious that there may be many cases when that would be a useful jurisdiction and would well serve the interests of litigants in the county court. I am bound to say, however, that, in my opinion, a case such as the present one

would not, *prima facie*, be a suitable case to be dealt with by means of a declaration of this sort. It may well be that in the present case there is, in truth, no dispute whatever between the parties save only the question who was the original tenant, but, if that is so, the case is, indeed, exceptional. My experience has taught me to expect that, when a landlord seeks possession of premises which are subject to the Rent Restrictions Acts and the defendant raises a claim to be a tenant by virtue of the definition in s. 12 (1) (g) of the Act of 1920, that is not likely to be the only issue raised. Moreover, applications for declaratory judgments do not appear to me well adapted to matters in which the only question is one of pure fact. Certainly the unhappy experience in this case is no strong advertisement for the use of s. 17 (2) in the present instance, but I do not desire, for reasons which I have already given, to express any further opinion on the sub-section, as I should be unwilling, unless I were compelled to do so (which I am not), to express an opinion which would limit the utility which may reside in the sub-section. Assuming, however, that this particular case was a matter within the competence of the county court under s. 17 (2), what is the consequence? In my judgment, if the parties attempt to tread this road, they get hardly any further along it than they got along the road labelled "r. 1 and r. 19", because, to sustain the subsequent proceedings, the first step in the action, *viz.*, the reference to the registrar, must be justified. That reference was made by the judge, I assume, under r. 19 of the rules of 1920, which, for reasons already given, had no application. The only other way in which the matter could have been referred to the registrar would have been under the County Courts Act, 1934, s. 90 (1), but it is, in my judgment, quite plain that the judge's direction to the registrar to hear and decide the case was not a reference to the registrar for inquiry and report under any of the provisions of s. 90 (1). The result, then, is that the decision of the registrar was made without jurisdiction and was a nullity, and it follows that all the subsequent proceedings which depended on it had no greater validity. On any view of the case, therefore, it seems to me that the proceedings were wholly ineffective. The order of this court should, I think, recite the opinion of the court that the original application was invalid and outside the jurisdiction of the registrar to determine, and should then discharge the order made by the county court judge on Mar. 16, and also, in case the effect of that should be to revive the registrar's earlier order, discharge his order also. In the circumstances, it seems to me that the fair and just order as to costs is that neither party recovers from the other any costs here or below.

BIRKETT, L.J.: I am entirely of the same opinion. [His LORDSHIP summarised the facts, and continued:] I agree with the Master of the Rolls that r. 1 (d) and r. 19 of the rules of 1920 are not applicable to the facts of the case. I should also like to add my concurrence with the view which my Lord has expressed that under r. 7 (b) the judge was acting, not as an appellate judge, but as a judge of first instance. It is clear, in my opinion, that, for the reasons stated by my Lord, the proceedings which the applicant began, and which were resisted by the landlord, were really a nullity. I also agree with the Master of the Rolls that the purported reference to Mr. Gurrin, the handwriting expert, was not a reference to a referee for inquiry and report under the County Courts Act, 1934, s. 90 (1), but that it merely put Mr. Gurrin in the position of an expert witness giving evidence in the case.

It is not necessary for the decision of this case to express a view about the true meaning of s. 17 (2) of the Act of 1920, but I should like to indorse the language used by the Master of the Rolls when he said that it would be a pity if anything were said in the present case to limit the operation of the sub-section in its utility, or, indeed, its application to similar or other facts in other cases brought under the Rent Restrictions Acts. [His LORDSHIP read s. 17 (2), and said:] On the face of it the effect of the sub-section seems to be that, since proceedings

under the Rent Restrictions Acts have been committed to the jurisdiction of the county court, that court is to have power to deal with them notwithstanding that circumstances may arise which ordinarily would oust its jurisdiction. Counsel, however, contended that the words of the sub-section, "any claim . . . arising out of this Act", would cover proceedings such as those in the present case, viz., an application for a declaration which was not ancillary to any other claim. In my view, the facts of the present case would seem to make it extremely doubtful whether the proper or advantageous course was to seek a declaratory judgment, but, as we are determining the matter on the first point, viz., that the proceedings were ineffective, I agree with SIR RAYMOND EVERSHERD, M.R., that this court will discharge the order of the county court judge, without prejudice to anything which the parties may choose to do in the future.

ROMER, L.J.: I agree entirely with the judgment which has been delivered by SIR RAYMOND EVERSHERD, M.R. For the reason which he has given, the parties altogether misapprehended the effect of r. 1 (d) and r. 19 of the rules made under the Act of 1920. It is plain that all the problems which have arisen since the beginning of this unfortunate litigation two years ago have flowed directly from that mistake. With regard to s. 17 (2) of the Act of 1920, I would like to reserve my concluded view as to what the precise scope of that statutory provision is, but I agree with my brethren in thinking that it would be undesirable to say anything calculated to confine the apparent meaning of the sub-section, and I can well conceive that in some cases, particularly cases raising short questions of law, it would be desirable for the county court to have the suggested jurisdiction to make declarations of rights, in disputes arising under the Acts, wider than their normal jurisdiction under the county court procedure. Beyond that I prefer to say nothing on that sub-section. I quite agree with the order which my Lord has indicated.

Orders of county court judge and registrar discharged.

Solicitors: *W. T. Donovan* (for the applicant); *Warren & Co.* (for the landlord).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ROBERTS v. DORMAN LONG & CO., LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.J.J.), May 19, June 12, 1953.]

Building—Building regulations—Safety belts—Need to provide—“Adequate foothold”—“Available”—Provision of belts at office half a mile from place of work—Evidence of practice not to use belts—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 97.

As part of a building operation a steel frame was lifted by a crane into position between two stanchions at a height of seventy or eighty feet from the ground. The frame did not fall exactly into place, and, in order to guide it into position, a charge-hand employed by the defendants, who were erecting the building, climbed on to the topmost member of the frame which was twelve inches wide and sat astride it. He was able to “wrap” his legs underneath the cross-member and get some purchase on a diagonal bracing below. He had no safety belt, the nearest point at which safety belts were available being half a mile away. As the crane moved the frame he fell to the ground and was killed. In an action by his widow for damages under the Fatal Accidents Act, 1846, in which she alleged that the defendants were guilty of negligence and breach of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 97, in not having available a safety belt for the use of the deceased, evidence was given that the work was not regarded as a particularly dangerous operation of steel erection, that special precautions were unnecessary, and that it was not the normal practice to use safety belts in such circumstances.

HELD: the charge-hand had not an “adequate foothold”, which meant something on which one could safely stand, within the meaning of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 97, and the safety belts were not “available”, which meant available at the place where they would be used, within the meaning of the regulation, and, therefore, whether or not it was likely that the charge-hand would have used a safety belt had one been available, the defendants were liable for breach of their statutory duty under reg. 97 to have safety belts available where there was no adequate foothold.

Judgment of BANKES, L.J., in *A. L. Underwood, Ltd. v. Bank of Liverpool. Same v. Barclays Bank* ([1924] 1 K.B. 789), applied.

Semble, employers are under no duty at common law to insist on the use of safety belts in such cases.

Evidence—Admissibility—Evidence at variance with particulars and other evidence—No objection by opposing party.

In an action for damages for breach of statutory duty to have safety belts available for the use of workers engaged in a building operation, the defence alleged that an adequate supply of safety belts was available, and particulars supplied stated that they were at the defendants' main office on the building site, and had been available since the defendants commenced operations on the site. The main office was about half a mile away from the place of work where they might be used. The trial proceeded on this basis, evidence for the defendants being given in accordance with the particulars, and, on an objection raised during his examination of a witness, counsel for the defendants disclaimed any intention of suggesting that there were any safety belts at a nearer point. The last witness for the defendants gave evidence that two safety belts were available at an office near the place of work, and, no objection being taken for the plaintiff, the evidence was admitted and acted on by the trial judge.

HELD: the evidence ought not to have been admitted.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 97, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 246.

Cases referred to:

(1) *Underwood (A. L.), Ltd. v. Bank of Liverpool. Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.

(2) *England v. National Coal Board*, [1953] 1 All E.R. 1194.

(3) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180.

APPEAL by the plaintiff against an order of STREATFEILD, J., dated Dec. 11, 1952, giving judgment for the defendants in an action for damages for negligence and breach of statutory duty brought under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The plaintiff was the widow of a charge-hand, a steel erector, who had been employed by the defendants on the erection of a steel building and had fallen seventy feet from the cross-member of a Portal frame which was being put by a crane into position between two stanchions. She contended that the defendants were negligent in not providing a safe system of work and in breach of their statutory duty to make safety belts available where there was no "adequate handhold and foothold" under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 97. The defendants denied negligence and contended that there was adequate handhold and foothold and that safety belts were available, according to particulars supplied, at an office which according to the evidence was half a mile away. In the course of the trial the last witness for the defendants gave evidence that two safety belts were available at an office close to the site, and, in the absence of objection on behalf of the plaintiff, STREATFEILD, J., accepted the evidence, and gave judgment for the defendants. The plaintiff appealed.

H. Edmund Davies, Q.C., and *R. Geraint Rees* for the plaintiff.

Lloyd-Jones, Q.C., and *G. P. Thomas* for the defendants.

Cur. adv. vult.

June 12. The following judgments were read.

LORD GODDARD, C.J.: The action out of which this appeal arises was brought by the plaintiff under the Fatal Accidents Act, 1846, to recover damages for the death of her husband who was a steel erector employed by the defendants. He met his death by falling from a steel frame, known as a Portal frame, which was being fixed at a factory which was in course of construction by the defendants, a distance of between seventy and eighty feet. The action was based first on a breach of statutory duty, it being alleged that the defendants were in breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 97, and, secondly, or alternatively, negligence at common law. The learned judge entered judgment for the defendants.

The facts out of which the accident arose are that the deceased was a steel erector of long experience and was a charge-hand on the particular job on which he was working at the material time. It had become necessary to place a frame, called a Portal frame, between two upright stanchions, which were between seventy and eighty feet high and some forty or fifty feet apart. This apparently is a very ordinary operation, which takes place in the course of erecting steel buildings. The frame is raised from the ground by a crane, and then the crane carries the frame over the stanchions and lets it down so that the two ends of the frame will fall into position between the cleats which are already fastened to the stanchions. The ends then have to be centred into the exact position, so that the rivets which are to bolt the frame to the stanchions will go through the holes which are provided. It not infrequently happens that the frame does not fall exactly into position and has to be guided or worked to get the holes in apposition. For this purpose the men

are provided with a tool called a podger, one end of which can be used as a lever for coaxing or levering the frame into position, while the other end is an ordinary spanner for tightening up the bolts or rivets. On the day in question two men, Mr. Davies and Mr. Slennet, were working under the deceased, and when the frame was lowered apparently all went well on the stanchion on which Mr. Davies had taken up his position. Mr. Slennet had some difficulty, and the deceased went to his assistance. He first stood on the lower member of the frame, but being unable to remedy the difficulty he climbed on to the top-most cross-member and sat astride of it. The cross-member was twelve inches wide, and it seems that, as he sat across it, he could wrap his legs underneath it and get some sort of purchase on a diagonal bracing which it was suggested gave him a perfectly good foothold. He had with him his podger, but it was impossible to see whether at the moment of the accident he was holding the podger with both hands. If he was not, he could get a handhold by holding on to a flange at the top of the member on which he was sitting. While he was in this position he gave a signal to the crane driver who swung the crane slightly to adjust the position of the frame, and as the frame moved he appears for some unexplained reason to have overbalanced and fallen off. It is quite obvious, as can be seen from the plan and the photographs, that the work involved these men being in a position which would ordinarily be called highly perilous, but apparently such an operation as this is all in the day's work of a steel erector, who is, no doubt, accustomed to working at great heights. The resident engineer of the defendants, Mr. Rideout, regarded this evidently as a job which was quite normal and usual and one in which it was quite unnecessary that any particular precaution should be taken for the safety of the men engaged in working at this height. He also regarded the diagonal bracing against which the deceased had rested or locked his feet as giving a perfectly satisfactory foothold, and apparently the learned judge so considered it.

Regulation 97 is in these terms:

"Safety nets, sheets and belts.—If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury."

On the question of adequate foothold I am unable to agree with the view of the learned judge. I think the ordinary meaning of the word "foothold" is standing ground, something on which a person can safely stand, and I cannot see that it can really be said, where a man is astride a twelve-inch girder or stanchion which is suspended in the air, that he has any foothold at all, although he may be able to rest his feet against a bracing such as existed in the construction of this frame, and if there was no foothold it is unnecessary to consider whether he had an adequate handhold. The regulation only excepts from its provisions persons for whom there is both adequate foothold and handhold.

The breach of duty which was alleged here was that the defendants had not made available any safety belts or other contrivances. The position with regard to the availability of safety belts is an important feature of this case. The action was tried at Swansea in December, 1952. As long ago as June 20, 1951, the plaintiff had required particulars stating precisely where the said safety belts were available and the number and type thereof, and as from what date it was alleged the same were available. These particulars were asked for because in para. 10 of the defence it was alleged that an adequate supply of safety belts was available for the workmen. The particulars delivered were

that the safety belts were provided and kept at the defendants' main office on the site and had been available since the defendants commenced operations on the site. The main office which was referred to was a considerable distance away from the site where these men were working. Estimates of the distance varied from five hundred yards to three-quarters of a mile, and, perhaps, the most reliable estimate was given by a witness who said that the main office was ten minutes' walk away, which would indicate that it was somewhere about half a mile. Until the last day the case proceeded on that footing so far as the availability of belts was concerned, and, in my opinion, it would be impossible to hold that safety belts were available so as to comply with these regulations if they were kept at such a distance as that from the site on which the men were working. As I have said, the case proceeded on the footing that these belts were only to be found some half a mile away from the work, and, indeed, when an objection was taken in the course of the examination of a witness by counsel for the defendants that it might be taken that he was suggesting that the belts were somewhere nearer, he disclaimed any such intention and evidence was given by Mr. Rideout that, after the accident, he fetched two belts from the main office and put them in the cold mill office, which was the office adjacent to the place where the accident happened. Evidence was also given of notices which were posted near this work and were in these terms:

"All employees are reminded that a safety belt is available on request for any man who wishes to use one for a proper and reasonable purpose."

It will be noticed that the notice says nothing about where the belts were to be found.

On the last day of the trial, the very last witness called was a Mr. Rees Price, who had formerly been in the employ of the defendants as a foreman erector, and was the foreman employed on the day of the accident. In view of the particulars and the foregoing evidence, it was at least surprising to find that, according to him, there were at the date of the accident two belts hanging behind the door in the cold mill office. This was a matter which, of course, took the plaintiff's advisers entirely by surprise, and the great importance of the matter is emphasised by the fact that, when he came to give judgment, the learned judge accepted the evidence of Mr. Rees Price, finding that belts were available in the cold mill office. In my opinion, the learned judge ought not to have allowed such a complete departure from the particulars, especially as no notice whatever had been given to the plaintiff of this fact spoken to for the first time by Mr. Rees Price in the box. They had come to meet a case in which the defendants had stated perfectly definitely that such belts as there were were at the main office, and, considering also that Mr. Rideout spoke himself of having taken two belts to the cold mill office and did not suggest that there were any there other than those two which he took after the accident, the only inference that can be drawn with regard to Mr. Rees Price's evidence, especially in view of the length of time that had elapsed since the accident, is that he was mistaken and was speaking of the same belts as Mr. Rideout himself had taken to the cold mill office, but not until after the accident. In my opinion, therefore, the case ought to have proceeded on the footing that the only belts which the defendants provided were those at the main office, and, as I have already said, that was too far away for them to be regarded as available for the men if they wished to use them.

Accordingly, it appears to me that there was a breach of reg. 97. It was the duty of the defendants to have belts available, so that if a man elected to use one he could do so. There was, however, a good deal of evidence that steel erectors never use these belts unless they are going to do an operation which necessitates their going over the side of a crane. Mr. Price in his evidence was asked if he had ever seen a man use a safety belt at all. His answer was that he had on such operations as bolting the seating of a crane girder for which

one goes over the side of the crane, and that, in the whole of his experience, he could only recollect three occasions when he had seen a belt used and then it was always for such an operation as he had just described. The witness, Mr. Slennet, however, said that, when he had been working for Sir William Arrol & Co., he had used a safety belt on many occasions and gave certain instances of work on which he had been engaged when he had worn one. It may well be that the learned judge could form the opinion on the evidence that it was unlikely that if safety belts had been available the deceased would have used one, but, in my opinion, once it is proved that the defendants had not got these belts available for them to say: "Well, even if we had them available the deceased would not have used them" is no answer. The fact that they were not available gave him no opportunity of exercising his election, and, had one been available and had he elected to use it, while it might not have prevented his meeting with some injury, it would certainly have prevented his falling to his death. Some actions for negligence are based on the failure of a person to make inquiries when the circumstances are such as to show that he was put on inquiry. If he is put on inquiry and makes none, it is no answer to say: "Well, if I had made the inquiry it would have led to no result". That is well established, and I need only refer to the judgment of BANKES, L.J., in *A. L. Underwood, Ltd. v. Bank of Liverpool. Same v. Barclays Bank* (1) ([1924] 1 K.B. 789), and it seems to me that the two things are closely analogous. If a person who had to make an inquiry fails to do so he cannot be heard to say: "But even if I had it would have led to no useful result". So I think that, if a person is under a duty to provide safety belts or other appliances and fails to do so, he cannot be heard to say: "Well, if I had done so, they would not have been worn". For this reason I think that the plaintiff has established a breach of duty causing or contributing to her husband's death and that for a breach of the regulation she is entitled to recover.

I have more difficulty in holding that she would have been entitled to recover at common law. It is said that there is a common law duty, and undoubtedly there is, for an employer to provide a safe place of working and to take reasonable steps to guard against the consequences of his men being in a perilous situation. Considering that there is this regulation made expressly for the protection of persons working at heights or in places where there is no adequate handhold or foothold, and considering that the regulation, while requiring belts to be provided, leaves it to the employee to elect whether he will use one or not, I do not think that we can say that the employers are under a common law duty to insist on these men using the belts. It was suggested that they ought to be advised or urged to use them. Apart from the fact that the case below seems to have been fought entirely on the failure of the defendants to provide them, I do not think that we ought to hold that the defendants were under this duty, more especially having regard to the provisions of the regulation. No doubt, it does not follow that, because there are regulations dealing with a particular matter, observance of them exonerates the employers from any other common law duty which may not be covered by the regulations. Steel erection is an operation undoubtedly accompanied by considerable risks—risks which are well known both to employers and workmen and which must always exist whatever precautions are taken. For my part, I think it is safer to decide this case entirely on the breach of the regulation, and on that ground I would enter judgment for the plaintiff for the amount assessed by the learned judge who was asked to fix the damages in the event of a successful appeal.

There will be judgment for the plaintiff in the sum of £4,500, apportioned as to £4,000 to the widow, £200 to the elder daughter, and £300 to the younger daughter, and the money must be brought into court and transferred to the Swansea County Court. The plaintiff will have the costs here and below.

BIRKETT, L.J., referred to the facts and continued: It was conceded that the building in course of erection came within the provisions of the Building (Safety, Health and Welfare) Regulations, 1948, and the main contest in the court below was on reg. 97, and in particular on the words

“except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury.”

Now to the ordinary layman, and I should have thought myself to anybody who considered the matter, the position of the deceased at the moment he fell to his death was one of considerable peril. Even assuming that he was familiar with the kind of work and that steel erectors were accustomed to do this kind of work almost daily, nevertheless a moment's reflection would show that a mere slip, a moment of forgetfulness in doing familiar work, or some quite unforeseen happening of any kind, might result in a sudden overbalancing with serious, and, in this case, fatal, consequences. But Mr. Rideout made these answers to counsel for the plaintiff:

“Q.—Supposing a man has to be five minutes up at a height of seventy or eighty feet, straddling a girder, with both hands engaged in holding a podger and having to exert great pressure. May I add one further thing. The girder is not fixed in position, but is suspended from a crane. Would you regard it as desirable in those circumstances for a belt to be used or not to be used? A.—I would not. I do not consider that a dangerous situation at all . . . Q.—Do you think that any safety precautions of any kind are required in performing the job which Roberts was engaged upon at the time when he met his death? A.—What he was doing was quite usual in steel work erection practice. Q.—It was quite usual in a dangerous occupation, was it? A.—There is an element of risk in steel-work erection, and he was not engaged on anything unusual. Q.—With respect, you are not answering my question. Is it your view that no safety precautions were required in the job which Roberts was engaged upon when he fell? A.—No, I do not think that any aids to safety were required in what he was doing.”

It was contended for the defendants that there was adequate handhold and foothold for the deceased, and, therefore, there was no obligation under the regulation for the defendants to supply safety nets or safety sheets, or to make available safety belts or other contrivances which would enable men who elected to use them to carry out their work without risk of serious injury. With regard to the handhold, it was said by Mr. Rideout that the top member on which the deceased was astride provided an adequate handhold because he was able to grip the side of it, but he also said that he might have to use both hands on the podger with which he was supplied, and, of course, at such times he would have no handhold at all. Mr. Rees Price, the foreman on the job at the time, said, in answer to the learned judge, that he would not have an adequate handhold, or, indeed, one at all, while he was doing the job, because he would have to use two hands on the podger. But apart altogether from the question of handhold, the regulation speaks of handhold and foothold. It was suggested by Mr. Rideout that the deceased man could have wrapped his legs round the diagonal bracing and could have locked his feet under it, and that that was an adequate foothold within the meaning of the regulation. The learned judge said that, although it was near the line, he thought that there was in fact an adequate handhold and foothold. With great respect to STREATFIELD, J., I do not agree. Whatever may be said about handhold, I am clearly of opinion that this was not a place where there was an adequate

foothold giving plain English words their plain meaning. The definition of "foothold" in the OXFORD ENGLISH DICTIONARY is:

"A hold or support for the feet; a surface (secure or otherwise) for standing or walking on; firm or stable position of the feet."

The learned judge seems to have relied in some measure on an unreported Scottish case*, the exact facts of which were not before us. But he recognised that his decision on this point was possibly open to question, and, therefore, proceeded to deal with the case as though his decision could not stand. I am clearly of opinion that the facts of this case show that the deceased man had not an adequate foothold, and the later part of the regulation applies accordingly.

It was not contended for the plaintiff that the defendants should have provided safety nets or safety sheets, but it was said that they should have had safety belts available for the deceased so that he could elect whether he would use one or not. It was admitted that, had the deceased been wearing a safety belt, he would not have fallen to his death. There was also a good deal of evidence that men in the deceased's position did not use safety belts, even when they were available. But what was said by the defendants in the present case was that they had fulfilled their duty under the regulation by having suitable safety belts available.

On this point a most remarkable situation developed on the evidence. Mr. Rideout had said that safety belts were available in the main office in the melting shop section, and a curiously worded notice was produced which read:

"All employees are reminded that a safety belt is available on request for any man who wishes to use one for a proper and reasonable purpose."

Mr. Rideout said that one of these notices was exhibited in the main window of the melting shop section, and in the hut in the cold mill section, and possibly one in the window of the foreman's office on the cold mill site, but he could not quite remember.

The main office in the melting shop section was about ten minutes' walk away from the place where the deceased man was working. Mr. Rideout was asked the specific question whether there were any other safety belts on any other part of the site and he said quite plainly: "Not at that time; not as far as I knew". When asked by the learned judge whether there were any in the men's cabin he said: "Not as far as I know at that time"; and when it was stated by counsel for the plaintiff that counsel for the defendants had suggested to Mr. Slennet, a witness who was working with the deceased at the time he fell to his death, that safety belts were available in the men's cabin, counsel for the defendants at once said: "If I did, it was quite an inadvertence". Further, it is to be observed that, after another accident of a similar kind, Mr. Rideout said:

"I took steps to have these new notices posted up and I also fetched two belts from the melting shop office to the cold mill office. I thought myself that if they were actually visible to a man they might have the effect of subduing nervous reaction."

The learned judge then asked Mr. Rideout:

"As far as you know that was the first time belts had been visible in the cold mill office? A.—That was the first time as far as I know."

The learned judge came to the conclusion that having safety belts at the main office was not a compliance with the regulation. The words that he used about that were these:

"Now what is meant by 'making available'? 'Making available' to my mind must mean to make reasonably available to the men who elect

* *Carnie v. Redpath, Brown & Co., Ltd.*, Court of Session, Mar. 21, 1951, unrep.

to use them. Quite clearly if a man desires to elect to use a safety belt it is no good telling him that those belts are situated some half a mile or three-quarters of a mile away. That is not, in my judgment, 'available' within the meaning of these regulations. In my judgment, that duty entails an obligation on the employers to have available on the site where a man who, in special circumstances perhaps, makes up his mind that he desires to use a belt, may get one and get it reasonably quickly."

A I agree with the learned judge on that matter, but then he went on to say that the defendants had complied with the regulation, because safety belts were available in the foreman's office only forty yards away from the site. He based this conclusion on some evidence that was given by Mr. Rees Price, the foreman, right at the very end of the case. He said that he had seen two safety belts behind the door in his office before the date of the accident. Mr. Rideout
B said he brought two safety belts to that office after the accident.

The defendants had pleaded in their defence, delivered on May 18, 1951, that safety belts were available, that the deceased man knew they were available and had neglected to use one, and that his death was due to his own negligence in not providing for his own safety by using a safety belt.
C When asked to particularise where the belts were available and the number and type available, and as from what date it was alleged that the safety belts were available, they answered on July 9, 1951, that the safety belts were kept at the main office and had been available there since work began on this site. Nothing could be clearer, and right up to the last moment the case had been conducted on that footing. When the evidence of Mr. Rees Price emerged it
D was clearly a great surprise to counsel for the defendants, but no objection was taken to the admissibility of the evidence, counsel for the plaintiff, no doubt, thinking that that evidence could not possibly stand against the evidence of Mr. Rideout, Mr. Davies and Mr. Slennet, and the earlier repudiation of counsel for the defendants. In my opinion, the evidence ought not to have been allowed at that stage of the case, though in the absence of any objection the learned judge admitted it. It was in flat defiance of the particulars which
E had been expressly asked for and given, and in any event, in my opinion, it ought not to have been accepted and allowed to be the decisive element in the widow's action when all the evidence had been considered. When Mr. Rideout brought his two belts after the accident because he was afraid of the effect of the accident on the morale of the men, it is a most amazing thing that he should never have mentioned those that were already there if they were there,
F as Mr. Rees Price suggested, which made his bringing of two belts quite unnecessary. The learned judge seems to have overlooked the nature of the particulars, the evidence which had already been given, the disavowal by counsel for the defendants, and the obvious possibility of mistake.

I am of opinion that the breach of statutory duty was proved, and I do not think that it is any answer to a breach of that duty to say that had it been
G fulfilled the result would have been the same. The deceased man had no right of election given to him such as the regulations provide, and the defendants were guilty of a breach of the regulations which occasioned or contributed to the death of the deceased man. I think, therefore, that this appeal should be allowed and that the plaintiff should have the damages assessed by
H STREATFIELD, J.

HODSON, L.J., stated the facts and continued: The claim based on negligence at common law (apart from one allegation not pursued) was particularised as follows: (a) Failing to provide safety nets or sheets, safety belts, ropes, or other precautions against falling. (b) Failing by notice, warning instructions, or otherwise, to insist on or require the use of such safety measures as aforesaid, if such were provided, which is denied. (c) Allowing or requiring

the deceased to work at dangerous heights without such safety measures or appliances as aforesaid and without any precautions being taken against the risk of falling. (d) Failing to make easily available at the site of the aforesaid work such safety appliances as were necessary.

Counsel for the plaintiff did not contend that safety nets or sheets were appropriate. He based his case on the absence of safety belts which he said the defendants should have insisted on the men using. He did not suggest any other precaution which should have been taken against falling. The case was thus fought on the following questions: (a) whether safety belts were required; (b) whether they were available; (c) whether the defendants should have insisted on their use.

In considering these questions from the common law aspect one cannot, I think, consider them in dissociation from the Building (Safety, Health and Welfare) Regulations, 1948, of which reg. 97, here relied on, deals specifically with safety belts. The provision of safety belts is said to be part of a safe system of work, but, as SOMERVELL, L.J., said in *England v. National Coal Board* (2) ([1953] 1 All E.R. 1198):

"The reasonable employer is entitled to assume . . . that the dangers which would occur to a reasonable man have occurred to Parliament or the framers of the regulations."

This is not to say that the regulations are exhaustive, but it seems to me that reg. 97, to which I shall have to refer later, is there for the purpose of defining the employer's obligations in what may be described as the ordinary processes of the work. In exceptional circumstances, or, as the learned judge said, where some special peril is going to be met with, the common law duty is not to be restricted by the regulations. A case, for example, might arise in which an employer must insist on the use of safety belts. In this case, on the facts as proved and found by the learned judge, the ordinary practice of steel erection was being followed, the jamming of the frame was not an unusual occurrence, and there was nothing unusual or exceptionally perilous in the methods employed in doing the work. As LORD TUCKER said in *General Cleaning Contractors, Ltd. v. Christmas* (3) ([1952] 2 All E.R. 1117), speaking of the employers of window cleaners who are employed in what is obviously a hazardous occupation:

"Their only duty is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation."

Bearing these considerations in mind, I am driven to the conclusion that this case falls to be determined on whether or not the employers were in breach of reg. 97 which reads as follows:

"Safety nets, sheets and belts.—If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury."

It will be observed that under the regulation no onus is placed on the employers to insist on the use of safety belts. The election is left to the man. If they were in breach and the breach was the cause of the accident the defendants are liable but not otherwise.

First: Was there adequate handhold and foothold? The learned judge found that there was adequate handhold, and in this I agree with him notwithstanding

the fact that if the workman were using two hands he would not at a given moment have a hand grasping any particular hold. As to foothold the learned judge came to the conclusion, though with less certainty, that there was adequate foothold. Here I find myself in disagreement with him. The word "foothold" in the context in which it appears in the regulation does, in my opinion, mean some place on which a man can place at least part of his foot so as to give him a stable position. The deceased was not in such a position, being able only to wrap his legs round an upright or diagonal piece of steel underneath the member on which he was seated. Moreover, he was not on a fixed structure at all, being on a frame which at the material time was suspended from the jib of a crane. I would, therefore, find that there was no adequate handhold and foothold.

A The next question is: Were safety belts available? The evidence, apart from that of one witness to whom I shall refer again, was all one way. It was in accordance with the case pleaded for the defendants by their particulars delivered on July 9, 1951, viz., that the belts were left at the defendants' main office. This office was about half a mile away from the place where the deceased was killed and the learned judge held, and I agree with him, that if they were in that place they were not available within the language of the regulation. One witness, however, the foreman, Mr. Rees Price, who at the time of the trial was working for other employers, said that before the accident there were two or three safety belts in the office at the cold mill site where the accident occurred. This evidence ought not, I think, to be accepted. That belts were there after the accident there is no doubt. Mr. Rideout, the resident engineer at the defendants' works, said that the belts were kept at the main office and that after the accident he fetched two belts thence and took them to the cold mill office, that is to say, the office on the site. This fits in with the evidence of Mr. Rees Price if the latter was mistaken in thinking that the belts were there before the accident. I think this must be the explanation of the foreman's evidence, but, however that may be, I cannot think that this evidence ought to be allowed to sustain a finding that the belts were in fact available on the cold mill site on the day of the accident. It was contrary to the pleaded case.

D No questions were put in cross-examination of the plaintiff's witnesses (except unintentionally) to show that there was any issue as to the place where they said the belts were kept, viz., the main office, half a mile away. The issue was first raised when Mr. Rees Price went into the witness box after Mr. Rideout had already given the evidence I have mentioned. No amendment was ever made or sought, although Mr. Rees Price had been seen by the defendants' solicitors a month before the trial. For these reasons I think that his evidence, in so far as it conflicts with the other evidence given on both sides on the point, must be rejected.

E

I would, accordingly, find that safety belts were not available for such persons who elected to use them. If this is so, I think it cannot lie in the mouth of the defendants to say that this was not the cause of the accident on the ground that the probabilities are that the deceased would never have elected to use a belt. The man having been killed, there is no possibility of finding out whether he would have exercised his election one way or the other, and I must decline to assume that he would not have elected to use a safety belt if one had been available. I would, therefore, allow the appeal on the ground that the plaintiff has proved that the accident in which her husband was killed was caused by the defendants' breach of the duty imposed on them by reg. 97.

G

Appeal allowed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PRESTON AND AREA RENT TRIBUNAL *v.* PICKAVANCE.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), April 14, 15, June 25, 1953.]

Rent Control—Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (1), (2) (b).

On Sept. 8, 1950, a tenant having referred his contract of tenancy of a furnished house to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, the tribunal gave a decision approving the rent and giving no direction as to security of tenure. On Dec. 9, 1950 (i.e., three months and one day after the tribunal's decision) the landlord served on the tenant a notice to quit expiring on Dec. 18. On Dec. 9, on being served with the notice, the tenant applied to the tribunal under s. 11 (1) of the Act of 1949 for an extension of his period of tenure. On Jan. 19, 1951, the tribunal made an order extending that period, and subsequently made further orders granting extension.

HELD: although s. 11 of the Act of 1949 was (by virtue of s. 11 (5) thereof) to be construed as one with the Act of 1946, it did not follow that "notice to quit" in s. 11 (1) must refer to the notice with which s. 5 of the Act of 1946 was concerned, namely, a notice to quit served by the lessor at any time before the decision of the tribunal or within three months thereafter; s. 11 applied to any case where a notice to quit had been served and the period at the end of which it took effect had not expired; and, therefore, the tribunal had power under s. 11 (2) (b) of the Act of 1949 to grant the extensions of tenure which they had ordered.

Decision of the COURT OF APPEAL (*sub nom. R. v. St. Helens and Area Rent Tribunal. Ex p. Pickavance*) ([1952] 2 All E.R. 9), reversed.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1089; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 11 (1), see *ibid.*, p. 1107.

Cases referred to:

- (1) *Union of South Africa (Minister of Rys. & Harbours) v. Simmer & Jack Proprietary Mines*, [1918] A.C. 591; 87 L.J.P.C. 117; 119 L.T. 4; 42 Digest 705, 1218.
- (2) *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J.Ch. 52; 172 L.T. 69; 2nd Digest Supp.
- (3) *River Wear Comrs. v. Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 36 Digest 105, 705.
- (4) *R. v. Folkestone & Area Rent Tribunal. Ex p. Sharkey*, [1951] 2 All E.R. 921; [1952] 1 K.B. 54; 116 J.P. 1; 2nd Digest Supp.

APPEAL by the Preston and Area Rent Tribunal, as the successors of the St. Helens and Area Rent Tribunal, from an order of the Court of Appeal dated May 15, 1952, and reported [1952] 2 All E.R. 9, affirming the grant of an order of certiorari made by the Divisional Court, dated Feb. 12, 1952, and reported [1952] 1 All E.R. 455, directed to the St. Helens and Area Rent Tribunal to bring up and quash directions given by the tribunal on Sept. 7 and Oct. 16, 1951.

The Court of Appeal (SOMERVELL and MORRIS, L.JJ., JENKINS, L.J., dissenting) held that the Landlord and Tenant (Rent Control) Act, 1949, s. 11 (2) (b), operated only on notices to quit covered by the Furnished Houses (Rent Control) Act, 1946, s. 5, and, therefore, the tribunal had no power to grant any extension of tenure under s. 11 (2) (b) where the notice to quit had

been served more than three months after the tribunal's decision on the tenant's reference to them of his contract of tenancy.

The Attorney-General (Sir Lionel Heald, Q.C.), J. P. Ashworth and R. J. Parker for the appellants, the tribunal.

Fox-Andrews, Q.C., and J. C. D. Harington for the respondent.

The House took time for consideration.

A June 25. The following opinions were read.

B LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal dismissing an appeal of the appellants' predecessors, the St. Helens and Area Rent Tribunal, from a judgment of the Divisional Court of the Queen's Bench Division, which ordered that directions given by that rent tribunal on Sept. 7, 1951, and Oct. 16, 1951, be removed into the High Court of Justice, Queen's Bench Division, and that thereupon those directions be quashed. By an order dated Nov. 5, 1952, the present appellants, who now represent the former rent tribunal, were substituted as a party in its place. The question involved in this case concerns primarily the Furnished Houses (Rent Control) Act, 1946, s. 5, and the Landlord and Tenant (Rent Control) Act, 1949, s. 11. Section 5 of the Act of 1946 is in the following terms:

C "If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—
D (a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."
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Section 11 of the Landlord and Tenant (Rent Control) Act, 1949 (hereinafter called "the Act of 1949"), is in the following terms:

F "(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section—
G (a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party an opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an
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application under this section the tribunal shall notify the parties of their determination. (4) Where on an application under this section the tribunal have refused a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

The facts are not in dispute, and so far as material to be herein stated, are as follows:—Ethel Pickavance is the owner of a dwelling-house situate at and known as 51, Rodney Street, St. Helens, in the county of Lancaster, and on or about Aug. 1, 1948, let it furnished to William John Leyland on a weekly tenancy at a rent of £1 per week. On Aug. 1, 1950, William John Leyland referred that contract to the St. Helens and Area Rent Tribunal under the provisions of the Furnished Houses (Rent Control) Act, 1946, s. 2. The tribunal heard the parties and gave their decision on Sept. 8, 1950. They approved the rent and did not reduce the statutory period of three months during which a notice to quit would not take effect. On Dec. 9, 1950, i.e., three months and one day after their decision, a notice to quit 51, Rodney Street, was served on William John Leyland to vacate by Dec. 18, 1950. On the same day that the notice to quit was served, William John Leyland applied to the rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949, s. 11, for an extension of the period at the end of which the notice to quit was to take effect, and on Jan. 19, 1951, the rent tribunal heard the application, granted the application and extended the period. On Mar. 6, 1951, before the extended period had expired, he again applied for a further extension, and was granted an extension until June 16, 1951. On June 4, 1951, a third application was made to the rent tribunal for a further extension, and on Sept. 7 the rent tribunal extended the period until Sept. 11, 1951. Finally, on Sept. 9, 1951, a further application was made, and on Oct. 16, 1951, the rent tribunal directed that the period should be extended until Dec. 11, 1951. On Dec. 7, 1951, pursuant to leave granted by a Divisional Court of the Queen's Bench Division, Ethel Pickavance applied by notice of motion dated Jan. 10, 1952, to the Divisional Court for an order of certiorari to remove into the High Court and quash the two directions of the rent tribunal given respectively on Sept. 7, 1951, and Oct. 16, 1951. The application was heard on Feb. 12, 1952, by a Divisional Court, which unanimously granted the order of certiorari and quashed the directions. The St. Helens and Area Rent Tribunal thereupon appealed to the Court of Appeal, and on May 15, 1952, that court, JENKINS, L.J., dissenting, gave judgment, dismissing the appeal with costs. Leave was given to the rent tribunal to lodge a petition of appeal to your Lordships' House on condition that, if successful, they would not seek to disturb the order as to costs in the Court of Appeal and would not ask for costs of the hearing before your Lordships.

Before the true construction of the relevant sections is discussed, it is, I think, desirable to bear in mind the exact position of the tenant at the time when the three months' protection given by the Act of 1949 came to an end. At that moment he was still in possession of the premises under his contract of tenancy, and no application for an extension of time was then necessary. Indeed, subject to the possibility that notice might be given at some future date, there was nothing of which to ask an extension. It would only be required if, as the respondent asserts, the tribunal had jurisdiction only to grant its first extension, provided application was made within the statutory three months. It is in the light of these circumstances that the material sections of the two Acts have to be construed.

In this state of facts, the appellants contend that their case plainly comes within the provisions of s. 11 of the Act of 1949. The contract, they say, had been referred to a tribunal and had not been withdrawn. A notice to quit

had been served, and the period at which the notice took effect had not expired. The scheme adopted in the two Acts apparently was that the termination of the tenancy brought about by the notice should not take effect until the hearing should be concluded, and under the earlier Act that the tenancy itself should be extended to a date three months after the determination of the application by the tribunal. So far as I understood the argument on behalf of the respondent, the method by which protection is given to the tenant is so interpreted by both sides: the only difference between the parties being whether the first application for extension must be made within the three months.

The argument on behalf of the respondent was, as I think, most succinctly put by MORRIS, L.J., in the Court of Appeal when he said ([1952] 2 All E.R. 20):

"The requirement that s. 11 must be construed as one with the Act of 1946 makes it inappropriate to consider the words of s. 11 (1) in isolation. The phrase ' . . . at any time when a notice to quit has been served and the period at the end of which the notice takes effect . . . has not expired ' refers, in my judgment, to the period between the serving of a notice to quit and its time of taking effect. But the words ' a notice to quit ' are not explained. It is not specified by whom the notice is to be given nor is there any mention as to the time of its service. This omission is explained if the reference is to a notice to quit as specified in the Act of 1946. It is only in s. 5 of the Act of 1946 that a notice to quit is referred to. The phrase ' a notice to quit ' in s. 11 (1), in my judgment, denotes a notice to quit of the particular kind set out in s. 5, that is, a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. The important words of s. 11 (1) are as follows: ' . . . at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired . . . ' If the period at the end of which ' the notice ' takes effect is being fixed by virtue of the Act of 1946—it is plain that ' the notice ' referred to is a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. It is a notice to quit of the same kind which, in my judgment, is referred to if the period at the end of which the notice takes effect is being fixed by virtue of the contract or by virtue of s. 11."

Undoubtedly, if it were not for the provisions of s. 11 of the Act of 1949, the landlady would be entitled to possession at the end of the three months, or at the moment at which the notice to quit expired, whichever might be the later date, and in that case no extension beyond the relevant period could be given. But the material period is not necessarily the ending of the three months, it may be the termination of the period of a notice that ends at a later date. What, then, is the effect of the provisions of s. 11? I cannot say that I myself gain any assistance in construing it from the insertion of the words "at any time": they are qualified by the condition that a notice to quit must have been "served", and that the date for quitting the premises should not have expired, but in no other way. Nor am I helped by the provision that the reference must not have been withdrawn. Its object is to ensure that the applicant should make up his mind once for all which course he intends to adopt. Taking the wording of s. 11 by itself, every word is given due weight if the construction propounded by the appellants is adopted—and notably so in the phrase

"the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired."

This expression seems to deal with three separate periods within which an application for extension may be made, i.e., (i) if the contractual period of

notice is still running; (ii) if that period has been extended by the three months respite given by the Act of 1946; and (iii) if a further extension has been given under the Act of 1949 and application is made before that extension has expired.

On the other hand, if the respondent's construction is adopted, I find it difficult to attribute their full and natural effect to the words "by virtue of the contract". According to the construction contended for on her behalf as I understand it, "the period at the end of which a notice takes effect by virtue of the contract" must be limited to the period at which a notice to quit which has been given within the three months' exemption has not expired. The whole strength of the respondent's argument depends on an insistence that, inasmuch as under s. 11 (5) of the Act of 1949 that section is to be construed as one with the Act of 1946, a notice to quit under both sections has the same connotation. Under s. 5, the notice to quit must be a notice served on the lessee before the decision of the tribunal or within three months afterwards: therefore, it is argued, s. 11 applies only where a notice has been given within this time: the two sections should be read as if they had been inserted consecutively in the same Act and applied to the same circumstances. Even if they had been so inserted in one Act, I should not have taken this view. I cannot see that the provisions of s. 11 require, or even suggest, such a construction. The expression "the period at the end of which the notice to quit takes effect . . . by virtue of the contract" is couched in the widest terms and, *prima facie*, refers to any notice whenever given which is still running. No doubt the giving of further time must be an extension of an existing tenancy, but, in the present case, the tenant remained in possession as a contractual tenant until the expiry of the notice to quit and was still a tenant until that moment. He comes under s. 11 because the only step taken to end his tenancy was the notice to quit given on Dec. 9, 1950, and the period of that notice had not expired.

It is suggested that to construe the section in this way is a hardship on the landlord because, if it be right, a tenant who had once made an application to the tribunal might, at some long subsequent time, apply for an extension. But this argument assumes that the landlord refrains from giving notice until a remote future time. In fact, he always has the remedy in his own hands: he can give notice at any time; a notice which may even end before the three months though it will not be effective until after that date. Moreover, it has to be borne in mind that the Act of 1949 does not provide that s. 11 is to be read with s. 5 of the earlier Act: it is to be read with that Act generally, and there are many other provisions of that Act to which that reference is applicable, e.g., s. 2 (1) and (3). Such an application seems to me to justify the use of the words "read with" in s. 11 of the Act of 1949, and negatives the necessity of confining the meaning of those words in that Act to a notice such as would be required under s. 5 of the Act of 1946. The expression "notice to quit" is a well-known form of words which conveys a well recognised meaning and should be given its ordinary significance unless there is some overriding necessity for limiting their scope. No doubt it is in one sense a hardship on the landlord to be subject in the case of a furnished lodging to a suspension of his right to recover possession. But this hardship exists in the case of an unfurnished tenancy, where the restriction is plainly established, and there is nothing exceptional in finding a limitation, though to a lesser degree, where the premises are let furnished.

It is urged, however, that to accept the appellants' contention would be to make a substantial alteration by an amending law which is destructive of the earlier provisions, and such cases as *Union of South Africa (Minister of Rys. & Harbours) v. Simmer & Jack Proprietary Mines* (1) ([1918] A.C. 596), *Aristoc, Ltd. v. Rysta, Ltd.* (2) ([1945] 1 All E.R. 42) and *River Wear Comrs. v. Adamson* (3) (2 App. Cas. 763) were quoted in support of the contention that an amending statute should not be so construed. What is a substantial alteration may be a matter of some difficulty, but in the present case I do not find

the alteration said to be effected either so substantial or destructive of the provisions of the earlier Act as to lead me to reject what I think is the more obvious meaning. Moreover, it is at least arguable that s. 11 does make an alteration in one matter. Section 5 applies only in a case where the contract has been referred to the tribunal by the lessee or local authority. Under s. 2 (1) of the Act of 1946, however, either the lessor, or lessee, or local authority, may refer it, and, therefore, as the two Acts are to be construed as one, s. 11 of the Act of 1949 enables a lessee to apply to the tribunal for an extension not only where he himself has referred the matter but also where his lessor has done so.

The Divisional Court have found some support for their decision in *R. v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (4). The decision in that case was that neither section could be called in aid where a notice had been given before the tenant's application was made to the tribunal: a decision which I should have thought clearly right on the wording of s. 5. But it is suggested that the reasoning in that case showed that the object of s. 5 was to prevent retaliation by the landlord, as LORD GODDARD, C.J., says, and that s. 11 gave no new power to the tribunal. I cannot, myself, accept so limited an application. Obviously the later Act did give some new power, since without it there could have been no additional extension of the tenancy. The only question is how far that power extends.

It will be observed that in this analysis I have made no reference to the anomalies which would result from either of the constructions sought to be put on the section. My reason for adopting this course is that, admittedly, whichever reading is preferred, unconsidered and anomalous results must follow. They have been referred to in the Court of Appeal by SOMERVELL and MORRIS, L.JJ., on the one side, and by JENKINS, L.J., on the other. To my mind, they cancel one another out and neither party can draw any satisfactory support from them. I found my decision on what I regard as the natural meaning of s. 11 and see no sufficient reason for limiting its effect. I would allow the appeal.

My Lords, LORD OAKSEY is not able to be present, and he has asked me to say that he has had the advantage of reading the opinion of LORD REID, which will be read hereafter, and he agrees with it.

LORD REID: My Lords, the Furnished Houses (Rent Control) Act, 1946, provided for tribunals being set up to deal with rents of furnished houses and other residential accommodation not covered by the Rent Restrictions Acts. The lessor, or the lessee, or the local authority, may apply to the local tribunal and the tribunal may approve the rent payable under the parties' contract or reduce it or dismiss the application. If a rent is approved or reduced it is entered in a register and no more than that rent can thereafter be charged for the premises. But on change of circumstances the case can be re-considered by the tribunal, and then the rent may be either increased or reduced. Apparently, it was thought that if the lessee or the local authority applied to the tribunal, the lessor might seek to retaliate by giving notice to quit, and, as such premises are often held by the lessee on as little as a week's notice, the possibility of such retaliation might well deter lessees or local authorities from applying to the tribunal. Accordingly, the Act, by s. 5, gives a limited measure of security of tenure to lessees. Section 5 is in the following terms:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—(a) the tribunal may, if they think fit, direct that a shorter period

shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

For the purposes of the present case it is, I think, enough to note (i) that if the application to the tribunal was made by the lessor, then s. 5 has no effect, and the lessor is entitled at any time to give and enforce notice to quit in the ordinary way; (ii) that if the application was made by the lessee or local authority, the protection given by the Act applies whether or not the applicant was successful in getting the rent reduced and that protection can only be modified by the tribunal giving a direction under proviso (a) to s. 5; and (iii) that the Act does not invalidate any notice to quit, but only provides that notices which would otherwise have taken effect within three months after the decision of the tribunal shall not take effect until that period has elapsed. Whether or not s. 5 confers any benefit on the lessee depends, not on the date when notice to quit is given, but on whether the notice would, or would not, have taken effect before the expiry of the three months, and a notice given within the three months but not due to take effect until after that period is not touched by the section. In effect, the Act provides that the lessee's occupation cannot be brought to an end by the lessor within the three months unless the tribunal gives a direction which allows that to be done. And there is nothing in the Acts enabling the period of three months to be extended.

Three years later the Landlord and Tenant (Rent Control) Act, 1949, was passed, and one of its objects was

"to amend the Rent of Furnished Houses Control (Scotland) Act, 1943, and the Furnished Houses (Rent Control) Act, 1946, as respects security of tenure"

(I quote from the long title of the Act). The only section of the Act which deals with the position in England is s. 11. Section 11 is in the following terms:

"(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section— (a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party the opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an application under this section the tribunal shall notify the parties of their determination. (4) Where on an application under this section the tribunal have refused

a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

The sole question before your Lordships is whether s. 11 has any application in this case. In 1948 the respondent let to a Mr. Leyland a furnished house in St. Helens on a weekly tenancy. In August, 1950, the tenant made an application to the local tribunal with the object of getting his rent reduced, but he was unsuccessful, and on Sept. 8 the tribunal approved the existing rent of £1 per week. Section 5 of the Act of 1946 would have applied if the respondent had given notice to quit to take effect before Dec. 8, but she did not do so. She did, however, give notice to quit on Dec. 9 to take effect on Dec. 18. During the currency of this notice the tenant made application to the tribunal under s. 11 of the Act of 1949 for extension of the period of notice and the tribunal extended the period until Mar. 11, 1951. Further applications were made, and granted, by which the period was successively extended to June 16, Sept. 11 and Dec. 11. The respondent had objected to all these applications on certain grounds, but she had not questioned the power of the tribunal to grant them. But when the matter came before the court she took the point that the case had never fallen within the scope of s. 11 because s. 11 only applies if notice to quit has been given within three months of the date of the decision of the tribunal, and her notice was not given within that period. She maintained that the tribunal had no power to grant any of these applications, and that is the point which is now in issue.

That question depends on the proper interpretation of the initial part of s. 11. The first three requirements of the section are, undoubtedly, satisfied in this case. The contract was one to which the Act of 1946 applied, it was referred to a tribunal under that Act, and the reference was not withdrawn. The section then provides:

"the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

Certainly this phraseology is involved and it requires careful analysis, but after studying it I do not think that there can be much doubt about what these words would mean if they were read by themselves. The real difficulty begins when one reads them in their context, but first one must see what they would mean by themselves. The words between the commas state the limits of time between which the lessee may apply to the tribunal; he may apply at any time between the service of the notice to quit and the expiry of the period at the end of which the notice is due to take effect. The words within the brackets set out the three possible ways in which the period of notice would come to an end and the notice would take effect if it were not extended by application under s. 11. First, a notice may take effect by virtue of the contract: that applies in a case where the Act of 1946 has not extended the period of notice, because the date when the notice to quit would take effect in the ordinary way is more than three months after the date of the decision of the tribunal. Secondly, a notice may take effect by virtue of the Act of 1946: that applies in a case where the notice to quit would, but for that Act, have taken effect before the expiry of the three months, but s. 5 has prevented that and has extended the period of notice to the end of the three months. And thirdly, a notice may take effect by virtue of "this section", i.e., s. 11 of the Act of 1949: that applies in a case where the lessee has already obtained one or more extensions under s. 11 and is seeking a further extension, and he must then apply for that before the end of the last extension. There are no words which state that

the section only applies if the notice to quit has been given within some time limit: and there are no words which state that the section applies if the notice is given at any time. The words "at any time" which follow the comma do not refer to the time when the notice may be given: they refer to the time when application may be made to the tribunal. So the words with which I have been dealing do not enact any limitation of time within which notice to quit must be given if s. 11 is to apply, but they do not exclude such a limitation being read in by implication if a sufficient reason for doing this can be found elsewhere.

The part of s. 11 on which the respondent relies as requiring such a limitation is sub-s. (5) which provides—"This section shall be construed as one with the Act of 1946 . . ." In my opinion, this means neither more nor less than that s. 11 must be read as if it were a section in the Act of 1946. There is no difficulty about so reading it. It does not alter or amend anything in the Act of 1946. It adds something new, which is materially different in character from anything in the Act of 1946. The lessee's right under s. 5 of that Act arises automatically, but it can only last for a short time. The lessee's right under s. 11 of the Act of 1949 only arises on an express decision of the tribunal, but if the tribunal so choose it can be continued for an indefinitely long period. The respondent's argument requires that s. 11 shall be treated as in some way subordinate to s. 5. The argument was put in various ways. It was said that "notice to quit" in s. 11 must have the same limited meaning and scope as it has in s. 5, which is the only place in the Act of 1946 where that phrase occurs, and that, if the conditions precedent to bringing s. 5 into operation do not exist, they cannot arise under s. 11. And then it was said that s. 11 is an amending section, and that an amendment should not be held to make a fundamental or far reaching change if adequate effect can be given to the words of the amendment without producing that result. These arguments might have great weight if s. 11 could be read as only conferring some additional protection in cases where a limited protection had already been given by s. 5, but I find it impossible so to read s. 11. Section 11 appears to me to apply to some cases which are wholly outside the scope of s. 5. Section 5 is expressly limited to cases where the reference to the tribunal has been made by the lessee or the local authority, whereas there is no such limitation expressed in s. 11. Section 11 could not have been drafted without the terms of s. 5 being prominently in view, and the failure to repeat the limitation to cases where the reference was by the lessee or the local authority must have been deliberate. So s. 11 must be held to apply to cases where the reference to the tribunal was by the lessor and no proceedings had been initiated by the lessee or local authority before the notice to quit; and s. 11 must, therefore, have a wider object than merely to afford some defence against retaliation by the lessor if the lessee or local authority invokes the statutory procedure. Then the words "by virtue of the contract" within the brackets near the beginning of s. 11 (1) do not consist well with the respondent's argument. As I have already said, they apply, and can only apply, to cases where s. 5 has not applied to extend the period of notice: if s. 5 had applied, the notice would take effect by virtue of the Act of 1946. On the respondent's argument, the words "by virtue of the contract" have an exceedingly limited application. The respondent does not argue that s. 11 only applies when s. 5 has already applied to the case: that would deny all force to these words. The argument is that s. 11 only applies if the notice to quit was given within the period mentioned in s. 5, and on that view there might be a case where the lessor gave notice shortly before the expiry of the three months, but the notice was not due to take effect until after the end of the three months, and the words "by virtue of the contract" would then apply. But the wording of s. 11 does not suggest so limited an application. And another difficulty emerges, if I am right in thinking that s. 11 applies to cases where the original reference was by the lessor: s. 5 has no application to them and it is not easy

to see why the period mentioned in s. 5 should be imported into s. 11 so as to affect them.

I find no similar difficulties involved in the interpretation for which the appellants contend. Section 11 is not dependent on s. 5 and, once the three initial conditions in s. 11 are satisfied, any lessee on whom a notice to quit is served can apply to the tribunal, whatever be the interval between the original decision of the tribunal and the service of the notice. So far as I can see the

- A only substantial objection to this interpretation is that it gives rise to serious anomalies in the practical application of the Act, but the respondent's interpretation gives rise to others hardly less substantial, and anomalies are inevitable under a scheme which gives nothing to tenants whose contracts have not been referred to a tribunal, but may give to others, although their application to the tribunal has been unsuccessful, a right to remain in possession for as long
- B as the tribunal will allow, there being no direction or guidance to tribunals how or on what principles they are to exercise this novel jurisdiction. Accordingly, I do not think it right in this case to take account of considerations of a general character which might be relevant if only one of the competing interpretations produced anomalies. Simply taking the words of the Acts as they stand, I am satisfied that the appellants' interpretation is the
- C more natural and straightforward and I think that it is, therefore, to be preferred. I agree that the appeal should be allowed.

LORD TUCKER: My Lords, this appeal turns on the meaning of the words "a notice to quit" in the Landlord and Tenant (Rent Control) Act, 1949, s. 11 (1). It is, I think, agreed by both sides, and by all the judges who have dealt with this case, that s. 11 standing by itself is unambiguous and

D in its ordinary and natural meaning would apply to a notice to quit given at any time. It is, however, contended by the respondent that the words "a notice to quit" should be given a restricted meaning, because s. 11 (5) provides:

"This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

- E It is said that the result of this sub-section is that "a notice to quit" must mean *the* notice to quit referred to in s. 5 of the Act of 1946, viz., a notice to quit the premises to which the contract relates served by the lessor on the lessee at any time before the decision of the tribunal is given, or within three months thereafter. Section 5 of the Act of 1946 is the only section which mentions a notice to quit. This is the construction which has found favour
- F with the Divisional Court and the majority in the Court of Appeal.

The exact consequence of a provision that one Act is to be construed as one with another, beyond incorporating the definitions contained in the first Act, is not altogether easy to ascertain, because it would seem that, if both Acts are dealing with the same subject-matter, it would in any event in a case of ambiguity be necessary to construe the second Act in the light of the

G provisions of the first. In the present case, having regard to s. 8 of the Act of 1946, which gives power to make procedural regulations, it would seem that, in order to make it clear that such regulations apply to applications under s. 11 of the Act of 1949, some such provision as that contained in sub-s. (5) was desirable. I am, however, prepared to accept the respondent's contention that one result of sub-s. (5) is that s. 11 should be construed as if it were

H inserted immediately after s. 5 in the Act of 1946 and I, therefore, approach its construction on that footing. It would have been a most remarkable piece of draftsmanship if s. 11 of the Act of 1949 in its present form had been inserted immediately after s. 5 in the Act of 1946 with the intention of producing the result contended for by the respondent. The opening words of s. 11 (1) are:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act",

not—be it observed—under s. 5 of that Act but “under that Act”. If s. 11 followed s. 5 and the draftsman had intended in s. 11 to include only references under s. 5, he would have said “has been referred to a tribunal under the preceding section”, and to achieve the same result in a subsequent Act he would have said “has been referred to a tribunal under s. 5 of the Act of 1946”. It seems to me, therefore, clear that at the outset s. 11 is dealing with references which are not limited to references made under s. 5 of the Act of 1946, but must include references by the lessor under the provisions of s. 2 of the Act of 1946. This view is, I think, strengthened by the fact that s. 11 (5) of the Act of 1949 requires that s. 11 shall be construed as “one with the Act of 1946”, not as one with s. 5 of that Act.

Proceeding, therefore, on the basis that, at the outset, the subject-matter of s. 11 extends beyond the subject-matter of s. 5, I cannot understand what rule of construction can limit the later words “a notice to quit” to the particular kind of notice referred to in s. 5. If this had been intended the draftsman would surely have said “a notice to quit served within the period referred to in the preceding section”, or would have repeated the language of that section, or in a later Act would have said “a notice to quit served within the period referred to in s. 5 of the Act of 1946”, or, more probably, would have repeated the language of the former section. Instead of this, we find the general words “a notice to quit” used in contrast to the restricted kind of notice which has been dealt with in the section which, for present purposes, we are considering as if it had preceded s. 11. The fact that in s. 11 the words “the premises to which the contract relates” have not been repeated, although the notice referred to must necessarily be a notice to quit the premises to which the contract relates, is not sufficient to persuade me that “a notice to quit” is merely an abbreviated reference to the notice referred to in s. 5, being a notice served within the limits of time therein prescribed. The opening words of s. 11 (1): “Where a contract to which the Act of 1946 applies has been referred”, make it clear that the notice to quit must be a notice to quit the premises to which such contract relates, though it would, no doubt, have been tidier to repeat the words which had been used in s. 5.

In the result, I can find no justification for restricting the ordinary meaning of the language of s. 11, especially in view of the fact that the section is admittedly designed to extend the security of tenure afforded by s. 5. The limits of that extension must, I think, be ascertained from the ordinary meaning of the language used, read in conjunction with the Act of 1946, including s. 5, and so read do not necessarily impose the limits contended for by the respondent.

My Lords, I have endeavoured to explain in my own words my reasons for differing from the construction placed on this section by five of the six judges in the courts below, but I am conscious that I have added little, if anything, to the detailed analysis of these sections by JENKINS, L.J., and I would only add that I can find nothing in the other judgments, nor have I heard anything in the course of argument before your Lordships, which demonstrates any flaw or fallacy in the process of reasoning by which he arrived at the conclusion that the applicant for the order of certiorari had failed to establish a lack of jurisdiction in the tribunal. I would, accordingly, allow the appeal.

LORD ASQUITH OF BISHOPSTONE: My Lords, I had prepared an opinion in this case, but shortly afterwards I had the advantage of reading that of my noble and learned friend, LORD REID, and I found myself in such complete agreement with it, that I thought, and think, it would serve no purpose to add an independent opinion of my own. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health* (for the appellants); *Neve, Beck & Co., agents for Joseph Davies & Son, St. Helens* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

LATIMER v. A.E.C., LTD.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), April 27, 28, 29, 30, June 25, 1953.]

Factory—Floor—Maintenance—Floor slippery from flood water and oil—Factories Act, 1937 (c. 67), s. 25 (1), s. 152 (1).

- A *Safe System of Working—Factory flooded in exceptional storm—Water mixed with oil—Floor rendered dangerously slippery—No want of care by occupiers—Accident through workman slipping—Liability of occupiers.*

Owing to an exceptionally heavy storm of rain, a factory was flooded with surface water which became mixed with an oily liquid used as a cooling agent for the machines which was normally collected in channels in the floor. When the water drained away from the floor, which was level and structurally perfect, it left an oily film on the surface which was slippery. The respondents spread sawdust on the floor, but owing to the unprecedented force of the storm and the consequently large area to be covered, there was insufficient sawdust to cover the whole floor. In the course of his duty the appellant slipped on a portion of the floor not covered with sawdust, fell, and was injured.

C HELD: (i) "properly maintained" in s. 25 (1) of the Factories Act, 1937, read with the definition of "maintained" in s. 152 (1), referred to the general condition and soundness of construction of the floor and not to some transient and exceptional condition of it; a floor which was in itself of sound construction and in proper condition did not cease to be in an efficient state because there was temporarily something on it which gave rise to danger; and, therefore, the respondents were not in breach of their duty under s. 25 (1) to see that the floor was "properly maintained".

(ii) on the facts the respondents had taken every step which an ordinarily prudent employer would have taken in the circumstances to secure the safety of the appellant, and so they were not liable to the appellant for negligence at common law.

Decision of the COURT OF APPEAL ([1952] 1 All E.R. 1302), affirmed.

FOR THE FACTORIES ACT, 1937, s. 25 (1) and s. 152 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1017, 1116.

F Cases referred to:

- (1) *Galashiels Gas Co., Ltd. v. O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.
- (2) *Pitfield v. Railway Executive*, (1942), unreported (Winchester Assizes).

APPEAL by the plaintiff in the action against an order of the Court of Appeal (SINGLETON, DENNING and HODSON, L.J.J.), dated May 1, 1952, and reported G [1952] 1 All E.R. 1302, affirming in part an order of PILCHER, J., dated Feb. 8, 1952, and reported [1952] 1 All E.R. 443, in which the learned judge held that there had been no breach by the respondents, the defendants in the action, of their duty under the Factories Act, 1937, s. 25 (1), properly to maintain the floors in the factory, but that they had been negligent at common law in permitting the appellant, the plaintiff in the case, to work in the factory when H they knew it to be in a potentially dangerous condition. The Court of Appeal affirmed the decision of the learned judge that there had been no breach of statutory duty by the respondents, but reversed his decision on the point of negligence at common law.

Beney, Q.C., and *Jukes* for the appellant.

Marven Everett, Q.C., and *Croom-Johnson* for the respondents.

The House took time for the consideration.

June 25. The following opinions were read.

LORD PORTER: My Lords, in this case the appellant recovered a sum of £550 as damages for injuries which he alleged had been the result of a failure on the part of the respondents in breach of their statutory duty to maintain one of the gangways in their works in an efficient state. He relied also on an allegation of common law negligence. PILCHER, J., rejected his claim based on a breach of statutory duty, but held the respondents guilty of common law negligence. The Court of Appeal agreed with the judgment of the learned judge on the claim for breach of statutory duty, but were of opinion that there was no common law negligence on the part of the respondents. A

The relevant facts are short and undisputed. The appellant was a horizontal milling machine operator employed by the respondents in their works at Southall. At those works they employ some four thousand persons and the works themselves extend over an area of about fifteen acres. On Aug. 31, 1950, the appellant was working on the night shift in the general machine room and came on duty at about 7.45 p.m. His work involved collecting barrels containing bundles of hand brake levers and weighing about two hundredweights. They had to be conveyed by him on a trolley along a passage or gangway for a distance of about thirty yards from the place where they were stored. Between about 12 noon and 3 p.m. on that afternoon there had been an exceptionally heavy storm of rain which caused the whole of the premises to become flooded with surface water. This water became mixed with an oily liquid known as "mystic" which was normally collected in channels in the floor of the building. These channels were covered with iron lids which were not watertight. The "mystic" was soluble in water and was used to act as a cooling agent for the machines. B C D E F G H
When the water which had so been impregnated drained away from the floor it left an oily film on the surface which was slippery. After the rainfall had subsided, the respondents spread sawdust on the floor so far as they had a sufficient quantity for that purpose. They had, in fact, enough at hand for any occurrence which they could be expected to foresee, but, owing to the unprecedented force of the storm in question and the large area that had to be covered, there was insufficient sawdust to place it on portions of the floor, including the part of the floor where the barrels were situated. The principal object of spreading sawdust on the floor was to dry it, but, incidentally, it would also have some effect in decreasing the slipperiness. The respondents knew that the coating of the floor with the mixture of "mystic" and water would, to some extent, increase its slipperiness. They also knew that the appellant in the course of his work would have to collect the barrels at the place in question. At about 8.45 p.m., in the course of his work, he went to collect a barrel with the help of a fellow workman and succeeded in getting the metal lip of a trolley under the base of the barrel in order to raise it from the floor. He then placed his right foot on the axle of the trolley and pushed with his left foot, but his left foot slipped on the oily surface of the floor, with the result that he fell on his back and the barrel rolled off the trolley and crushed his left ankle. Undoubtedly, the respondents did their best to get rid of the effects of the flood, employing such of the day workers as could be spared, and obtaining volunteers from them for work in the interval between day and night work and from the night shift at a later period, but, in the learned judge's opinion, it was not possible for them to take any further steps to make the floor less slippery. I understand his view to have been, however, that, inasmuch as the effect of the storm left the gangway in question, and possibly other portions of the works, somewhat slippery, and, therefore, potentially dangerous, they should have shut down the whole works if necessary, or, at any rate, such portion as was dangerous.

My Lords, the difficulty which I feel about this solution is that neither the

necessity for such an action nor its effect was ever pleaded, explored or considered until the respondents' counsel was in the course of making his final speech. No doubt, the point was then raised and argued on behalf of the respondents. It may, indeed, be that an adjournment could have been asked for at that stage and evidence called on either side. But to take such action would have meant re-casting the whole framework of the case, and I do not think it was incumbent on the respondents' representatives to take this course.

- A In my opinion, they were entitled to rest on the evidence as given, and to ask that it should be considered as a whole and the requisite inference drawn from it. It was urged that the mere happening of such an accident cast the onus on them of explaining it and excusing themselves, but the facts material to the matters pleaded had been given in evidence and where the relevant facts have been established no question of onus arises. A number of complaints of negligence and breach of duty are set out in the statement of claim, but so far as common law negligence is concerned I can find no suggestion that the factory should have been closed, nor was any amendment asked for, or permitted, to that effect. All the particulars set out in the statement of claim consisted of complaints which the learned judge found not to have been established and which were not persisted in before your Lordships. On the
- C issue of common law negligence, as now presented, the direction which should be given is not in doubt. It is to determine what action, in the circumstances which have been proved, would a reasonably prudent man have taken. The probability of a workman slipping is one matter which must be borne in mind, but it must be remembered that no one else did so. Nor does the possibility seem to have occurred to anyone at the time. It is true that after the event
- D Mr. Milne, one of the respondents' witnesses, expressed the opinion that he would not have gone on to the floor in the condition in which it was and that it would be too dangerous to do so. But this was after the event, and, though he was the respondents' safety engineer and was present until late that night, it seems never to have occurred to him that there was any danger or that any further steps than those actually taken were possible, or required for the safety
- E of the employees. The seriousness of shutting down the works and sending the night shift home and the importance of carrying on the work on which the factory was engaged are all additional elements for consideration, and without adequate information on these matters it is impossible to express any final opinion. Moreover, owing to the course taken at the trial, there is no material
- F for enabling one to judge whether a partial closing of the factory was possible, or the extent to which the cessation of the appellant's activities would have retarded the whole of the work being carried on. In my view, in these circumstances, the appellant has not established that a reasonably careful employer would have shut down the works, or that the respondents ought to have taken the drastic step of closing the factory.

- G The question whether there has been a breach of statutory duty turns on the true construction of s. 25 (1) of the Factories Act, 1937. That sub-section provides that

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained"

and s. 152 (1) defines "maintained" as meaning

- H "maintained in an efficient state, in efficient working order, and in good repair."

Section 25 (1), were it not for the definition, would seem merely to provide for sound construction and a proper state of repair. But the definition does give rise to a more difficult problem, inasmuch as it requires both the existence of "good repair" and an "efficient state". The further provision as to "efficient working order" may be neglected since that requisite is more

appropriate to working machines than to a static portion of the premises. It has still, however, to be determined what it is which has to be in an efficient state. Does it include the elimination of some matter which is temporarily superimposed on the floor, or is the requirement confined to the floor itself? To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation on the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation.

Primarily, in my opinion, the section is aimed at some general condition of the gangway, e.g., a dangerously polished surface, or the like, or possibly some permanent fitment which makes it unsafe. But I cannot think the provision was meant to, or does, apply to a transient and exceptional condition. If it had been directed to such a state of affairs it would have been easy to say so. Indeed, in s. 34 (2) the kind of language appropriate to such an object is to be found where there is provision that "all means of escape . . . shall be properly maintained and kept free from obstruction". Perhaps the best illustration of the extent of the obligation which has reached your Lordships' House is to be found in *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (1), where the grips which ought to have held a lift in place at one of the floors for some unaccountable and unascertainable reason failed to act, with the result that one of the workmen fell down the shaft and was injured. No blame could be attached to the employers, yet, as the duty was absolute, your Lordships held them liable. The decision was given on the very section now under discussion and was much relied on by the appellant. That case, however, differs from the facts of the present case in that the lift itself was out of order, and no temporary superincumbent danger had been added to it. It is no authority, therefore, for holding the respondents liable in the present case. It may be added as an additional factor that the obligation is a penal one, that the phraseology is at least ambiguous, and, although it has to be remembered that the Act is intended for the protection of workmen, and to that extent should receive a benevolent construction, yet employers are not lightly to be made criminals unless a clear direction of an Act of Parliament has that effect. I agree with the Court of Appeal that this point fails and that there was no negligence at common law. I would dismiss the appeal with costs.

LORD OAKSEY: My Lords, I agree. On the question of common law negligence I have come to the conclusion, though not without doubt, that the judgment of the Court of Appeal ought to be affirmed. What is negligence is, in my opinion, a question of fact to be decided by the tribunal of fact. In the present case, although PILCHER, J., who tried the case, did not, in terms, say that he was applying the standard of care which an ordinarily prudent employer would have taken in all the circumstances, there is, in my view, no doubt that he intended to apply that standard. If he did, and if there was admissible evidence on which he might base his finding, that finding ought only to be set aside where it is clear that he was wrong. There was such evidence in the present case since the respondents themselves proved that the flooding of their factory was unprecedented: that, owing to their system of partially open mystic drains, oil in such circumstances would, and did, escape over the factory floor: that in view of this state of affairs they put forty men on specially to lay down all the sawdust they had on the floors and passages: that they kept twenty-four volunteers on to continue the work of cleaning the floors and passages, but that they did not stop the work of the factory but allowed the night shift to come on duty. Now, although it is true that no questions

were put in cross-examination to the respondents' witnesses suggesting that they ought to have closed the factory, the point was raised by the judge during the argument and no application was made for an adjournment, or for an amendment of the pleadings. The facts, indeed, were admitted, and the principal question on the issue of common law negligence was whether such facts amounted to negligence. It does not seem to me that, if a jury had found in such circumstances that the respondents had been negligent, the Court of Appeal could properly have set aside their verdict. But, no doubt, a judge's finding is not entitled to the same finality, and I think, on the whole, that, since the evidence as to the condition of the floors and passages at the time the night shift came on was very meagre and that practically the only evidence of their slippery condition was the accident to the appellant, I come to the conclusion that the conduct of the respondents can, at the highest, be said to have been an error of judgment in circumstances of difficulty and such an error of judgment does not, in my opinion, amount to negligence.

On the question of the construction of s. 25 (1) of the Factories Act, 1937, I am of opinion that, by virtue of that sub-section and the interpretation section, s. 152 (1), the respondents were bound to maintain the floors and passages in an efficient state, but I do not consider that it was proved that they were not in an efficient state. A floor does not, in my opinion, cease to be in an efficient state because a piece of orange peel, or a small pool of some slippery material, is on it. While I do not agree that the maintenance of the floors is confined to their construction, I think the obligation to maintain them in an efficient state introduces into what is an absolute duty a question of degree as to what is efficient. I, therefore, agree that this appeal should be dismissed.

LORD REID: My Lords, a film of oil had been deposited by flood water on the floor of the respondents' factory. At a place where sawdust had not yet been applied to it the appellant, without realising the danger, tried to get a heavy barrel on to a trolley. He was standing on one foot and using considerable force with the other when he slipped and received severe injuries. His case is that his injuries were caused by a breach by the respondents of s. 25 (1) of the Factories Act, 1937. That sub-section provides:

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained".

It is not alleged that the floor was not of sound construction, but it is said that, by reason of the presence of the oil which was a source of danger, the floor was not at the time of the accident properly maintained. It seems to me that the first question is whether the film of oil can be regarded as a part of the floor. There may be difficult cases where something has been put on a floor without being incorporated with it and where it could be regarded as part of the floor, but this is not one of those cases. The oil was on the floor casually and temporarily, and seems to me to have been no more part of the floor than a banana skin dropped by a passer-by. The question, then, is whether s. 25 (1) applies to things which are not part of the floor, but whose presence on it is a source of danger. If s. 25 stood alone, I would say that it did not. No doubt the section is one dealing with safety, but, even so, keeping the surface of a floor free from dangerous material does not appear to me to come within the scope of maintaining the floor.

The difficulty in the case arises from the definition of the word "maintained" in s. 152 (1). That sub-section provides:

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say: . . . 'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

The word "maintained" occurs in many sections, often in connection with machinery. The whole definition can then be applied without difficulty. But, unless "working order" is used in a very loose way, which one does not expect in an Act of Parliament, to ask whether a floor is in efficient working order is to ask a meaningless question. It was not disputed that this part of the definition cannot be read into s. 25 (1), and it was argued that, because the context excludes this part of the definition, it excludes the whole of the definition. I do not see why it should. I think that each part of the definition is severable. The phrase "in good repair" is clearly applicable to a floor, but this floor did not cease to be in good repair by reason of the presence of the oil on its surface. The difficulty arises with regard to the phrase "in an efficient state". "Efficient" is an awkward word to use in connection with a floor, but I cannot reject it as meaningless. The appellant argues that a floor cannot be in an efficient state if people are liable to slip on it, but, again, I think one must ask whether the danger comes from the floor or from something which happens to be on it. It would be going a long way to say that a floor, perfectly good in itself, ceases to be in an efficient state whenever there is something on it which gives rise to danger. If there is any ambiguity, one is entitled to look at the consequences of adopting each of the possible interpretations. It is one thing to say that an employer is absolutely responsible for the condition of his floors, even if the unsafe condition has come about through no fault of his or his servants, and could not have been remedied before the accident, but I would expect clearer words if it were intended that he should also be held responsible if something dangerous got on his floor and made it for the time being "inefficient" through some inevitable accident or the fault of some other person not his servant. But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state: it is that the floor shall be maintained in an efficient state. "Maintained" is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor "properly" as required by s. 25 (1) and maintaining it "in an efficient state" as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it. To prevent misunderstanding, I ought, perhaps, to add that maintaining a machine in efficient working order does, I think, involve preventing foreign matter from reaching any place where it can interfere with the proper working of the machine, and for that reason I cannot get much assistance in this case from *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (1).

The appellant also alleges breach of the respondents' duty to him at common law. On that part of the case I agree entirely with the speech which my noble and learned friend, LORD TUCKER, is about to deliver and which I have had an opportunity of reading. I, therefore, agree that this appeal should be dismissed.

LORD TUCKER: My Lords, as to the proper construction of s. 25 (1) of the Factories Act, 1937, in the light of the definition of the word "maintained" in s. 152 (1) of that Act, I am in agreement with the conclusion reached by the trial judge, the members of the Court of Appeal and your Lordships, that it has not the wide meaning contended for by the appellant so as to render the respondents liable for the condition of the floor of this factory in the circumstances existing on Aug. 31, 1950, and I do not desire to add anything on this part of the case.

With regard to the alleged breach by the respondents of their common law duty to take reasonable care for the safety of their servants, I am in complete agreement with what was said by SINGLETON, L.J., in the Court of Appeal in his application of the standard required to the facts as found by the trial

judge. I only venture to add a few observations out of respect for the careful judgment of PULCHER, J., and because it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations on employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.

A In the present case, the respondents were faced with an unprecedented situation following a phenomenal rain storm. They set forty men to work on cleaning up the factory when the flood subsided and used all the available supply of sawdust, which was approximately three tons. The judge has found that they took every step which could reasonably have been taken to deal with the conditions which prevailed before the night shift came on duty, and
B he has negatived every specific allegation of negligence as pleaded, but he has held the respondents liable because they did not close down the factory, or the part of the factory where the accident occurred, before the commencement of the night shift. I do not question that such a drastic step may be required on the part of a reasonably prudent employer if the peril to his employees is sufficiently grave, and to this extent it must always be a question of degree,
C but, in my view, there was no evidence in the present case which could justify a finding of negligence for failure on the part of the respondents to take this step. This question was never canvassed in evidence, nor was sufficient evidence given as to the condition of the factory as a whole to enable a satisfactory conclusion to be reached. The learned judge seems to have accepted the reasoning of counsel for the appellant to the effect that the floor was slippery,
D that slipperiness is a potential danger, that the respondents must be taken to have been aware of this, that in the circumstances nothing could have been done to remedy the slipperiness, that the respondents allowed work to proceed, that an accident due to slipperiness occurred, and that the respondents are, therefore, liable.

E This is not the correct approach. The problem is perfectly simple. The only question was: Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work? The learned judge does not seem to me to have posed this question to himself, nor was there sufficient evidence before him to have justified an affirmative answer. The absence of any evidence that anyone in
F the factory during the afternoon or night shift, other than the appellant, slipped, or experienced any difficulty, or that any complaint was made by or on behalf of the workers, all points to the conclusion that the danger was, in fact, not such as to impose on a reasonable employer the obligation placed on the respondents by the trial judge. I agree that the appeal be dismissed.

G **LORD ASQUITH OF BISHOPSTONE:** My Lords, this appeal raises two points: (A) Are the defendants liable under the Factories Act, 1937? (B) Are they liable at common law for negligence? Of these, the first point presents the greater difficulties.

(A) The question is what the words "properly maintained", in s. 25 (1), mean. The sub-section provides that the "floors", inter alia, "shall be of
H sound construction and properly maintained". If these words stood alone and there were no definition of the word "maintain" in the statute, for myself, I should be in little doubt as to their interpretation. I should take them to mean that, at the time of its construction or installation, the floor should possess the structural qualities which a floor ought to possess, e.g., a level surface and sufficient strength to bear the stresses to which it is liable to be subjected, and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition. But the fact cannot be

ignored that there is a definition of "maintain" in s. 152 (1), and that this definition, in part or in whole, must be read into s. 25 (1). There are three limbs in the definition. "Maintained" means "maintained in an efficient state, in efficient working order, and in good repair". This definition is capable of more than one construction. (i) Counsel for the respondents, in an attractive argument, contended that the three limbs of the definition should be read selectively or distributively, viz., that, according to the subject-matter involved, all three limbs might apply, or some two of them, or only one. Thus, in the case of a machine (e.g., a lift), there is no difficulty in applying all three. In the case, however, of a wholly and permanently passive entity, such as a floor, he argued (and I think this was common ground) that "efficient working order" was inapplicable, and, going further, that "efficient state" was also inapposite, since "efficiency" connotes at the least potential activity or mobility, which a floor does not possess. Ergo, the words "in good repair" alone applied, and these words were fully satisfied by adequate repair of the structure. (ii) The respondents also argued that, short of this, the words "of sound construction" in s. 25 (1) ran through, and coloured, both the words "properly maintained" and the definition of "maintained". The second "reason" in the respondents' case formulates this contention as follows:

"Because the definition of the word 'maintained' in s. 152 (1) of the Factories Act, 1937, means, in relation to s. 25 (1), that it is the sound construction which has to be maintained in an efficient state, in efficient working order, and in good repair."

This argument accepts the applicability of all three limbs of the definition, but treats their scope as controlled and narrowed throughout by the words "of sound construction" at the opening of the substantive sub-section. (iii) Or again, s. 25 (1), plus the definition, may be read as imposing two independent and cumulative obligations: (a) to maintain the soundness of the floor's structure; (b) to maintain the floor in an efficient state, not in respect of its structure only, but over some wider range of qualities, which might include what has been called a "non-skid" quality in the surface.

It is somewhat tempting to solve these difficulties of construction by contenting oneself with the comparatively simple test on which DENNING, L.J.'s judgment mainly proceeds. He treats the duty of maintaining the soundness of the floor qua floor as absolute, but distinguishes between the floor itself and things, whether solid or liquid, superimposed on it, in respect of whose presence no absolute duty, in his view, exists but only a duty of reasonable care. You must maintain the floor, but it does not cease to be maintained because cumbered with things resting on it. I do not dissent from this view, but it may be difficult to apply in practice in border-line cases. Where, e.g., a floor has polish so rubbed into it as to become absorbed and incorporated in its structure, are we dealing with a floor simpliciter or a floor plus something superincumbent on it? On the whole, I consider that the second of the three constructions outlined above is the most satisfactory, viz., that the words "of sound construction" control, colour, or canalise the whole of s. 25 (1) and the definition. The unreported decision of HILBERY, J., in *Pitfield v. Railway Executive* (2) proceeds on this basis, and I can see nothing in the *Galashiels* case (1) (which proceeded on s. 22 (1), a section with a different wording, and applied to a different subject-matter—a mobile object and a machine) which is inconsistent with it. On the point of construction, therefore, I am of opinion that the respondents succeed.

(B) Negligence at common law. At common law the question can only be whether, having regard to the nature and extent of the risk created by the slippery patches on the floor, a reasonably careful employer would have suspended all work in this fifteen acre factory and sent the night shift home or, whether, having done all he could (and did) do with the sawdust at his disposal,

A the forty production service men in the afternoon, and the twenty-four volunteers between the end of the day shift and the beginning of the night shift, he would have allowed the work to proceed. The learned trial judge concluded that a reasonable employer would have closed down. I agree with practically everything else he said in a most careful judgment. But, of course, this conclusion was crucial. In considering it, one cannot but be impressed by the following considerations: (a) It was nowhere specifically pleaded in the statement of claim that the works should have been closed down; (b) no witness for the appellant suggested that this should have been done; (c) no question was put to any witness for the defence to that effect; (d) no evidence was directed to the question, which on this issue was fundamental, what degree of dislocation or complication a complete stoppage would have entailed; (e) the point was first taken, after the evidence was closed, by the learned judge himself during B the final speech of one of the counsel. In these circumstances I agree with the observations of SINGLETON, L.J. ([1952] 1 All E.R. 1304):

C "If the test is, as I believe, what a reasonable employer would have done in those circumstances, I fail to see that there is any breach by the employers of the duty which they owed, and I fail to see, too, any evidence on which a finding that the employers were negligent in not closing the factory can be based."

D What evidence the learned judge had before him suggests, to my mind, that the degree of risk was too small to justify, let alone require, closing down. The evidence of the appellant himself is that "you always get a certain amount of grease about". Ampstead, his fellow worker, says exactly the same, adding E that on "numerous occasions" (four or five times) he had seen "mystic" well up from the channels in the floor of the factory owing to flooding. Yet the appellant says that, except for the accident to himself on this occasion in August, 1950, he has never known any accident happen to any one in the factory through these causes. I cannot resist the conclusion that on this occasion, notwithstanding the extent of the flooding, the risk was inconsiderable, and E that the learned judge's conclusion cannot stand. Treated as a finding of fact, it cannot be supported on the evidence, which, as to the onerousness of the suggested remedial measure, was non-existent. Treated as an inference of fact, it was open to the Court of Appeal and is open to your Lordship's House to draw a different inference, and I would do so. I agree that the appeal should be dismissed.

F *Appeal dismissed.*

Solicitors: *Rowley, Ashworth & Co.* (for the appellant); *Carpenters* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

MAURAY v. DURLEY CHINE (INVESTMENTS), LTD.

[COURT OF APPEAL (Singleton, Jenkins and Morris, L.JJ.), May 20, 21, 22, June 17, 1953.]

Rent Control—Excessive rent—Requirement to pay—Rent under lease reduced—Option by deed to renew lease at original rent—Validity of option—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 4 (1) (a).

By a lease dated Dec. 14, 1946, the landlords let to the tenant a furnished flat for seven years from June 24, 1946, at the yearly rent of £525. By a deed dated Mar. 30, 1949, the tenant was given the option of taking a new lease of the flat for a term of seven years from June 24, 1953, at the same rent. In January, 1950, on the tenant's application, a rent tribunal set up under the Furnished Houses (Rent Control) Act, 1946, s. 1 (2), reduced the rent of the flat to £425, and that reduced rent was duly entered in the register kept under s. 3 (1) and (2) of the Act. On Dec. 6, 1951, the tenant purported to exercise the option by requesting the landlords to grant him a renewed lease of the premises for a further seven years "from June 24, 1953, at the yearly rent of £525 (reduced to £425 for the duration of the Furnished Houses (Rent Control) Act, 1946, by the decision of the rent tribunal . . .)." The landlords refused to grant him a new lease. On a claim by the tenant for a declaration that the option was valid and subsisting and had been duly exercised by him,

HELD: (i) the notice given by the tenant required the landlords to grant a lease commencing on a date (viz., June 24, 1953) later than that then fixed for the expiration of the Act of 1946 (viz., Mar. 31, 1953); the mere granting of such a lease at the rent of £525 did not amount to a "requiring" of that rent contrary to s. 4 (1) (a) of the Act so as to constitute an offence under s. 9 (1), nor was the agreement to grant such a lease impossible of performance by reason of illegality; and, therefore, the tenant was entitled to the grant of the lease.

(ii) the words contained in the tenant's notice "at the yearly rent of £525 (reduced to £425 for the duration of the Furnished Houses (Rent Control) Act, 1946 . . .)" did not call for a lease in terms different from those of the lease specified by the option agreement, but were merely declaratory of the legal effect of granting a lease in the terms offered by that agreement, and, therefore, the plaintiff's notice was a good and valid notice.

Decision of GERRARD, J. ([1953] 1 All E.R. 712), affirmed.

AS TO OPTION TO RENEW LEASES, see HALSBURY, Hailsham Edn., Vol. 20, p. 68, para. 74.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1088.

APPEAL by the landlords from an order of GERRARD, J., dated Feb. 24, 1953, and reported [1953] 1 All E.R. 712.

The tenant claimed a declaration that the option contained in a deed dated Mar. 30, 1949, to take a new lease of a flat at a rent of £525 per annum was valid and subsisting and had been duly exercised by him, notwithstanding that the rent of the flat had been reduced by a rent tribunal from £525 to £425. GERRARD, J., granted the plaintiff the declaration, and held (i) that under the Furnished Houses (Rent Control) Act, 1946, s. 2 (3), where a rent had been entered in the register kept under s. 3 (1) of the Act either party to the contract could refer the case to the tribunal for the re-consideration of the rent on the ground of change of circumstances, and so, when the new lease took effect, the rent entered in the register might have been amended to £525 or even more, and so the court could not assume that the renewal of the lease at a rent of £525 would be illegal. He held further that the effect of mere covenant

to pay a rent in excess of the rent entered in the register did not amount to a "requiring" of the payment of that excessive rent within s. 4 (1) of the Act of 1946, and, therefore, the granting of a new lease at a rent of £525 would not be unlawful under that sub-section.

L. A. Blundell for the defendants, the landlords.

Levy, Q.C., and *P. H. R. Bristow* for the plaintiff, the tenant.

Cur. adv. vult.

JENKINS, L.J., read the following judgment of the court. By a lease dated Dec. 14, 1946, and made between the defendants, Durley Chine (Investments), Ltd. (who are the present appellants), of the one part, and the plaintiff, Maurice Mauray (who is the present respondent), of the other part, the defendants demised to the plaintiff flat No. C.1 in a building known as Durley Chine Court, Bournemouth, for the term of seven years from June 24, 1946, at the yearly rent of £525 payable quarterly in advance, with a provision for the payment by the plaintiff as an additional rent of such further amount as the defendants might be called on to pay for general rate, poor rate and water rate, or any of them, in respect of the flat over and above the amount payable at the date of the commencement of the said term. The covenants on the part of the defendants as lessors included a covenant to pay all rates and taxes in respect of the flat except for gas and electricity used in it, and also included covenants to provide certain services for the benefit of the plaintiff as tenant of the flat. The defendants' covenants in regard to the provision of services admittedly had the effect of bringing the letting within the purview of the Furnished Houses (Rent Control) Act, 1946. In order to appreciate the questions involved in the appeal, it is necessary to refer to some of the provisions of that Act.

Section 1 (1) provides for the application of the Act to any district by order of the Ministry of Health on representation by or after consultation with the local authority concerned. It is not in dispute that at all times material to the present appeal the Act has been applicable in the district in which Durley Chine Court is situate. Section 1 (2) provides for the setting up of a tribunal constituted as therein mentioned for each district in which the Act is in force. Section 2 (so far as material for the present purpose) provides as follows:

"(1) Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district, and where any such contract (hereinafter referred to as 'a contract to which this Act applies') is so referred to the tribunal, they may by a notice in writing served on the lessor require him to give to them, within such period (which shall not be less than seven days from the date of the service of the notice) as may be specified in the notice, such information as they may reasonably require regarding such of the prescribed particulars relating to the contract as are specified in the notice. (2) Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall consider it and, after making such inquiry as they think fit, and giving to each party . . . an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reason-

able, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case. (3) Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

Section 3 and s. 4 are in these terms:

"3. (1) The local authority shall prepare and keep up to date a register for the purposes of this Act, and shall make the register available for inspection in such place or places and in such manner as the Minister may direct. (2) The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section (being a contract relating to premises situated in the area of the local authority), entries of (a) the prescribed particulars with regard to the contract; (b) a specification of the premises to which the contract relates; and (c) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period. (3) It shall be the duty of the tribunal, when they notify, under sub-s. (2) of the last foregoing section, the local authority of their decision in a case, to furnish to the local authority such particulars as are requisite for enabling them to discharge their functions under the foregoing provisions of this section. 4. (1) Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered . . . (2) Where any payment or consideration has been made or received in contravention of the foregoing sub-section, the amount or value thereof shall be recoverable by the person by whom it was made or given."

Section 9 (1) provides:

"A person who requires or receives any payment or any consideration in contravention of s. 4 of this Act shall be guilty of an offence and be liable on summary conviction to a fine not exceeding £100 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment, and, without prejudice to any other method of recovery, the court by which he is found guilty may order the amount paid or the value of the consideration given to be repaid to the person by whom the payment was made or the consideration given."

Section 13 provides that the Act (which came into force on Mar. 26, 1946) should continue in force until Dec. 31, 1947, but it has been from time to time continued. The two latest continuations have been those affected by the Expiring Laws Continuance Act, 1951 (to Mar. 31, 1953), and by the Expiring Laws Continuance Act, 1952 (to Mar. 31, 1954).

A dispute arose between the parties concerning the provision in the lease for the payment as additional rent of the amount of any increase in the rates payable by the defendants as therein mentioned. This dispute led to an action in the Chancery Division in which the defendants were plaintiffs and the plaintiff was defendant. The action was compromised on terms which included the

giving by the present defendants to the present plaintiff of the option contained in the next-mentioned agreement.

By an agreement under seal dated Mar. 30, 1949, and made between the defendants of the one part and the plaintiff of the other part, after a recital to the effect that the terms of settlement of the Chancery action included the granting by the defendants to the plaintiff of the option thereafter contained, it was witnessed (so far as material for the present purpose) as follows:

"1. In pursuance of the said term of settlement and in consideration of the premises the lessee shall have the option of taking a lease of the several rooms bathrooms and servants' offices known as flat No. C.1 on the second floor of the building known as Durley Chine Court Bournemouth in the county of Hants for a term of seven years from June 24, 1953, at the yearly rent of £525 such lease to be in the form of the existing lease of the said premises dated Dec. 14, 1946 and made between the lessors of the one part and the lessee of the other part except that there shall be substituted in cl. 1 for the words 'at the date of the commencement of the said term' the words 'on June 24, 1946.' . . . 4. The said option shall be exercisable by notice in writing to the lessors at any time before or on June 24, 1952, and if and when the same shall be exercised then the lessors shall forthwith grant and the tenant shall accept a lease of the said flat on the said terms of the said premises to commence from June 24, 1953 . . . In the event of the option being exercised the lease and a counterpart thereof shall be prepared by the lessors' solicitors at the expense (including stamps) of the lessee and shall be executed by the lessors and lessee respectively."

Within a year after the execution of such agreement, the plaintiff, with a view to improving his position yet further, applied to the rent tribunal for Bournemouth and area constituted under the Act of 1946 for a reduction in the rent payable in respect of the flat. His application succeeded to the extent that on Jan. 23, 1950, the tribunal issued a notification of their decision to fix the rent of the flat at £425 per annum "for the duration of the Furnished Houses (Rent Control) Act, 1946", but subject to the right of the defendants, or the plaintiff, or the local authority, to refer the case to the tribunal for re-consideration of the rent so fixed on the ground of change of circumstances. The formal date of notification of this decision to the parties and to the local authority for registration was stated therein to be Feb. 2, 1950. The reduced rent of £425 per annum was duly entered in the register kept by the local authority pursuant to s. 3 of the Act of 1946. It thus became unlawful for the defendants to require or receive on account of rent for the flat any sum in excess of the rent of £425 per annum entered in the register (see s. 4 (1) of the Act) on pain of fine or imprisonment or both: see s. 9 (1) of the Act. Moreover, any sum received by the defendants in contravention of s. 4 (1) would be recoverable from them by the person paying it. This state of affairs would, moreover, continue for the duration of the Act of 1946, subject to the possibility of the defendants' being able to secure an increase in the registered rent on a re-consideration of it by the tribunal on the ground of change of circumstances under s. 2 (3) of the Act.

By a notice dated Dec. 4, 1951, and enclosed in a letter from his solicitors to the defendants dated Dec. 6, 1951, the plaintiff purported to exercise the option given by the agreement of Mar. 30, 1949. That notice was in these terms:

"To: Durley Chine (Investments) Ltd., 63, Coleman Street, London. I, Maurice Mauray of flat C.1, Durley Chine Court, Bournemouth, hereby give you notice that in exercise of the option in that behalf given by an agreement dated Mar. 30, 1949, and made between yourselves of the one part and myself of the other part do hereby request you to grant to me a renewed lease of the premises demised by a lease dated Dec. 14, 1946, and made between yourselves of the one part and myself of the other

part for a further term of seven years from June 24, 1953, at the yearly rent of £525 (reduced to £425 for the duration of the Furnished Houses (Rent Control) Act, 1946, by the decision of the rent tribunal for Bournemouth and area notified on Feb. 2, 1950) such lease to be in the form of the said lease except that there shall be substituted in cl. 1 thereof for the words 'at the date of the commencement of the said term' the words 'on June 24, 1946,' and I agree to accept such renewed lease and do all such acts and things as under the said lease ought to be done by the lessee in relation to the grant of such lease. Dated this Dec. 4, 1951. (Signed) Maurice Mauray."

A copy of such notice was at the same time sent to the defendants' solicitors, and elicited from them this reply dated Dec. 7, 1951, addressed to the plaintiff's solicitors:

"Dear Sirs, Re flat C.1, Durley Chine Court. We are in receipt of your letter of yesterday with its enclosure. In view of what has happened since the agreement dated Mar. 30, 1949, was entered into by our clients and your client, we have been advised that the option contained in such agreement is null and void, and in the circumstances we are not able to accept the notice enclosed with your letter, and therefore return it herewith and would point out that in the absence of any new arrangement with your client, our clients will expect Mr. Mauray to vacate the premises on the expiration of his present lease."

The contention thus advanced on the defendants' behalf to the effect that in the events which had happened the option had become null and void was disputed on the plaintiff's side, and ultimately on Apr. 3, 1952, he brought the present action against the defendants alleging in para. 6 of his statement of claim delivered with the writ that

"By notice in writing dated Dec. 4, 1951, the plaintiff by his solicitors exercised the said option and requested the defendants to grant a new lease in pursuance thereof, but the defendants by a letter by their solicitors dated Dec. 7, 1951, refused to do so and contended that the said option was null and void",

and claiming:

"A declaration that the option contained in the deed dated Mar. 30, 1949, is valid and subsisting and has been duly exercised by the plaintiff."

The substance of the defence delivered on behalf of the defendants is to be found in para. 4, para. 5 and para. 6, which are in these terms:

"4. The defendants admit the notice and letter referred to in para. 6 of the statement of claim but will refer thereto for the precise terms and effect thereof. No admission is made as to the validity or effect in law of the said notice as a purported exercise of the said option. 5. As a result of the said decision of the said rent tribunal made on the application of the plaintiff as hereinbefore mentioned the rent of £525 per annum which was expressly stipulated in the said deed of Mar. 30, 1949, as the rent at which the plaintiff was given the said option of taking a further lease of the said flat became under the provisions of the Furnished Houses (Rent Control) Act, 1949, an unlawful rent for the said flat which the defendants under penalties set forth in the said Act were prohibited from requiring or receiving. 6. In the premises the said option became null and void and the said purported exercise thereof became and is a nullity."

It will be seen that, while the defendants kept open the question whether the notice relied on by the plaintiff was, or was not, a valid and effective exercise of the option on the footing that the option itself was valid and subsisting at the time of its purported exercise, the substance of their case, as

foreshadowed in their pleading, appeared to be that the Act of 1946, coupled with the tribunal's decision to reduce the rent of the flat to £425 per annum, and the registration of the rent as so reduced, had the effect of making the option void for illegality, because it thenceforth became unlawful for the defendants to grant a lease at the rent of £525 provided for in the option agreement, or, at all events, to demand or receive that rent under any lease granted pursuant to the option agreement and purporting to reserve that rent.

A The case was heard by GERRARD, J., on Feb. 24, 1953. It is clear that before him the argument for the defendants was directed exclusively to the issue of illegality. The learned judge rejected the defendants' contentions on this issue, and as it was the only issue argued before him, it necessarily followed that he held the plaintiff entitled to the declaration claimed, and gave judgment accordingly. From that judgment the defendants now appeal to this court, and counsel on their behalf has relied not only on the argument based on illegality (which the learned judge considered and rejected), but also on a further argument, not raised before the learned judge, to the effect that in any case the notice of Dec. 4, 1951, was not a valid exercise of the option even if (contrary to his contention) the option itself was still valid and subsisting at the date of its purported exercise by the plaintiff.

C To deal first with the argument based on illegality. We may say at once that we agree with the learned judge's conclusions, although we prefer to put our reasons for coming to that conclusion in a somewhat different way. For the purposes of this argument the vital points seem to us to be these. First, on the assumption that, apart from the question of illegality, the notice purporting to exercise the option was a valid exercise of it, the option was exercised when the letter enclosing it was received by the defendants, that is, apparently on Dec. 7, 1951; secondly, the option agreement provided that on the exercise of the option the defendants should grant the plaintiff a new lease on the stipulated terms "forthwith"; thirdly, the term to be granted by the new lease was to run from June 24, 1953, the date of the expiry of the existing term; fourthly, the legislative position in regard to the duration of the Act of 1946 at the material period was that immediately before Dec. 7, 1951, it was due to expire on Mar. 31, 1952, to which date its life had been prolonged by the Expiring Laws Continuance Act, 1950, and that on Dec. 7, 1951, the Expiring Laws Continuance Act, 1951, further extended its duration until Mar. 31, 1953.

F The argument based on illegality is put in two ways. First, it is said that the mere granting to the plaintiff of a lease for seven years from June 24, 1953, at the rent of £525 per annum would (in view of the reduction by the tribunal of the rent payable for the flat to £425 per annum and the registration of the rent as so reduced) in itself amount to a "requiring" by the defendants of rent in excess of the rent entered in the register, and thus constitute a transaction in terms made unlawful by s. 4 (1) of the Act and a contravention of that section punishable as an offence under s. 9. Alternatively, it is said that in these circumstances the option agreement has become illegal in the sense that its terms, as contemplated by the parties, can no longer be lawfully carried out, demanding, as they do, a lawful and recoverable rent of £525 per annum. Whichever way it is put, we do not see how the argument can be maintained in the face of the four vital points to which we have referred. It is, perhaps, just conceivable that the grant of a lease taking effect in possession at a given rent might be said in itself to amount to a "requiring" of that rent within the meaning of s. 4 (1), though we are far from so holding. It is hardly conceivable that the granting of a lease to take effect from some future date at a given rent to become payable from and after that future date should in itself be held to amount to such a "requiring", and, as at present advised, we would not so hold. But, however these two hypothetical cases may stand, the actual position in the present case was that (apart from any defect in the notice itself)

the option was exercised, and the defendants became obliged, according to the terms of the option agreement, to grant the lease "forthwith", on Dec. 7, 1951. Thus, allowing the most lenient interpretation to the word "forthwith", the defendants ought to have granted the plaintiff a lease at £525 per annum for a term of seven years commencing from June 24, 1953, at a time when the whole of that future term fell beyond the date (viz., Mar. 31, 1953) then fixed for the duration of the Act of 1946. It seems to us quite impossible to hold that the mere granting of a lease at a given rent to take effect from a date after the date for the time being fixed for the duration of the Act of 1946 amounts to a "requiring" of that rent in contravention of any of the provisions of that Act. If the duration of the Act is subsequently extended so as to embrace wholly or in part the term granted by the lease, then in respect of so much of the term as falls within the extended duration of the Act the lessor will be precluded from requiring or receiving more than the registered rent. But he cannot, in our view, be said to have "required" more than the registered rent by granting a lease at a given rent to take effect from a future date at which, as the law stands at the date of the grant, the Act of 1946 will have expired and the registration of rents thereunder will have ceased to have any legal effect. Nor, in our view, can it be said that an agreement to grant a lease from a future date which, when the time comes for granting the lease according to the terms of the agreement, falls after the date for the time being fixed for the expiration of the Act of 1946, is impossible of performance because the rent reserved exceeds the registered rent, so that, if such expiration is subsequently postponed to a date overlapping the commencement of the term to be granted, the excess of the contractual over the registered rent will not be lawfully recoverable. In such a case, it seems to us that the agreement to grant the lease, at the time fixed for its performance, is perfectly legal and must be performed accordingly, and the lessor must take his chance of his right to recover the full rent reserved by the lease, when the time for payment of such rent arrives, being defeated by some further extension of the duration of the Act of 1946. We are, accordingly, of opinion that the argument based on illegality must fail.

There remains the new point, not taken below, to the effect that on the footing that the option was still valid and subsisting at the date when the plaintiff purported to exercise it his notice purporting to do so was not a valid exercise of the option. Although this point was not argued below, it was, as has appeared above, open on the pleadings, and as it is a point of law arising on undisputed facts, we think we would be wrong to exclude it from consideration here. It is, however, only right that a new point taken at this late stage should be somewhat jealously scrutinised. The argument on this point turns entirely on the inclusion in the notice of Dec. 4, 1951, of the words

"reduced to £425 for the duration of the Furnished Houses (Rent Control) Act, 1946, by the decision of the rent tribunal for Bournemouth and Area notified on Feb. 2, 1950",

which follow the words

"for a further term of seven years from June 24, 1953, at the yearly rent of £525."

Apart from the inclusion of the additional words we have quoted, the document appears to be in point of form unexceptionable as a perfectly good exercise of the option. But it is suggested that these additional words have the effect of making the lease called for by the notice of Dec. 4, 1951, a lease in different terms from those of the lease offered by the option agreement. If that were indeed the case, the point would, as it seems to us, be unanswerable. An option to take a lease at a specified rent is not well exercised by a notice demanding a lease at some lower rent. But we do not think it is possible, on a reasonable construction of the additional words, to attribute to them a

meaning which would have the effect of vitiating the notice on that ground. It would, we think, be a strained construction of the words in question to interpret them as demanding a lease at the rent of £525 per annum reduced to £425 per annum for the duration of the Act of 1946, irrespective of any upward revision of the permitted rent which might be made by any further decision made by the tribunal on a re-consideration of the case under s. 2 (3) of the Act. It is true that the reference is to the tribunal's decision notified on Feb. 2, 1950, which is described as reducing the rent to £425 for the duration of the Act, but that is no more than a perfectly accurate description of the tribunal's decision as it stood at the date of the notice and still stands, and we do not think it can fairly be construed as impliedly depriving the defendants of the benefit of any upward revision of the permitted rent which might be made by the tribunal after the date of the notice, whether before or after the execution of the lease or the commencement of the further term thereby granted. Giving the best consideration we can to the construction of the words in question, with due regard to the surrounding circumstances and to the provisions of the Act, we do not think they can fairly be held to be anything more than declaratory of the legal effect of the granting of a lease on the terms offered by the option agreement, the lease called for by the notice being nothing more nor less than a lease strictly in those terms. In our view, the disputed words are really no more than a parenthetical reference to the fact that, while the lease to which the plaintiff was entitled, and for which he called by the notice exercising the option, was a lease for seven years from June 24, 1953, at the rent of £525 per annum and otherwise in the form prescribed by the option agreement, the rent would, during so much of the term as might fall within the duration of the Act of 1946, be reduced to £425 per annum by the tribunal's decision notified on Feb. 2, 1950, so long as that decision remained in force. We are, accordingly, of opinion that the new point based on the alleged invalidity of the notice exercising the option also fails, with the result that the appeal fails and must be dismissed.

It is not without regret that we reach this conclusion, for the case is one in which the provisions of the Act of 1946 appear to us to work an injustice to the defendant landlords. It is an undesirable, though it may be unavoidable, by-product of this enactment that a man negotiating under no pressure, and on equal terms, is thereby enabled to take a lease for a term of years at a specified rent, and at any time after he has secured the lease obtain from the appropriate tribunal a substantial reduction in the rent to which he has freely agreed, while nevertheless holding the landlord to his side of the bargain. It is, no doubt, true that the whole object of the Act, designed as it is to prevent landlords from exploiting a shortage of accommodation, would be stultified if contracting out were permitted, or if landlords were enabled to rescind the leases of tenants for terms of years who availed themselves of the statutory right to apply for a reduction in their rents. It is, no doubt, also true that it would be difficult, and it may be impracticable, to limit the application of the Act in such a way as to confine its operation to cases of real hardship or oppression. But one cannot help feeling that in practice advantage is taken of the Act by tenants in no need of protection—tenants, for example, who are in a position to take flats of a class commanding rents of several hundred pounds a year—for the purpose of benefiting themselves at the expense of their landlords and in derogation of bargains freely and deliberately made. In other words, the Act, which was designed to prevent the exploitation of tenants by landlords, may in such cases be made an engine for the exploitation of landlords by tenants. In the present case, the hardship on the defendants is twofold. Not only have they had to submit to a reduction of their rent from £525 to £425 during the latter part of the term originally granted, but they are now under an obligation to grant a lease for a further term of seven years during part, and it may well be the whole, of which the rent of £525

stipulated for by them, and agreed to by the plaintiff in the option agreement, will be similarly reduced. We would willingly have held them relieved from the last-mentioned obligation had we been able to find any justification in law for so doing. If at the time when the new lease ought to have been granted (i.e., forthwith after the exercise of the option) the duration of the Act of 1946 as then fixed had extended beyond the date of the commencement of the new term (namely, June 24, 1953), we would, as at present advised, have been disposed to hold the defendants relieved on the ground that the new lease could not lawfully have been granted at a recoverable rent of £525 per annum, and that the agreement under which it was to have been granted had accordingly become impossible of performance because it could not be legally performed. To this extent we are, as at present advised, disposed to part company with the learned judge, who appears to have proceeded on the ground that the possibility of some further decision of the tribunal restoring the contractual rent of £525 before the commencement of the new term sufficed to prevent impossibility of lawful performance being imputed to the option agreement at the time when the lease ought to have been granted. We find difficulty in seeing why the defendants should have been required to accept the mere possibility of the full rent of £525 being once more lawfully recoverable as from the commencement of the new term, by virtue of a purely hypothetical further decision of the tribunal, in substitution for the right to a lawfully recoverable rent of £525 for which they had bargained and to which the plaintiff had agreed. But we see no answer to the point that at the time when the new lease ought to have been executed the new term to be granted by it fell wholly outside the period then fixed for the duration of the Act of 1946. However probable it may have been that such duration would in fact be extended so as to overlap the commencement of the new term, we cannot regard the existence of that contingency as sufficing to relieve the defendants of their obligation to grant the new lease at the time when it ought to have been granted. That being so, it follows that on the principle that equity looks on that as done which ought to have been done the plaintiff should be put in the same position as he would have been in if the new lease had actually been granted at the proper time, and the defendants cannot escape their obligation to grant it on the ground that since that time the duration of the Act of 1946 has been extended to Mar. 31, 1954.

We would, therefore, dismiss the appeal, although we would be disposed, in order to avoid any possibility of dispute hereafter, and to make it clear that the court is not countenancing anything inconsistent with the Act of 1946, to amplify the declaration made by the learned judge by adding words to the effect that for the duration of the Act of 1946 the lease to be granted pursuant to such declaration will, as regards the amount of the rent payable thereunder, take effect subject to the provisions of that Act, and to any decision of the relevant rent tribunal under it for the time being in force.

Appeal dismissed.

Solicitors: *Evans Baker & Co.* (for the defendants); *Jacobson, Ridley & Co.* (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BOARLAND (INSPECTOR OF TAXES) v. MADRAS ELECTRIC
SUPPLY CORPORATION (In Liquidation).

[CHANCERY DIVISION (Upjohn, J.), May 12, 13, 14, June 18, 1953.]

Income Tax—Deduction against profits—Wear and tear—Balancing charge—Sale of undertaking to the Crown—Undertaking carried on by Crown—
A “Person [who] succeeds to any trade”—Inclusion of Crown—Assessment as if trade “discontinued”—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 11 (2), as substituted by Finance Act, 1926 (c. 22), s. 32 (1)—Income Tax Act, 1945 (c. 32), s. 17 (1).

B A company sold its undertaking to the Crown, ceased to trade, and was wound-up, but it was found as a fact that the trade had not been discontinued, but had been carried on by the Crown. The company was assessed to income tax for the period terminating on the date of sale in the sum of £850,000 in respect of balancing charges under s. 17 (1) of the Income Tax Act, 1945, arising on the sale of the plant and machinery included in the transaction.

C HELD: (i) “person” in r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918 (as substituted by the Finance Act, 1926, s. 32 (1)) included the Crown, and, therefore, the Crown had succeeded to the trade within the meaning of the rule, with the result that the company was liable to be assessed under the rule as if the trade had been discontinued and balancing charges on the sale fell to be made in respect of the basis period ending on the date of the sale.

D (ii) the requirement in r. 11 (2) that the tax of the company should be computed as if the trade “had then been discontinued” did not prevent the sale from being regarded as occurring before “the trade is permanently discontinued” under s. 17 (1) of the Act of 1945, because, in fact, it had not been discontinued, and, under the sub-section, discontinuance did not include “the happening of any event which by . . . r. 11 . . . is to be treated as equivalent to the discontinuance of the trade.”

E *Inland Revenue Comrs. v. Barr* (1953) (46 R. & I.T. 217), not followed.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 11 (2), as amended by the Finance Act, 1926, s. 32, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 164; and FOR THE INCOME TAX ACT, 1945, s. 17 (1), see *ibid.*, p. 629.

F Cases referred to:

(1) *Income Tax Comrs. v. Gibbs*, [1942] 1 All E.R. 415; [1942] A.C. 402; 111 L.J.K.B. 301; *sub nom. Inland Revenue Comrs. v. Gibbs*, 166 L.T. 345; *sub nom. R. v. Income Tax General Comrs. Ex p. Gibbs*, 24 Tax Cas. 221; 2nd Digest Supp.

G (2) *Bank voor Handel en Scheepvaart N.V. v. Slatford* (sued as Custodian of Enemy Property), [1952] 2 All E.R. 956; [1953] 1 Q.B. 248.

(3) *Coomber v. Berks JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.

(4) *R. v. Cook*, (1790), 3 Term Rep. 519; 100 E.R. 710; 42 Digest 690, 1043.

H (5) *Fry v. Burma Corpn.*, [1930] 1 K.B. 249; 98 L.J.K.B. 693; 141 L.T. 361; *affd. H.L.*, [1930] A.C. 321; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113; Digest Supp.

(6) *Inland Revenue Comrs. v. Barr*, (1953), 46 R. & I.T. 217.

(7) *Inland Revenue Comrs. v. West. Inland Revenue Comrs. v. Reid*, 1950 S.C. 516; 31 Tax Cas. 402; 2nd Digest Supp.

(8) *Re Hartland*, [1911] 1 Ch. 459; *sub nom. Re Dixon Hartland*, 80 L.J.Ch. 305; 104 L.T. 490; 21 Digest 38, 247.

(9) *Re D'Avigdor Goldsmid*, [1951] 1 All E.R. 240; [1951] Ch. 321.

CASE STATED by the Special Commissioners of Income Tax.

The appellant company appealed against an assessment to income tax made on it under sched. D to the Income Tax Act, 1918, for 1947-48 in the sum of £850,000. The assessment was made in respect of balancing charges under Part II of the Income Tax Act, 1945, alleged to arise on the sale by the company of its plant and machinery to the Madras government on Aug. 29, 1947, as part of the sale of the undertaking. On the date of sale the company ceased to trade, but its undertaking was carried on without interruption in Madras under the management of a department of the Madras government. On Sept. 29, 1950, the company went into voluntary liquidation. It was common ground between the parties that by reason of s. 17 (1) of the Income Tax Act, 1945, the balancing charges forming the subject of the assessment fell to be made on it, if at all, for the year of assessment in the company's basis period in which the sale of its plant and machinery occurred, that for the purposes of the Act the sale occurred on Aug. 29, 1947, and that, by reason of s. 57 (2) of the Act of 1945, the company's basis period for 1947-48 was the period on the profits or gains of which income tax fell to be computed under Case I of sched. D in respect of its trade.

The Crown contended that on Aug. 29, 1947, there was a succession to the company's trade, which brought into operation r. 11 (2) of the Rules Applicable to Cases I and II of sched. D (as substituted by the Finance Act, 1926, s. 32 (1)), and that under that rule the tax payable by the company for all years of assessment fell to be computed as if the trade had been discontinued on that date, and that, by reason of s. 31 (1) (a) of the Finance Act, 1926, the company fell to be charged to income tax for 1947-48 on the amount of the profits or gains for the period from Apr. 6 to Aug. 29, 1947, that that period was the company's basis period for 1947-48, and in it occurred the sale of the plant and machinery. The company contended, *inter alia*, that the person succeeding to the company's trade on Aug. 29, 1947, was the Crown and that r. 11 (2) had no application where the Crown succeeded to a trade. It submitted, alternatively, that, if the Crown did not succeed to the trade, the person so succeeding was not a person chargeable to income tax in respect thereof and that r. 11 (2) had no application where the person succeeding to the trade in question was not so chargeable.

The commissioners found that the trade or undertaking in Madras carried on by the company up to Aug. 29, 1947, was not discontinued at that date, but continued to be carried on in Madras after that date by the Crown. They held that r. 11 (2) of the Rules Applicable to Cases I and II of sched. D did not apply to the case because (i) in their view "any person" in the main charging rules of the schedule did not refer to the Crown and they saw no reason for giving it any different meaning in r. 11 (2), and, moreover, (ii) the context of r. 11 (2) seemed to indicate that the "person" therein referred to must be a person who was or might in certain events be liable to the charge imposed by sched. D, and they did not see how the Crown could be such a person. They did not decide whether the "person" referred to must in any event be a person actually liable to income tax in respect of the trade. They allowed the appeal and reduced the assessment to £379 less capital allowances £379. The Crown appealed.

The Attorney General (Sir Lionel Heald, Q.C.), J. H. Stamp and Sir Reginald Hills for the Crown.

Millard Tucker, Q.C., and J. W. P. Clements for the company.

Curr. adv. vult.

June 18. UPJOHN, J., read the following judgment. The principal point in this case is whether in r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918 [as substituted by the Finance Act, 1926, s. 32 (1)], the word "person" includes "the Crown". The Special

Commissioners have held it does not. There is also a subsidiary point not raised before the commissioners, but sought to be raised before me.

A The respondent company was incorporated on Jan. 27, 1906, with the object, as its name would imply, of carrying on the business of suppliers of electricity in Madras. The company did so under three licences granted by the government of Madras, and each of these licences provided that on Aug. 29, 1947, the local authorities, whom failing the local government, should have the option of purchasing the electricity undertaking of the company. The option was duly exercised by the local government, and as on the said Aug. 29, 1947, the company sold and the local government purchased the undertaking for 215 lakhs of rupees, the sterling equivalent actually received being £1,611,437. The commissioners have found as a fact that the trade or undertaking in Madras was not discontinued on Aug. 29, 1947, but continued to be carried on without interruption there under a department of the Madras government. It is conceded that, for the purposes of this appeal, the Madras government is a branch of the Crown, and, therefore, the purchaser of the undertaking was the Crown. So far as the principal point is concerned, it is also conceded that *prima facie* on the sale of the company's plant and machinery a balancing charge of some £850,000 or thereabouts fell to be made on the company under s. 17 (1) of the Income Tax Act, 1945. The relevant year of assessment in respect of that charge is to be ascertained by finding out the company's "basis period" which is defined in s. 57 (2) of the Act. I need not consider that section, for it is conceded by the company that, if r. 11 (2) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, is applicable, then, having regard to s. 31 (1) (a) of the Finance Act, 1926, the company would fall to be assessed to income tax for the year 1947-48 on its profits from Apr. 5 to Aug. 29, 1947, and it would be subject to assessment on the balancing charge for the same period. The company, however, submit that r. 11 (2) has no application because the Crown is not a person, and that the balancing charge fell to be assessed pursuant to r. 9 in respect of the following year, when the company, having ceased to trade, was not in fact assessable at all under Case I.

E In view of the submissions made to me, it will be convenient to trace the history of the relevant rules in tax legislation before reading the vital r. 11 (2) itself. In the Income Tax Act, 1842, in r. 4 dealing with Cases I and II of sched. D, it was provided that, whenever there was any change in any partnership by death, dissolution or the admission of a new partner, or whenever any person succeeded to any trade, tax was to be computed according to normal principles (then the three years average) notwithstanding such change or succession. There was no provision for apportionment of the profits as between predecessor and successor in that Act, but by s. 134 it was provided in effect that, where there was a succession, both the predecessor and the successor should be liable, presumably at the option of the Crown. The first provision for apportionment of tax between predecessor and successor is to be found in s. 62 of the Taxes Management Act, 1880, where it was provided that where one ceased to carry on business and there was a succession a certificate was to be given to the commissioners, and then sub-s. (2) and sub-s. (3) provided:

H " (2) On the receipt of such certificate the commissioners shall cause notice to be given to the respective parties of a meeting of commissioners for considering the same; and the commissioners shall, on the examination of the respective parties, if in attendance, or on other satisfactory proof of the facts, adjust the assessment by charging the successor with a fair proportion thereof from the period of his succeeding to the concern and relieving the person originally assessed from a like amount. (3) The determination of the commissioners on any such certificate shall be final, and the assessment so adjusted shall be recoverable from the respective parties in like manner as an original assessment; and if either of the

parties has paid in respect of an assessment so certified more than the proportion which appears by the determination of the commissioners to be chargeable on him, the amount so over-paid shall, when recovered from the party liable, be paid to the person by whom the overpayment was made."

These provisions were consolidated in the Income Tax Act, 1918, the earlier r. 4 and s. 62 of the Act of 1880 appearing as r. 11 and r. 9 respectively of the Rules Applicable to Cases I and II of sched. D and s. 134 of the Act of 1842 as r. 3 of the Miscellaneous Rules Applicable to Sched. D. Then by the Finance Act, 1926, drastic alterations were made. Section 31 provided that, where a trade was permanently discontinued, profits for the last year were to be charged on the profits from the last Apr. 6 to the date of discontinuance, with a right on the part of the Crown to re-open the previous year's assessment. Section 32 repealed the existing r. 11 and re-enacted the following, which, as since amended by the Finance Act, 1930, s. 16, is r. 11 as applicable in the present case. I must read it in full:

"11.—(1) If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts; Provided that, where all the persons who were engaged in the trade, profession or vocation both immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within twelve months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly. (2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued. In this paragraph references to a person include references to a partnership."

There was no alteration to r. 9, which remained, and gave rise to much discussion as to how far r. 9 remained effective having regard to the new form of r. 11. The history of these rules and the conflict, if I may so describe it, between r. 9 and r. 11, were the subject of elaborate opinions delivered in the House of Lords in *Income Tax Comrs. v. Gibbs* (1), but the brief outline I have given is, I hope, sufficient to make clear the submissions made to me based on the historical development of the relevant taxing provisions.

A The case for the Crown can be stated concisely. It is submitted, and not disputed, that the Crown is a corporation sole, and, therefore, a person: see s. 19 of the Interpretation Act, 1889. Therefore, it is said, the case where the Crown purchases a business or trade is within r. 11 (2). It is submitted that the true approach to the rule is that throughout the Act the word "person" must be given its ordinary wide meaning. Thus it is said a person resident outside this country who does not carry on business in this country is not taxed for the reason that, although he is a "person" for the purposes of the Act, he is not a person who is within the class of persons mentioned in any of the sub-headings in para. 1 (a) of sched. D. So, to give another example, a charitable trustee is not taxed, not because he fails to fulfil the definition of a person for the purposes of the Act, but because, although such a person, he is exempt from taxation by s. 37 of the Income Tax Act, 1918. Finally, it is said that the Crown is not taxed, not because it fails to fulfil the definition of person for the purposes of the Act, but because, as it is not expressly mentioned in the Act, the rights of the Crown cannot be prejudiced by anything in the Act: *Bank voor Handel en Scheepvaart N.V. v. Slatford* (2).

B
C It is pointed out that, if the contrary view be right, namely, that the Crown is exempted from tax because, on the true construction of the Act, it is not a "person", the wealth of learning to be found in the authorities on the immunity of the Crown from taxation was quite unnecessary. A number of authorities was cited to me on this point. I do not propose to review them all at length, for the exact point I have to consider was never raised. It is sufficient to refer to one passage in *Coomber v. Berks JJ.* (3). In the House of Lords, LORD BLACKBURN said (9 App. Cas. 71):

D
E "It seems to me that it is not material whether the assessment statute imposing any tax does so, like the Poor Rate Acts, for a local purpose, or like the statute imposing a duty on post-horses, considered in *R. v. Cook* (4), or the income tax, for an imperial purpose. In each there is an implied exemption on the ground of prerogative. And if the property is so held as to bring it within the ground of exemption for the one statute, it must surely be brought within the ground of exemption for the other."

F That seems inconsistent with the view that the Crown is immune from taxation because it is not a person for the purposes of taxing Acts. Then, again, in *Slatford's* case (2), it is said that the illuminating judgments in the Court of Appeal on "Crown status" and "Crown purposes" would have been quite unnecessary if the short answer was that, as a matter of construction, the Crown, and, therefore, its servant, the Custodian of Enemy Property, were not a person for the purposes of the Income Tax Acts, and the decision must have been the other way. I think there is much force in the contention of the Crown on this point. It was next submitted that it would be a most strained and unnatural construction of the Act to hold that the principles of taxation of a vendor of a business should vary according to the apparently irrelevant circumstance whether the vendor should happen to sell to another subject of the Crown or to the Crown itself.

G
H On the other hand, counsel for the company submits that the only safe guide is to consider the necessary construction which must be placed on the word "person" in a taxing Act. He points out that, in every taxing Act going back for many years, there is a preamble in the following form:

"Most Gracious Sovereign, We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned; and do therefore most humbly beseech

Your Majesty that it may be enacted, and be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—"

then follow the substantive taxing provisions. It is said with force, having regard to that preamble, that the Crown as the grantee of the taxes cannot be a person for tax purposes, and that, in the charging provisions in the Income Tax Act, 1918, charging tax upon "persons" cannot sensibly include the Crown.

In support of that argument counsel for the company points to the history of the relevant rules which I have already summarised. He points out that, until the Finance Act, 1926, at all events, the relevant rule would be r. 9, re-enacting s. 62 of the Act of 1880, and he said the Crown could never be a "person" for the purposes of sub-s. (2) and sub-s. (3), for Parliament could not possibly have intended that the Crown should be summoned to appear before the commissioners. In further support of his argument, counsel drew my attention to certain of the Rules Applicable to sched. A. By No. VII, r. 1, income tax is charged on the occupier. By No. VIII, r. 1, the occupier is entitled to deduct such tax out of the next rent payable by him to the landlord. A special provision is made in the rule that the right to deduct is available against a receiver of Crown lands. Therefore, it is said, that *prima facie* shows that the Crown is, as a matter of construction of the Act, not a landlord. I do not find this argument very convincing because a special provision entitling a subject to deduct from rent against the Crown is necessary whichever of the contending views is right. The argument is also somewhat double-edged, for the rule refers in terms to a

"receiver on behalf of the Crown or *other* person receiving the rent."

The next point of counsel for the company is that r. 11 (2) contemplates a predecessor and a successor both subject to tax. It is pointed out that in *Income Tax Comrs. v. Gibbs* (1), LORD MACMILLAN, in dealing with r. 9, points out ([1942] 1 All E.R. 425) that the word "person" denotes an entity of assessment. Therefore, it is said, for the rule to apply there must be found two entities of assessment, a predecessor and a successor, both of them subject to tax. LORD MACMILLAN however, was dealing with quite a different problem. The sole question was whether r. 9 applied to the case of admission of a new partner to a firm of stockbrokers carrying on business in the City of London, having regard to the new r. 11 introduced by the 1926 Act. LORD MACMILLAN was not in any way concerned with the position of the Crown, and it would be contrary to every principle of construction to lift his words out of their context and try to apply them to the case before me.

The question ultimately comes to a very short point of construction as to the meaning of the word "person" in r. 11 (2), and to paraphrase the words of LORD DUNEDIN, delivering his opinion in *Fry v. Burma Corpn.* (5) ([1930] A.C. 327), another taxing case although on quite a different point, it is safest to go by the ordinary meaning of words. There is here no context which compels me to give some special meaning to the word "person". In its ordinary meaning it is a word of widest import and apt to include the Crown. If some limitation is to be placed on the ambit of that word, difficulties arise, as the commissioners appear to recognise in their finding in the Case Stated. Is the word limited to "all persons other than the Crown" or to "all taxable persons". As a matter of construction, I see no ground for placing any limitation on the ordinary and natural meaning of the word. In my judgment, in r. 11 (2) the word "person" includes the Crown, persons resident abroad, or charity trustees and others who for different reasons may be found to be exempt from tax. Consequently, in my judgment, the commissioners came to a wrong conclusion on this point.

I must now turn to the subsidiary point briefly mentioned at the beginning of my judgment. In an undated letter sent after the hearing before the commissioners the company gave notice that they would rely on a recent decision in the Court of Session, *Inland Revenue Comrs. v. Barr* (6). In reply to that letter the Crown stated that they would rely on proviso (ii) to s. 17 (1) of the Income Tax Act, 1945. Judgment was given in *Barr's* case (6) on Jan. 13, 1953. The point arose in this way. In an earlier case of *Inland Revenue Comrs. v. Reid* (7), reported together with *Inland Revenue Comrs. v. West* (7), a fishing vessel, the *Girl Eileen*, was sold, and, although the purchaser continued to use the vessel for fishing, there was nothing in the nature of a purchase of the vendors' business and goodwill or undertaking as fishermen but only of the ship, and it was found as a fact that on the sale of the ship there was a simultaneous permanent discontinuance of the trade. On these facts the Court of Session naturally held that, on the true construction of s. 17 (1) of the Income Tax Act, 1945, a claim to a balancing charge failed, though both the Lord President and LORD KEITH expressed the view that a balancing charge could only be recovered from persons still carrying on the trade. That decision has, however, no application to the facts of the present case, having regard to the finding of fact that there was no discontinuance of the trade or undertaking though it was carried on by another. The present case is clearly one where (apart from the argument on "person") one person succeeds to a trade of another within the meaning of r. 11 (2). The provision at the end of s. 17 (1) is, therefore, relevant. It is in these terms:

"Any reference in this sub-section to the permanent discontinuance of a trade does not include a reference to the happening of any event which, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D, is to be treated as equivalent to the discontinuance of the trade."

In the subsequent case of *Inland Revenue Comrs. v. Barr* (6), however, the facts were similar to those before me. A business was sold as a going concern, but the Court of Session held that no balancing charge was leviable. They did so, as it appears from the very brief judgment, because counsel for the appellant, in opening the appeal, admitted that the ratio of *West's* case (7) (it was not disputed before me that in fact *Reid's* case (7) was the relevant case) covered the case then under appeal. That admission overlooked the relevant provision in s. 17 (1) which I have already read and which does not appear to have been drawn to the court's attention. Counsel for the company candidly did not endeavour to support the decision by independent reasoning, but he invited me to follow it. Normally I should feel it my duty to follow a unanimous decision of the Court of Session: see *Re Hartland* (8); *Re D'Avigdor Goldsmid* (9), per VAISEY, J. ([1951] 1 All E.R. 247); but in the circumstances I have mentioned I do not feel compelled to do so. Nor do I think this is a case where I ought to send the case back to the commissioners in order that the company may invite the commissioners to express new findings on this matter. It seems to me that the concluding words of s. 17 (1) govern this case on the findings of the commissioners, and I cannot treat this case as one where there has been a simultaneous discontinuance of the trade. A balancing charge is, therefore, leviable. The appeal must be allowed and the original assessment must be remitted to the commissioners for adjustment of the figures. The company must pay the Crown's costs of the appeal.

Appeal allowed. Case remitted to commissioners for adjustment of the figures.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Sanderson, Lee & Co.* (for the company).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PRACTICE NOTE.

WILLIAMS v. WILLIAMS.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), June 22, 1953.]

Legal Aid—Costs—Security for costs—Right of assisted person to order—Need of evidence of means.

ORIGINAL MOTION.

On Mar. 6, 1953, a wife who was an "assisted person" under the Legal Aid and Advice Act, 1949, obtained a decree nisi for divorce on the ground of her husband's cruelty. The husband having entered a notice of appeal, the wife's solicitors asked him for security for her costs of the appeal, but he refused to give security. The wife applied to the Court of Appeal for an order for security of costs.

Aarvold for the wife.*Pain* for the husband.

SOMERVELL, L.J., said that under s. 1 (7) (b) of the Legal Aid and Advice Act, 1949, if it were proved that the wife was impecunious, the fact that she was an assisted person did not relieve the husband from liability to give security for her costs of the appeal. The mere fact that she was legally aided was not evidence of her impecuniosity, and there should be an affidavit before the court that she was impecunious.

JENKINS and HODSON, L.JJ., agreed.

An affidavit to the effect that the wife was impecunious was then produced and the court made an order for security of costs of £10.

Solicitors: *Isadore Goldman & Son* (for the wife); *Helder, Roberts & Co.* (for the husband). P.P.

SIMPSON v. CONNOLLY.

[QUEEN'S BENCH DIVISION (Finnemore, J.), June 15, 16, 1953.]

Sale of Land—Contract—Agreement to discharge debt conditional on transfer of land—Whether contract for sale of land—Law of Property Act, 1925 (c. 20), s. 205 (1) (xxiv).

In 1948, on the winding-up of a company, the company's land and other assets were divided by agreement between three persons, including the plaintiff and the defendant, leaving a sum of money owing by the defendant to the plaintiff which was to be paid by instalments. Three instalments were paid, but the defendant then ceased to pay, leaving a balance owing to the plaintiff of £217 10s. In the latter part of 1949 it was agreed in correspondence between the parties that the defendant should transfer to the plaintiff a certain piece of land in discharge of the debt. The plaintiff's solicitors wrote several times to the defendant asking him to implement this transfer, and in or about November, 1949, without entering into a formal contract, the defendant allowed the plaintiff to take possession of the land. The plaintiff's solicitors wrote several times thereafter asking the defendant to submit a draft contract for the transfer of the land, but the defendant took no action, and the matter fell into abeyance until the beginning of 1951, when the defendant was pressed to convey the land. In July, 1951, the plaintiff informed the defendant that the agreement between them must be regarded as terminated, and in September, 1951, a writ was issued claiming payment of £217 10s.

HELD: the agreement of 1949 was, not a contract for the sale of land,

but an agreement to discharge a debt owed by the defendant to the plaintiff conditional on certain land being transferred by the defendant to the plaintiff, and, as the defendant had not fulfilled the condition within a reasonable time, the plaintiff was entitled to repudiate the agreement and to sue for the £217 10s. owed to him by the defendant.

A FOR THE LAW OF PROPERTY ACT, 1925, s. 205 (1) (xxiv), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 840.

Cases referred to:

- (1) *Smith v. Hamilton*, [1950] 2 All E.R. 928; [1951] Ch. 174; 2nd Digest Supp.
(2) *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539; 22 Digest, Replacement, 209, 1959.

B ACTION for breach of contract.

C Before 1948 a limited company (owned by the plaintiff, the defendant and a Mr. Williamson) carried on the business of fruit growing at Shalden, near Alton, Hampshire. In 1948 the three members of the company decided to separate, and it was agreed that the land, goods, and certain moneys of the company should be divided between them. As a result of this agreement the defendant owed the plaintiff a sum of money which was to be paid in instalments of £50 per month. Three instalments were paid, but thereafter the agreement was not carried out and a balance of £217 10s. was left owing to the plaintiff.

D On Sept. 6, 1949, the plaintiff's solicitors wrote to the defendant pointing out that £217 10s. was still owing to the plaintiff, and stating that unless they received the money within three days a writ would be issued. The defendant replied on Sept. 11 saying that the plaintiff had suggested that the balance owing to him might be met by the transfer to him by the defendant of a small portion of land which would straighten the boundaries of their respective properties (which were contiguous). To this the plaintiff's solicitors replied on Sept. 12 that the plaintiff had never agreed to the suspension of the payments of £50 per month, but that he was interested in purchasing the land at a reasonable price, and added:

E " . . . If you transfer four-fifths of [an] acre to [the plaintiff] this should square all the debt owing between you. We shall be glad to know whether you are prepared to agree to this . . . "

F The defendant replied to this on Sept. 17:

" . . . possibly the transfer of the land he suggests may be the answer. It will be necessary first, however, to check the acreage . . . "

G The defendant did nothing further and the plaintiff's solicitors wrote on Oct. 25 and Oct. 28 saying that unless the defendant agreed to transfer the land or pay the money they would issue a writ. The defendant did in fact ultimately agree to transfer the land, and at about the same time he permitted the plaintiff to take possession of it. On Nov. 2, 1949, the plaintiff's solicitors by letter requested the defendant to instruct his solicitors to let them have a contract as soon as possible for the sale of the land. No contract was sent, however, and in July, 1951, the plaintiff, after some further correspondence (from which it appeared that the defendant had mortgaged his land), orally told the defendant that their agreement must be regarded as cancelled, and that he required payment of the £217 10s. which was still owing to him. Accordingly, a writ was issued by the plaintiff in September, 1951, claiming £217 10s., and a further small sum which was not in dispute.

H It was contended on behalf of the defendant that the plaintiff was not entitled to sue for the money because the defendant was ready and willing to complete the transfer of the land, no date was ever fixed for completion, time was not of the essence of the contract (which was one for the sale of land), and the

defendant was never called on to complete the matter by any particular date except in November, 1949, and this requirement was later waived. On behalf of the plaintiff it was contended that the agreement was a contract that the debt due from the defendant should be discharged on condition that the land was transferred to the plaintiff and not a contract for the sale of land, and, therefore, the plaintiff was entitled to repudiate the agreement when the defendant had taken no steps to fulfil his part of the bargain after a reasonable time. It was further contended by the plaintiff that even if the agreement were a sale of land, in the circumstances the plaintiff was entitled to repudiate the contract without delivering to the defendant a notice to complete within a specified period.

A

A. C. Goodall for the plaintiff.

Samuel-Gibbon for the defendant.

B

FINNEMORE, J., stated the facts and continued: I have been referred to a great many cases and I do not know that it will be of assistance merely to recite them or the passages which have been read to me. Counsel for the defendant quoted a passage from *Smith v. Hamilton* (1) ([1950] 2 All E.R. 935), which emphasised the position which arises when there is no time for completion fixed. The purchaser or vendor cannot just say: "The time has gone and the contract is at an end". Some kind of notice must be given or what has been called in this case, an ultimatum, to say that: "After a certain time if you do not complete this matter, we shall treat the contract as at an end." No such ultimatum ever was given in this case, and, therefore (it is argued), when the plaintiff said to the defendant in July that he was no longer bound by this agreement, whatever it was, he was acting wrongly, because he had not the power to do it. Counsel for the defendant also quotes *Halkett v. Earl of Dudley* (2), but I think that was rather on the point which counsel for the plaintiff concedes, i.e., that when the plaintiff found there was a mortgage on this land, he did not at once withdraw and on that ground repudiate, and did not, indeed, intend to do so.

C

D

E

The first point that I have to decide is: What was this contract between these two people? Was it a contract for the sale of land, or was it a contract that a debt due from one party to the other should be conditionally discharged, the condition being that this piece of land should be transferred from the defendant to the plaintiff? If the second alternative is the right one, all the complications and refinements, if one may so call them, which have been argued on both sides with regard to what happened afterwards appertaining to a contract for the sale of land will have no application, and the plaintiff is able to say: "You owe me money. I agreed to discharge that debt provided you transferred to me certain land, but you have never transferred that land to me. It was not on my shoulders to do anything about it; it was your responsibility. You have never made the transfer, in spite of the letters which have been written, and in spite of my personal interviews and requests nothing has been done; and, therefore, after a reasonable time had gone by, without issuing an ultimatum and without doing anything further, I was entitled to say, as I did, that you have not performed the condition, and the discharge is not valid, and I am, therefore, entitled to my £217 10s. which admittedly was due to me." The answer depends on what is meant by a sale of land. I am told by both counsel that there is no direct authority on this point, and they have not been able to find it dealt with anywhere.

F

G

H

I was referred to s. 205 (1) (xxiv) of the Law of Property Act, 1925, which says: "'Sale' includes an extinguishment of manorial incidents, but in other respects means a sale properly so called." It is argued for the plaintiff that a sale means in the case of land, as in the case of goods, an exchange of land (or goods) for money. It is laid down quite clearly in the books which deal with

A sale of personal chattels that a sale or a contract of sale is an agreement to exchange goods for money, although it is possible that part of the consideration might be something other than money, as, for example, when a person buys a new car for an agreed price, part of which he pays in money and part of which he satisfies by means of surrendering another car. But the general principle of English law is that a sale means the exchanging of property for money. That applies—and I think both counsel agree with this—to a sale of land and a sale of chattels equally.

The real problem is: Is it still a sale if no money passes, but one person says to another, as in this case: If you give me a piece of land, I will excuse you the debt which you owe me. Is the agreement one for the discharge of a debt conditional upon the handing over of land, or is it for the sale of land, i.e., for the transfer of land in return for money? In my view, it is a fine point, but, doing the best I can in the absence of authority, on the principles so far as I understand them, I come to the view that it is not properly so called a contract for the sale of land, because it is not really an agreement to hand over land in return for money. It is an agreement to extinguish an existing debt if land is transferred.

I think it is to be noted that the land was never precisely measured, no exact price in money per acre or per square yard was ever agreed, and no attempt was ever made in any way whatever to relate the value of the land to the value of the debt which was due from the defendant to the plaintiff. The plaintiff was, possibly, anxious to have this land, and he was anxious to have his debt paid. The correspondence shows, I think quite plainly, that he was saying, either himself or through his solicitor, to the defendant: "Pay me my money or settle this debt by transferring this land to me."

I appreciate that in one or two letters the solicitors did refer to a sale and did refer to a price, but I have to look at the realities of the situation. It was not a sale in the ordinary meaning of that word.

If that is so, I do not think that it is disputed by counsel for the defendant that the onus then would be on the defendant to carry out his side of the bargain. That means that he must transfer the land, and none of the refinements which affect a contract for the sale of land when there is delay comes into the matter at all. The defendant would, of course, have a reasonable time in which to transfer the land. I should not think anybody could argue that he was not given reasonable time before the contract was repudiated by the plaintiff. Months went by. Even if he had not been requested to carry out his side of the bargain, it was his duty to do so. But I think he was requested on many occasions by the plaintiff. It is true that he was in possession of the land and, therefore, the urgency of the transfer may not have been unduly in the minds of either of them. I am satisfied that the plaintiff did try to get this matter finished, and it was the defendant who dealt with the matter in the most casual, off-hand and, indeed, negligent way. The defendant has never transferred the land and has, therefore, never carried out his side of the agreement, and the plaintiff is entitled to be paid his debt.

Judgment for the plaintiff.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *W. Bradley Trimmer & Son*, Alton, Hants (for the plaintiff); *Arthur Taylor & Co.* (for the defendant).
[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

STAPLEY v. GYPSUM MINES, LTD.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), April 16, 21, 22, 23, June 25, 1953.]

Negligence—Breach of statutory duty—Breach fault of deceased jointly with fellow workman—Liability of employers in respect of death of deceased—Apportionment of liability—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

The deceased was employed as a miner in the respondents' gypsum mine. On Aug. 21, 1950, he and D., a fellow workman of equal status, neither being in charge of the other, were directed by a foreman of the respondents to bring down the roof of a stope, in which they were proposing to work, as it was unsafe and likely to fall. After attempting unsuccessfully to bring it down, they jointly agreed to cease their efforts and to carry on with their normal work, D. going to perform some duties nearby, while the deceased went to work in the stope. In acting thus both workmen were in breach of their duty under the Metalliferous Mines General Regulations, 1938, reg. 15. Shortly after resuming work the deceased was killed by a fall of part of the roof. In an action by his widow against the respondents under the Fatal Accidents Act, 1846,

HELD: (i) (LORD PORTER and LORD ASQUITH OF BISHOPSTONE dissenting) in disobeying the foreman's order the deceased and D. were equally negligent and in breach of their duty, and the negligence of the one was so "mixed up" with the negligence of the other that the negligence of the deceased could not be regarded as an independent act, unrelated to and distinct from their negligence, so as to make it the sole "real" or "effective" cause of the accident, and, therefore, D.'s fault should be regarded as having contributed to the accident, and the respondents, as his employers, were liable to the widow in damages.

Observations of VISCOUNT BIRKENHEAD, L.C., in *Admiralty Comrs. v. S.S. Volute* ([1922] 1 A.C. 144), applied.

(ii) the conduct of the deceased in entering and working in the stope before it had been made secure contributed more immediately to the accident than anything that D. did or failed to do, and, therefore, in apportioning the liability under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), the deceased's "share in the responsibility for the damage" should be assessed at eighty per cent., and the respondents were liable for twenty per cent.

Order of the COURT OF APPEAL ([1952] 1 All E.R. 1092), reversed.

AS TO EFFECTIVE CAUSE OF INJURY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-595, paras. 843-845; and FOR CASES, see DIGEST, Vol. 36, pp. 24, 25, Nos. 118-124.

Cases referred to:

- (1) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 29 Digest 229, 1858.
- (2) *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.
- (3) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549; [1949] L.J.R. 727; 2nd Digest Supp.
- (4) *The Bywell Castle*, (1879), 4 P.D. 219; 41 L.T. 747; 41 Digest 771, 6267.
- (5) *Sigurdson v. British Columbia Electric Ry. Co.*, (July 21, 1952), unreported.

APPEAL from an order of the Court of Appeal (SINGLETON, BIRKETT and MORRIS, L.J.J.), dated Apr. 7, 1952, and reported [1952] 1 All E.R. 1092, reversing an order of SELLERS, J., dated Dec. 20, 1951.

The appellant, the widow of a miner employed in the respondents' gypsum mine, claimed damages against the respondents under the Fatal Accidents

Act, 1846, in respect of the death of her husband which was caused by the fall of the roof of a stope in which he was working. The deceased appellant was a workman had been charged by the respondents with the duty of bringing down the roof so as to make the stope safe to work in, but they had failed to do so, and the deceased had gone to work in the stope. The learned judge found in favour of the appellant on the ground that the respondents were liable for the negligence or breach of statutory duty of the workman who was working with the deceased, but he deducted one half of the award which he would otherwise have made, as he held that the deceased was partly to blame for the accident. On an appeal by the respondents and cross-appeal by the appellant, the Court of Appeal held that the deceased's own negligence and breach of statutory duty, and not that of the respondents, was the substantial cause of the deceased's death, and, accordingly, they allowed the appeal and dismissed the cross-appeal.

Beney, Q.C., and *Jukes* for the appellant.

Percy Lamb, Q.C., and *Friend* for the respondents.

The House took time for consideration.

June 25. The following opinions were read.

LORD PORTER: My Lords, this appeal is brought by Mrs. Seagull Gladys Stapley, the widow of Mr. John Sydney Stapley, against a decision of the Court of Appeal which held that her action failed. Before *SELLERS, J.*, she had succeeded in recovering £1,512 10s., being half the damages of £3,025 which that learned judge found that she had sustained from the death of her husband.

Mr. Stapley was employed by the respondents as a breaker in their gypsum mine, and part of his duty was to break up gypsum rock, which had been blasted by a previous shift of workers, in order that it might be removed by scraper haulage from the spot where it lay. The circumstances giving rise to her claim are not in dispute and can be shortly stated. At about 4.15 p.m. on Aug. 21, 1950, Stapley and one Dale, in the course of their employment by the respondents, were underground in No. 9 stope at the respondents' gypsum mine in the county of Sussex. Stapley was a breaker and Dale a borer, which was a slightly more skilled task than that of breaker, but the two men were of equal status. Neither was in control of, or entitled to give orders to, the other. The task of Stapley was to break up gypsum with a pick or a drill to a size convenient for removal, and Dale's task was to prepare the stope in order that a scraper hauler could be installed in it to facilitate the removal of the gypsum. When they were about to commence work in the stope they both observed that the roof was unsafe and likely to fall, a condition which is of frequent occurrence in this class of mine, and particularly so in the stope in question, because a fault in the rock formation ran diagonally across its entrance. While the two men were in the stope and before they had commenced work, the respondents' foreman, Church, in the course of his regulation routine round of the mine came to the entrance of the stope, saw Stapley and Dale, and was informed by them of the condition of the roof. He there and then instructed them both to bring it down so as to render the position safe for work. The task of bringing down the roof was one which was understood by both men and was one within their capacity to perform without supervision. Moreover, they were both well aware that such an order meant that they were not to work in the stope until they had got the roof down. There were three methods by which that task could have been accomplished, all of which were well known to both, namely, with picks, with pinch bars, or by boring holes in the roof and then summoning the shot-firer to blast it down. Church left Stapley and Dale after he had instructed them to bring down the roof, it being unnecessary either for him, or anyone else, to be present to supervise them while they

and this duty. For a period of approximately half an hour they attempted to perform their task, restricting themselves to the use of picks. They might, possibly, have used pinch bars and, certainly, might have resorted to boring and shot-firing, but, having failed to bring down the roof with picks, they decided to disregard the instructions of their foreman and to return to their respective duties of breaker and borer. Having made this decision, Dale went to perform his duties in the twitten near No. 9 stope, leaving Stapley to work in the stope itself under the roof which they had been ordered to bring down and which they both knew had shown signs of danger but believed to be safe enough. A short time after they had abandoned their attempts to bring down the roof and had commenced their respective work, Dale returned to No. 9 stope, and found Stapley buried beneath a quantity of gypsum which had fallen from the roof and killed him.

The liability sought to be placed on the respondents was based on common law and on a breach of the provisions of reg. 7 (3) and reg. 14 (5) of the Metalliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630, as amended by S.R. & O., 1945, No. 1351), made under s. 86 of the Coal Mines Act, 1911, as applied to metalliferous mines by the Mining Industry Act, 1920. Certain others of the regulations were relied on as having some bearing on the point at issue, and are, accordingly, inserted here:

" 7 (3). The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure."

" 14 (1). The owner or agent shall carry out the provisions of the Acts, the regulations, and the special rules and to the best of his power enforce the observance thereof, and he shall give such directions as may be necessary to ensure compliance with those provisions and to secure the safety of the mine, and the safety, health and proper discipline of the persons employed . . . (5). The owner or agent, or an official appointed in writing by him for the purpose, shall—(a) during every ordinary mineral-getting shift, inspect every working place and road in every part of the mine in which persons work or along which they have to pass . . . every dangerous place shall be fenced off, or, if this is not practicable, adequate warning shall be given so that such place shall not be inadvertently entered by any person . . . (7). If any danger is revealed by the examination or inspection, steps shall be taken at once to remove it and except for that purpose any person exposed to the danger shall be withdrawn."

" 15 (1). Every person employed at the mine shall comply with the provisions of the Acts, the regulations and the special rules and any regulations made by the owner or agent in pursuance thereof and with such directions concerning safety and discipline as may be given to him by those in authority over him. (2) Every workman employed in the mine shall, before commencing work, and during the course of it, especially after blasting, make a careful examination of his working place, and so far as practicable remove any or secure any loose rock, stones or ground which might be dangerous. (3). Every person employed at the mine who notices anything that appears unsafe, or likely to cause danger, shall remedy the matter if it is within the scope of his duty, and if not shall withdraw forthwith from the place of danger and report the matter to the owner, agent, or other responsible official . . . (10). No person shall negligently or wilfully do anything likely to endanger life or limb in the mine, or negligently or wilfully omit to do anything necessary for the safety of the mine or of the persons employed therein."

Both grounds of claim were forcibly argued before your Lordships' House, based in each case substantially on the same facts and reasoning. So far as

the statute was concerned it was submitted that the duty under regult was to make the roof and sides of the working place secure was an absolute one, that the respondents had failed to do so, albeit through no personal fault of their own, and that they had not fulfilled the requirements of the regulation, though they had taken all usual or, indeed, all possible steps to comply with their obligations. It is true, the appellant admitted, that contributory negligence was a defence in part to such a claim and it was conceded that Stapley was himself negligent and in part the author of his own death. But Dale, it was urged, was also negligent, as he also had failed to carry out his employers' orders and was in breach of reg. 15 (1), (2), (3) and (10). The respondents, as employers, it was submitted, were responsible for the negligence or neglect of duty of their employees, of whom Dale was one. Dale's action was, it was said, at any rate in part the cause of Stapley's death, and, now that the doctrine of common employment has been abrogated and contributory negligence is no longer a complete defence, Dale's employers are affected by Dale's breach and must pay the penalty, in so far as his fault contributed to the disaster. This view, as I understand it, was that which appealed to the learned judge, and he based his decision on it without distinguishing between a common law and a statutory liability.

C My Lords, a number of alleged acts of negligence were inserted in the statement of claim, but all save two were disposed of by the learned judge and are not now relied on. The two remaining are that the respondents

"failed to make the said roof of the said stope or working place secure, contrary to reg. 7 (3) of the said regulations,"

D and (by amendment) that

"the said Dale their servant failed to bring down the said roof by firing or boring holes for firing and/or failed to report to the said Church his inability to bring down the said roof."

E It was on those allegations, which he found to be proved, that SELLERS, J., held the respondents liable. As, in his view, however, Stapley was in part to blame for the accident, he deducted one half of the award which he would otherwise have given. The appellant now accepts the decision of SELLERS, J., and does not seek to disturb his finding that Stapley's own act contributed to his death or the apportionment consequent thereon. The Court of Appeal agreed that the respondents were in breach of their statutory duty, in that they had not fulfilled the obligation imposed on them by reg. 7 (3) of keeping the roof secure, and that that duty was absolute. They also, like SELLERS, J., were of opinion that both men had failed to carry out the orders of their foreman, Church, and, therefore, had broken the statutory obligation imposed by reg. 15 (1), (2), (3) and (10). Once those findings are accepted it is, to my mind, unnecessary to consider whether either masters or men had neglected any of the other duties which the statute enjoined. They were in breach and it could make no difference whether the breach was less or greater, except, possibly, to the extent to which the blame was distributed and the amount to be deducted from the appellant's award. All the members of the Court of Appeal, however, absolved the respondents from liability, but, so far as I am able to judge, not wholly on the same grounds. It was said, on the one hand, that the obligation placed on Stapley and Dale was a joint obligation and each was wholly to blame for neglecting to carry it out. One can set out the proposition in the words of BIRKETT, L.J. He says ([1952] 1 All E.R. 1101):

"Now, there is no doubt that the men were charged with the statutory duty jointly, and the learned judge so finds. Whatever may be attributed to Dale by way of breach of duty can be attributed to Stapley with equal force. If Stapley had not failed in his statutory duty the drummy roof would have been brought down whatever Dale did or did not do. Why,

Because one of the two men is killed should the breach of duty be attributed to Dale the survivor in order to make the employers liable? It was a joint duty, not the duty of Dale alone, but by the amendment the learned judge indicated that he was deciding the case as though Stapley had nothing to do with the breach of duty that resulted in the drummy roof being left without being brought down, though he recognised that Stapley was equally to blame. The two men had mutually agreed to disobey the orders of Church, and in so doing they committed offences against the Metalliferous Mines Regulation Acts of 1872 and 1875, punishable by fine and imprisonment. It seems to me to be impossible to say that the employers were guilty of a breach of statutory duty because of the default of Dale without saying in the same breath that they were at the same time guilty of the same breach because of the default of Stapley."

The other ground was that the cause of the death was, in the legal sense, the resumption of work by Stapley under the "drummy" roof.

Again, BIRKETT, L.J., says (*ibid.*):

"But I think this appeal can be decided on another ground. It seems clear that if the inquiry to be made is: What was the cause of Stapley's death?, then the answer must be that it was his own breach of duty in resuming work under the drummy roof. If he had not done that, it is obvious that he would not have been killed."

SINGLETON and MORRIS, L.J.J., appear, on the other hand, to rely mainly on the first of the two reasons.

My Lords, I find the first ground elusive and difficult. It may be that in some future case your Lordships will be confronted with the difficulty of finding a solution. For myself, I am content to say that I agree with the judgment of the Court of Appeal on the second point. The cause of Stapley's death, to my mind, was brought about by his own return to the stope. Causation is always a difficult topic. One is but using a commonplace if one repeats that many causes have some place in the sequence of events which lead to a result or if one follows LORD SHAW OF DUNFERMLINE, in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1), in saying ([1918] A.C. 369) that "Causation is not a chain, but a net". The question always is: How far back is one justified in going, or how wide a net must one envisage? In the present case, both men, it is true, neglected their duty, and it is said that they agreed to do so. The exact meaning of what their agreement amounted to has never been inquired into or elucidated. For my own part, I agree with MORRIS, L.J., when he says (*ibid.*, 1106):

"I do not consider that their 'agreement' should be considered as denoting more than their concurrence in a joint decision to abandon their duty to make the roof secure."

Each, in my view, after discussing the matter with the other, went his own way and returned to his own work. If I did not hold this opinion, a further question might require consideration, viz., whether Stapley, in agreeing that Dale should return to his work and leave the appointed task undone, was not to that extent also the victim of his own negligence so that his, and not Dale's, act was the cause of his death. It was urged that, if Dale had insisted on continuing the work or had started to bore holes for shot-firing, Stapley would have followed his lead. It may be so, but such a conclusion is, at best, speculative, and in any case it was not Dale's place to command or persuade his comrade to do his duty. The more forcible argument is to say that Stapley's death was caused by the fall of the roof, that that fall would not have occurred if Dale had either bored the roof for shot-firing and obtained the assistance of a shot-firer, or reported again to Church. It may, indeed, be said that, historically, the fall of the roof was a cause of the accident, but though it was a cause,

yet, in my opinion, it was not, in a legal sense, *the* cause. The result was brought about by Stapley's own act and for that act his employers are not liable.

- A My Lords, a number of authorities were brought to your Lordships' attention, I think for two purposes: (i) to show that the duty of the respondents under reg. 7 (3) was an absolute one, and (ii) to direct your Lordships' minds to the relevant approach to matters of causation. For my own part, I do not find myself much helped in this way. In the first place, I am content, for the purpose of this case, to assume, without deciding, that the employers' duty under reg. 7 (3) is absolute, and such an assumption does not conflict with my view as to what the result of the case should be. In the second place, one example of what has been deemed to be the cause of an event is of but slight assistance to the true view in other and different circumstances. I agree, indeed, with the opinion which has been commonly held since the decision of *Admiralty Comrs. v. S.S. Volute* (2), viz., that the abolition of the rule that any contributory negligence, however small, on the part of a plaintiff defeated his claim has no effect on causation. It enables the court (be it judge or jury) to seek less strenuously to find some ground for holding the plaintiff free from blame, or for reaching the conclusion that his negligence played no part in the ensuing accident, inasmuch as, owing to the change in the law, the blame can now be apportioned equitably between the two parties. What was the cause of an event, however, leads to an inquiry of the same nature as existed before the change. I should add that, if I took the view which commended itself to the learned judge, I should, nevertheless, think the proportions in which he divided the blame attributed far too much to Dale. If I were left to myself I should place it at an infinitesimal quantity, but, if the matter becomes material, I should not think it necessary to dissent from an allowance to the representatives of the deceased man of twenty per cent. of the total damage, i.e., £605.

- E LORD OAKSEY: My Lords, the only question which was decided in the courts below, and the only question fully argued before your Lordships, was whether the breach of duty by Dale was causally connected with the death of the appellant's husband, Stapley. The doctrine of common employment having been abolished, there is no doubt that the respondents are liable for Dale's negligence if it was causally connected with Stapley's death. Dale's negligence was not disputed, but it was argued that Stapley's death was not, in any way, a result of Dale's negligence. Dale and Stapley were ordered to "fetch the roof down" and they understood that order to mean: "Do not work under it until you have got it down". But, notwithstanding these orders, after attempts to get the roof down for about half an hour, they decided, after discussion together, that it was safe and that they would go on with their ordinary work. As Dale was a borer and Stapley a breaker, Dale's work took him away from the place in the mine where they had been trying to get the roof down and Stapley's work took him to that place. There was no suggestion that Dale went where he did because of the order, or to report the matter, or to make any further effort to get the roof down. But it is argued that, because the roof fell while Stapley was under it and Dale was not, Stapley's presence alone was the cause of his death. In my*opinion, they were both equally disobeying an order which applied to each of them, and in so doing they were both equally in breach of their duty. Dale's disobedience continued up to the moment of Stapley's death, and I agree with SELLERS, J., that Stapley's death was a result of their decision not to continue their efforts to get the roof down, a decision which was just as much Dale's decision as Stapley's. As VISCOUNT BIRKENHEAD, L.C., said ([1922] 1 A.C. 144) in *Admiralty Comrs. v. S.S. Volute* (2):

" . . . the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably

deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent . . . might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

VISCOUNT BIRKENHEAD, L.C., was there dealing with acts of negligence which were not synchronous, but in the present case the breach of duty by Dale was synchronous with the breach of duty by Stapley and continued up to the moment of Stapley's death, and it seems to me, looking at the matter broadly and on common-sense principles, impossible to say that the acts of Dale and Stapley did not "come so closely together" and were not so closely "mixed up" that Dale's breach of duty could be regarded as not being part of the cause of Stapley's death.

MORRIS, L.J., was, apparently, of the opinion that, because they agreed to disobey the order and because neither was in a position of authority over the other, the negligence was joint and that Dale's negligence could not have been asserted by Stapley if he had lived, or by his widow in the circumstances of his death. With the greatest respect for the lord justice's opinion, I cannot follow his reasoning. The doctrines of common employment and of contributory negligence having been abolished, the only question is whether, under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), Stapley's death was "the result partly of his own fault and partly of the fault of" Dale, for whose fault the respondents are responsible. It follows, in my opinion, that Stapley, if he had lived, could have asserted as against the respondents that Dale's breach of duty had contributed to the accident and that his widow can do likewise in the circumstances of his death. Each man was responsible for disobeying the order and, in my opinion, it is quite uncertain whether Stapley would have acted as he did had not Dale agreed that the roof was safe and that they should go on with their ordinary work. I think the matter may be tested by considering a case of conspiracy. If an agreement to commit an unlawful act is sufficiently causally connected with the unlawful act to be criminal, how can it be said that an agreement to commit a breach of duty is not causally connected with the consequences to either party of that breach of duty? For these reasons, my Lords, I am of opinion that the judgment of SELLERS, J., was right and ought to be restored on the question of liability. I am not at all certain that I should not have decided the apportionment in the same way as the learned judge did, but in view of your Lordships' view that the apportionment should be varied, I am not prepared to dissent.

LORD REID: My Lords, in the respondents' mines the workings are driven at right angles away from the main haulage way. The actual working place is the stope and the part between it and the haulage way is the twitten. The miners all work in pairs, one being the borer and the other the breaker. There is no sharp demarcation between their work and neither can give orders to the other, though the borer appears to be the senior man. Before the accident Stapley and Dale were working together, Stapley being the breaker. He was a steady workman with long experience, but rather slow. He had for a time been a borer but had reverted to being a breaker. A well recognised danger in the mine is a fall of part of the roof. The roof is not generally shored up as any weakness in it can be detected by tapping it. If it is "drummy", giving a hollow sound, it is unsafe and must be taken down. There are three ways of doing this—with a pick, or with a pinch bar or crow bar, or by firing a shot. Whichever way is adopted, of course, men doing the necessary work must not stand immediately below the dangerous part of the roof. One morning when Stapley and Dale arrived at their stope they tested the roof and found

it to be drummy. They saw the foreman, Church, about it and he ordered them to fetch it down. They all knew that that meant that no one was to work under the roof before it had come down. Church did not say which method was to be adopted. Both men were accustomed to this work and the method was properly left to their discretion. They used picks, but after half an hour had made no impression. The work was awkwardly placed as a fault ran across the mouth of the stope, the floor and roof inside being about eighteen inches higher than outside it. Probably they could not use a pinch bar, but they could easily have prepared the place for firing a shot and sent for the shot-firer. Instead, according to Dale whose evidence was accepted, they agreed that the roof was safe enough for them to resume their ordinary work, and did so. There was a quantity of gypsum lying in the stope and if the roof had been safe their first task would have been to get this to the haulage way.

A To do that, Stapley had to enter the stope and break the gypsum into smaller pieces and Dale had to make preparations in the twitten. So they separated, and when Dale came back half an hour later he found Stapley lying dead in the stope under a large piece of the roof which had fallen on him.

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations, and both ought to have known quite well that it was dangerous for Stapley to enter the stope. The present action against the respondents is chiefly based on Dale's fault having contributed to the accident, and on the respondents being responsible for it, the defence of common employment being no longer available. So it is necessary to consider what would have happened if Dale had done his duty. It was his duty either to try a pinch bar or to start boring holes for the shot-firer, and on the evidence I think that it is highly probable that, if he had insisted on doing that instead of agreeing with Stapley to neglect their orders and the regulations, Stapley would not have stood out against him or tried to resume his ordinary work. Stapley had nothing to gain from his disobedience, and, if he had not found Dale in agreement with him, it appears to me unlikely that he would have persisted. But if he had persisted

E and thereby prevented Dale from carrying out his orders—because Dale could not have worked at the roof if Stapley had persisted in going below it—then it was Dale's duty to go for the foreman, as he, Dale, could not give orders to Stapley. We do not know how soon the roof fell or how long it would have taken Dale to find and bring the foreman, but it is, at least, quite likely that the foreman would have arrived in time to prevent the accident. If Dale's

F failure did contribute to the accident, then I do not see on what ground the respondents can escape liability in respect of that failure.

In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant cannot succeed. But if it was caused partly by his own fault and partly by the fault of Dale, then the appellant can rely on the Law Reform (Contributory Negligence) Act, 1945. To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it. As LORD DU PARCQ said ([1948] 2 All E.R. 246) in *Grant v. Sun Shipping Co., Ltd.* (3):

H “A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims.”

The question must be determined by applying common sense to the facts of each particular case. One may find that, as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be

regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally. It may often be dangerous to apply to this kind of case tests which have been used in traffic accidents by land or sea, but in this case I think it useful to adopt phrases from the speech of VISCOUNT BIRKENHEAD, L.C. ([1922] 1 A.C. 144, 145) in *Admiralty Comrs. v. S.S. Volute* (2), and to ask: Was Dale's fault "so much mixed up with the state of things brought about" by Stapley that "in the ordinary plain common sense of this business" it must be regarded as having contributed to the accident? I can only say that I think it was and that there was no "sufficient separation of time, place or circumstance" between them to justify its being excluded. Dale's fault was one of omission rather than commission and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view of the probabilities in this case and I think that it must lead to the conclusion that Dale's fault ought to be regarded as having contributed to the accident.

Finally, it is necessary to apply the Law Reform (Contributory Negligence) Act, 1945. SELLERS, J., reduced the damages by one half holding both parties equally to blame. Normally one would not disturb such an award, but SELLERS, J., does not appear to have taken into account the fact that Stapley deliberately and culpably entered the stope. By doing so, it appears to me that he contributed to the accident much more directly than Dale. Section 1 (1) of the Act directs that the damages

" . . . shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do. I agree with your Lordships that in all the circumstances it is proper in this case to reduce the damages by eighty per cent. and to award twenty per cent. of the damages to the appellant. I have not dealt with the question whether, at the time of the accident, the respondents were in breach of reg. 7 (3) of the Metalliferous Mines General Regulations, 1938, because, whichever way that question was decided, it would not in this case affect my view as to the amount by which the damages should be reduced.

LORD TUCKER: My Lords, I need not repeat the facts as found by the learned judge. It will, I think, tend to simplify the case if these facts in relation to their causal effect are considered irrespective of the accidental circumstances as to which of the actors happens to be, or to be regarded as standing in the position of, plaintiff or defendant in the action. Two men, named Stapley and Dale, disobeyed the lawful instruction of their foreman, Church, "to bring down the roof" of the stope. It is common ground that this instruction meant, and was understood to mean, that they were to bring it down by the use of a pick or pinch bar or, if either of these methods failed or was impracticable,

to bore holes and get the shot-firer to blast it down. Failing all these methods their duty was to report the matter to Church. Having tried for about half an hour to get the roof down with a pick, they did not adopt any of the other methods or report to Church. The result was that the roof remained insecure and dangerous, and if any one entered the stope in that condition an accident was liable to occur. Someone did enter and an accident did occur.

A My Lords, I cannot avoid the conclusion that the failure of these men to carry out their instructions was a contributory cause of the accident. In *Admiralty Comrs. v. S.S. Volute* (2) VISCOUNT BIRKENHEAD, L.C., said ([1922] 1 A.C. 144):

B “Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under *The Bywell Castle* (4) rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.”

C Towards the conclusion of his speech he observed (*ibid.*, 145):

“The *Volute*, in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision.”

D In this connection I venture to quote a passage from a recent judgment of the Privy Council in *Sigurdson v. British Columbia Electric Ry. Co.* (5), because it was the judgment of the Board including VISCOUNT SIMON, LORD NORMAND and LORD OAKSEY, although it was delivered by me. After referring to the above quoted passages from the *Volute* (2) the judgment proceeded:

E “This was an Admiralty case, but now that common law courts have to apply the same principles to cases of collision on land it seems to their Lordships that this language will be found particularly suited to the exposition to a jury of the principles which they have to apply in these cases, and is much to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence of the other party and his appreciation of the resulting danger and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Time and knowledge may often be decisive factors but it is for the jury or other tribunal of fact to decide whether, in any particular case, the existence of one of these factors results or does not result in the ascertainment of that clear line to which VISCOUNT BIRKENHEAD referred—moreover, their Lordships do not read him as intending to lay down that the existence of ‘subsequent’ negligence will alone enable that clear line to be found.”

H My Lords, in the present case, the negligence of Stapley in going into the stope seems to me to be “so . . . mixed up with” the negligence of Dale and himself in not obeying their instructions that it cannot be regarded as an independent act unrelated to and distinct from their disobedience so as to make it the sole “real” or “effective” cause of the accident. The decision in these cases is one of fact and degree, and I see no reason for rejecting the conclusion arrived at by SELLERS, J., on this issue. If your Lordships were compelled as a matter of law to hold otherwise, it would appear that no relief is afforded by the Law Reform (Contributory Negligence) Act, 1945, in a great

number of cases under the Factories Act, 1937, where employers are in breach of their obligation to fence but an operative has been negligent in working at an unfenced machine.

My Lords, so far as causation is in question, it can make no difference whether Stapley or Dale was the person injured, nor can it matter whether Stapley was one of two or one of a hundred men who acted in disobedience to the order. Each of them was guilty of a separate and independent act of negligence and breach of statutory duty which was a contributory cause of the accident. It is admitted that, in acting as he did, Dale was in breach of reg. 15 (1) and (10). On the facts of this case these breaches clearly also constituted negligence at common law for which the respondents are responsible. As to the proper proportion of responsibility to be attributed to them, the learned judge does not appear to me to have given sufficient weight to the important fact that it was Stapley alone who entered the dangerous stope. Dale and Stapley were, no doubt, equally at fault up to that stage, but then Stapley alone acted in contravention of reg. 7 (3) by entering and working in the stope which had not been made secure. He must, I think, consequently bear a much larger share of responsibility than the respondents. I agree to the proposed proportions of eighty per cent. and twenty per cent. On this view of the case I have not found it necessary to decide whether the respondents were in breach of their duty under s. 23 of the Metalliferous Mines Regulations Act, 1872, and reg. 7 (3) of the Metalliferous Mines General Regulations, 1938 [which regulations were substituted by the preamble thereto for the general rules originally contained in s. 23], because on any view it would not affect my conclusion on liability or the proportions of responsibility indicated above. I desire to reserve for future consideration, if and when it arises, whether the result would be different if Dale's acts or omissions had not amounted to negligence, but had only been breaches of statutory duties imposed on him personally. For the reasons stated, I would allow the appeal and assess the damages recoverable by the appellant at the sum of £605. I agree to the order proposed as to costs.

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree that if, as the majority of your Lordships hold, contributory negligence by the respondents is established and, therefore, a question of apportionment arises, the appellant should not recover more than twenty per cent. of the damage. I find myself, however, unfortunately in disagreement with the majority of your Lordships in so far as you hold that any contributory negligence has been proved, and wish to record, briefly and with respect, my reasons for concurring with the conclusions on this issue of my noble and learned friend, LORD PORTER.

There was in this case, in my opinion, no breach by the respondents, by themselves, or by any servant or agent, of the Metalliferous Mines General Regulations, 1938, made under s. 86 of the Coal Mines Act, 1911. The respondents carried out their obligations under reg. 7 (3) to the letter, if the first line and a half of that regulation be read with the last two and a half lines. If the respondents detail X. and Y. to repair a defect in the walls or roof to restore safety, they cannot possibly, it seems to me, be told that they are breaking the regulation by permitting the repairers to work in a working place which, pending the completion of the repair, is insecure. It was further suggested that the respondents were guilty of a breach of reg. 15 (1). This is a regulation binding on the employee only. It binds him to comply with "such directions concerning safety and discipline as may be given to him by those in authority over him." It was, however, argued that a breach of this regulation by the employee was a breach by the mineowner, on the principle of respondeat superior, which is now disencumbered from the fetters of the doctrine of common employment. This argument, in my view, also fails, so far as it is based on the

regulations, since reg. 14 (1) defines the extent to which the mineowners are to be liable for the failure of their employees to carry out the provisions of the regulations and provides that the owner or agent need only "enforce the observance thereof" "*to the best of his power*". This the respondents clearly did, on the facts of the present case. The regulations were, in my view, complied with, and I only mention them because a very large percentage of the argument was devoted to their supposed breach and its consequences.

A But, it is said, the matter does not rest on the regulations. Over and above them, and unimpaired by them, there is the common law liability of the employers to use all due care for the safety of their employees. This duty, the argument runs, was infringed when Dale, an employee of the owners, acting within the course of his employment, failed to carry out the instructions of Church, the foreman, and this, it is said, was a contributory cause of Stapley's death.

B That Dale was in breach of his duty seems to me undeniable. He, like Stapley, was told (i) to bring down the roof of the dangerous stope; (ii) not to work on the stope till the roof had been brought down. Stapley violated both of these injunctions. Dale violated only the first. Of the three well-recognised methods of bringing the roof down, one—that of fetching the shot-firer and getting it blasted down—he failed to employ, and was a consenting party to

C an arrangement whereby each of them, he and Stapley, should proceed with their respective normal tasks, without that method having first been resorted to. Let it be assumed, therefore, that Dale was guilty of a negligent act committed within the course of his employment. Does it follow, as the night does the day, that Dale's omission, the negligence of Stapley's act being undisputed, was contributory negligence in part causing the mishap to Stapley? In my

D view it does not. The Court of Appeal has so held. Like my noble friend, LORD PORTER, I am not confident that I can wholeheartedly subscribe to the ground on which BIRKETT, L.J., based his conclusion in this sense. He seems to say that, since Stapley's negligent act in resuming work at the dangerous stope with the roof still intact was sufficient in itself to cause the disaster without assistance from any positive negligent act by Dale, ergo the court

E need not take into account the fact that, if Dale had done his duty, the consequences of Stapley's breach of duty might have been averted, and that, consequently, Dale's omission was not a contributory cause of the accident. While I feel, with great respect, doubt about the validity of this reasoning, I consider that the conclusion of the lords justices can, and should, be supported on a different ground.

F Courts of law must accept the fact that the philosophic doctrine of causation and the juridical doctrine of responsibility for the consequences of a negligent act are not congruent. To a philosopher—a term which I use in no disparaging sense, for what is a philosopher but one who, *inter alia*, reasons severely and with precision?—to a philosopher, the whole legal doctrine of responsibility must seem anomalous. To him, if event C could not occur unless each of two

G previous events—A and B—had preceded it, it would be unmeaning to say that A was more responsible for the occurrence of C than was B, or that B was more responsible for its occurrence than was A. The whole modern doctrine of contributory negligence, however, proceeds on the contrary assumption. If not, there would be no question of apportionment. But the fission between law and strict logic goes deeper than that. For I am persuaded that it is still

H part of the law of this country that two causes may both be necessary pre-conditions of a particular result—damage to X—yet the one may, if the facts justify that conclusion, be treated as the real, substantial, direct or effective cause, and the other dismissed as at best a *causa sine qua non* and ignored for purposes of legal liability. This is a doctrine affirmed by your Lordships' House, and not, in my view, displaced by the Law Reform (Contributory Negligence) Act, 1945. On the contrary, the words "as the result of" in s. 1 (1) of that

statute impliedly preserve the doctrine, the assertion of which your Lordships have more than once coupled with an admonition that, if the conditions for its application occur, a judge sitting alone should assume the mantle and the mentality of a jury, and should take what is called a "broad common-sense view" in deciding whether one of the causes (there may be two or twenty) is the "real" cause. Approaching the matter from this angle, I have hardly any doubt that a jury would have said that the real cause of this mishap was Stapley's resumption of work at the perilous place without the roof having been brought down. While, no doubt, they would have realised that, if Dale had acted in conformity with his duty, this result *might* have been averted—it is a pure speculation whether it would or not—yet I am satisfied that they would have said Stapley's act was the real and substantial cause. His resumption of work, in the circumstances, was the crossing of the legal Rubicon. For that reason I agree with my noble friend, LORD PORTER, that the appeal should be dismissed, but, as a majority of your Lordships are of a contrary opinion, I repeat that I think twenty per cent. is a reasonable percentage for the widow to recover.

Appeal allowed.

Solicitors: *Rowley, Ashworth & Co.* (for the appellant); *Blyth, Dutton, Wright & Bennett*, agents for *Menneer, Idle & Brackett*, St. Leonards-on-Sea (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

TERRELL v. SECRETARY OF STATE FOR THE COLONIES AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), June 4, 5, 17, 19, 1953.]

Judge—Colonial judge—Tenure of office—Tenure during pleasure—Appointment by letter from Secretary of State—No contractual force.

In 1930, by letters dated July 15 and Aug. 7, the claimant was offered by the Secretary of State for the Colonies the appointment of a judge of the Supreme Court of the Straits Settlements. One of the matters mentioned in the letter was that the compulsory retiring age would be sixty-two. The claimant accepted the appointment on the terms stated in the letters. In 1942, when Malaya was occupied by the Japanese, he was on leave in Australia, and was unable to resume his office until the British regained control of Malaya. In March, 1942, he was informed that, as no other suitable appointment in the colonial legal service could be found for him, he must be awarded a pension on abolition of office, and on July 7, 1942, his appointment was ended, seventeen months before his sixty-second birthday. On a claim by him that he was not liable to be dismissed before he reached the age of sixty-two, when he would be entitled to a larger pension,

HELD: (i) judges in Malaya did not hold their office during good behaviour, but they held, and always had held, office at the pleasure of the Crown, and, therefore, the claimant had held office during pleasure.

(ii) the right of the Crown to dismiss at pleasure was a rule of law which could not be taken away by any contractual arrangement made by any executive officer or department of State, and, therefore, the letters of July 15 and Aug. 7, 1930, did not constitute a contract between the claimant and the Crown that the Crown would employ him till he reached the age of sixty-two, and, therefore, his claim must be dismissed.

AS TO TENURE OF JUDICIAL OFFICE IN THE COLONIES, see HALSBURY, *Hailsham Edn.*, Vol. 11, p. 207, para. 397; and FOR CASES, see DIGEST, Vol. 17, p. 451, Nos. 202-206.

Cases referred to:

- (1) *Cooper v. Stuart*, (1889), 14 App. Cas. 286; 11 Digest 572, *g*.
- (2) *Freeman v. Fairlie*, (1828), 1 Moo. Ind. App. 305; 18 E.R. 117; 17 Digest 459, 264.
- (3) *Yeap Cheah Neo v. Ong Cheng Neo*, (1875), L.R. 6 P.C. 381; 17 Digest 458, 251.
- (4) *Choa Choon Neoh v. Spottiswoode*, (1869), 1 Kyshe's Reports, 216; Wood's Oriental Cases, App. I; 37 Digest 71, 118.
- (5) *Dunn v. Reginam*, [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 11 Digest 506, 83.
- (6) *Shenton v. Smith*, [1895] A.C. 229; 64 L.J.P.C. 119; 72 L.T. 130; 11 Digest 505, 78.
- (7) *Rodwell v. Thomas*, [1944] 1 All E.R. 700; [1944] K.B. 596; 114 L.J.K.B. 6; 171 L.T. 278; 2nd Digest Supp.
- (8) *Pillans v. Van Mierop*, (1765), 3 Burr. 1663; 97 E.R. 1035; 12 Digest, Replacement, 198, 1372.
- (9) *Rann v. Hughes*, (1778), 7 Term Rep. 350, n. (101 E.R. 1014); 4 Bro. Parl. Cas. 27; 12 Digest, Replacement, 198, 1373.
- (10) *Willis v. Gipps*, (1846), 5 Moo. P.C.C. 379; 13 E.R. 536; 17 Digest 451, 202.
- (11) *Reilly v. Regem*, [1934] A.C. 176; 103 L.J.P.C. 41; 150 L.T. 384; Digest Supp.
- (12) *Mackay v. Lord Advocate*, 1937 S.C. 860.

AWARD in form of Special Case stated by arbitrator.

By a letter dated July 15, 1930, the Secretary of State for the Colonies offered the claimant, Arthur Koberwein a'Beckett Terrell, a member of the English Bar, then aged 49, practising as an advocate and solicitor in the Straits Settlements since 1909, an appointment as a puisne judge of the Supreme Court of the Straits Settlements. One of the terms of the offer was that he should not resume his practice in Malaya after retirement. At the same time he was sent a copy of the regulations governing leave and pension. On July 20, 1930, he wrote to the Under-Secretary of State pointing out that, as the rules provided for a minimum of ten years' service as a qualification for pension, and for compulsory retirement at the age of fifty-five, they could not apply to him. On Aug. 7, 1930, the Secretary of State wrote to the claimant stating that he had been selected for appointment on the terms of the letter of July 15, that his special position was governed by reg. 13 (1) of Regulations 2285 of 1928, made under the Straits Settlements Pensions Ordinance, 1928 (No. 22 of 1928), which specified seven years as a qualifying term for a pension, and that the compulsory retiring age in the case of a judge was sixty-two. The claimant accepted the appointment on these terms and was appointed by letters patent under the seal of the colony dated Jan. 23, 1931. He served as a judge of the Supreme Court of the Straits Settlements until Jan. 1, 1940, when he became a judge of appeal of the Supreme Court. In February, 1942, when Malaya was occupied by the Japanese, the claimant was on leave in Australia and it became impossible for him to resume his duties until control of Malaya by the British was regained. On Mar. 10, 1942, he was informed that the Secretary of State regretted that he could find no suitable post for him to occupy in the colonial legal service between the expiration of his leave and December, 1943, when he would reach normal retiring age. He was invited to ask for permission to retire and was told that the retirement would become effective three months after notice of acceptance. He felt unable to comply with this suggestion and asked that he might remain on half pay until a suitable appointment became available. On Apr. 7, 1942, the official secretary to the High Commissioner for the United Kingdom in Australia wrote to the claimant, at the request of the Secretary of State, stating that, as there was no suitable

legal appointment, he could not justify retaining him on half pay as his post was necessarily in abeyance, and, therefore, there was no alternative but to award him a pension on abolition of office, and his retirement would take effect and pension commence on the expiration of his leave or three months after the date of the letter, whichever was the later. In the result, his appointment ended on July 7, 1942, seventeen months before his sixty-second birthday. From that date he was paid a yearly pension of £722 18s. 11d., being the pension appropriate to the length of his service if he had retired on that date, whereas, if he had been treated as continuing in office until he was sixty-two, he would have been entitled to a salary of £1,820 per annum till that age and thereafter a pension for life of £812 per annum.

A dispute whether the claimant was liable in law to be required to retire from the position he held as judge of appeal before reaching the age of sixty-two was referred to an arbitrator, who, at the parties' request, stated his award in the form of a Special Case. The arbitrator's findings of law were that: (i) judges of the Straits Settlements and of the Supreme Court of Malaya held office during pleasure; (ii) they were, in any case, subject by statute to compulsory retirement at the age of fifty-five; (iii) the letters of July 15 and Aug. 7, 1930, did not constitute an enforceable contractual obligation, and, even if they did, the claimant was not thereby exempted from his liability to compulsory retirement at the age of fifty-five; (iv) if his finding on (i) was correct, the Crown was not prevented by the representations contained in the letters of July 15 and Aug. 7, 1930, from legally dismissing the claimant before he attained the age of sixty-two, but, if his finding on (i) was wrong, the Crown was in equity prevented from asserting that the claimant was in law liable to be dismissed before attaining the age of sixty-two.

The arbitrator set out the following points of law to be decided by the court:— (i) whether judges of the Straits Settlements and of the Supreme Court of Malaya held office during pleasure; (ii) whether such judges were in any case subject to compulsory retirement at the age of fifty-five; (iii) whether (a) the letters of July 15 and Aug. 7, 1930, amounted to an enforceable contractual obligation annexed to the appointment, and if so (b) whether, as the result of that obligation, the claimant was not liable in law to be required to retire before reaching the age of sixty-two; (iv) whether, by reason of the representations contained in those letters, the Crown was prevented from legally dismissing the claimant until he had attained the age of sixty-two.

Sir Frank Soskice, Q.C., E. Terrell and K. J. T. Elphinstone for the claimant.

The Attorney-General (Sir Lionel Heald, Q.C.) and J. P. Ashworth for the Crown.

Cur. adv. vult.

June 19. **LORD GODDARD, C.J.**, read a judgment in which he stated the facts and continued: The questions mainly argued before me were (i) Does a judge in Malaya hold his office at the pleasure of the Crown, or is he protected by the provisions of s. 3 of the Act of Settlement, 1700, whereby judges hold their office during good behaviour and can only be removed by an address of both Houses of Parliament? (ii) If a judge is appointed during pleasure and not during good behaviour, was there here a contract that the Crown would employ the claimant until he attained sixty-two, and, if so, can he sue the Crown on that contract?

As to the first contention, counsel for the claimant submitted that the provisions of the Act of Settlement relating to the tenure of a judge are so fundamental in the law of this country that they would form part of the law of a new colony when it was first settled. The doctrines relating to the application of English law to territories acquired by the Crown are to be found in **BLACKSTONE'S COMMENTARIES**, vol. I, [107], and his statement of the law was approved in *Cooper v. Stuart* (1). The mode of acquisition may vitally affect

the application, or, at least, the extent of the application, of English law to the acquired territory. If, at the time of annexation by cession or conquest, there exists there a system of law, that will be the law of the country until it is altered by legislation, but there may exist a system of law adapted to the requirements of a native population but unsuitable for English settlers, in which case the settlers will carry the English law with them, at least so far as is necessary to the conditions of the new colony, as in the case of the settlement of unoccupied territory: see *Freeman v. Fairlie* (2), a case relating to India. This seems to have been the position with regard to the Straits Settlements, which were first colonised by the East India Company, and is, I think, recognised by the decision in *Yeap Cheah Neo v. Ong Cheng Neo* (3), which approved a statement of the law on this point by SIR BENSON MAXWELL, C.J., in *Choa Choon Neoh v. Spottiswoode* (4) (1 Kyshe's Reports, 221), referred to in BRADDELL'S THE LAW OF THE STRAITS SETTLEMENTS, 2nd ed. (1931), vol. 1, p. 62. But, in my opinion, it is quite impossible to say that the particular provision of the Act of Settlement relating to English judges of the superior courts automatically became the law of this, or any other, colony. A short answer is that while the section provides for judicial office being held during good behaviour, thus preventing the arbitrary removal of a judge, it also provides that he may be removed by an address of both Houses of Parliament. This appears to me to be wholly inapplicable to a colonial judge, for I cannot believe that it would be right to hold that he could only be removed by an address of both Houses of the Imperial Parliament. It is for the Crown, by exercise of the prerogative, or Parliament, by statute, to set up courts in acquired territory, whether the acquisition be by cession, conquest, or mere settlement, and the conditions under which judges of those courts are to hold their office must depend on the terms on which the Crown or Parliament establish them.

In considering under what tenure the judges in Malaya hold office it is not, I think, necessary to go into a long history of the colony, for in 1866 the Straits Settlements Act (29 & 30 Vict. c. 115), was passed providing, among other things, for the establishment of courts of law in the Straits Settlements. It is, however, by no means unimportant to see what the position was with regard to courts and judges in the colony before the Act was passed. A charter of justice known as the Third Charter had been granted by the Crown in August, 1855, and was ratified by a statute passed in the same year (18 & 19 Vict. c. 93, s. 4). The court established thereunder was to consist of two divisions, one sitting at Singapore and Malacca, the other at Prince of Wales' Island, afterwards known as Penang. The judges were the governor, the resident councillor for the time being of the station in which the court sat, and, as professional judges for each division, the recorders of Singapore and Penang. It was expressly provided in the charter that the recorders should hold office during pleasure. A colonial governor always holds office during pleasure and the resident councillor was also a royal appointment, and the charter provided that they should act as judges during their term of office. It is clear, therefore, that when the Act of 1866 was passed, the judges held office during pleasure. Section 2 of that Act empowered Her Majesty by Order in Council *inter alia* to constitute such courts and officers as might be deemed advisable, any law, statute or usage to the contrary in any wise notwithstanding, thus, in my opinion, giving a complete and unfettered discretion to the Crown as to the terms on which judges and officers might be appointed. By the following section Her Majesty was given power to delegate her powers to three or more persons within the Settlements, and powers have been delegated by the Crown from time to time by letters patent to the governor and executive council.

Consequent on this Act and the delegation, the Supreme Court of the Straits Settlements was established by the Supreme Court Ordinance, 1868 (No. 5 of 1868). Thereunder, the recorder of Singapore became the chief justice of the

Straits Settlements and the recorder of Penang became the first judge of Penang, and it was provided by s. 6 that future judges should be appointed by Her Majesty by letters patent under the public seal of the colony to be issued in pursuance of a warrant under the sign manual or signet. There is nothing whatever in the ordinance to indicate that the tenure of these judges was changed, and the only possible inference is that they, as judges of the newly constituted court, held office at pleasure, as they had in the former court. It cannot be supposed that the tenure of future judges was intended to be in any way different from that by which the chief justice and the other senior judge, who were the original judges of the new court, held their offices. The ordinance in force at the time of the claimant's appointment was the Courts Ordinance, 1926 (Revised Laws, 1926 (No. 101)), and s. 4 (1) provided that judges of the Supreme Court should be appointed by His Majesty by letters patent under the public seal of the colony to be issued in pursuance of any warrant to be granted by His Majesty under his sign manual and signet, and this provision again appears in s. 4 (1) of the consolidating ordinance, the Courts Ordinance, 1935 (Revised Laws, 1936 (c. 10)). The royal letters patent of February, 1911, which are the instructions by the Crown to the governor, provide (as there is no doubt that earlier editions did, for, as I shall mention later, I have seen them) that

"the governor may, in our name and on our behalf, constitute and appoint all such judges, commissioners, justices of the peace, and other necessary officers as may be lawfully constituted or appointed by us, all of whom, unless otherwise provided by law, shall hold their offices during our pleasure."

It is not without importance to observe that, when those letters patent of February, 1911, were sealed, the material section of the Act of Settlement had long been repealed. It was repealed by the Statute Law Revision Act, 1881, as no longer necessary because a similar provision had been inserted in the Supreme Court of Judicature Act, 1873, which indisputably applied only to the Supreme Court of this country. So I can find no statutory provision that could apply to the judges of the Straits Settlements in 1911 making their offices tenable on conditions different from those which existed in 1868. The words "unless otherwise provided by law" are probably inserted *ex abundanti cautela*, and, in any case, would safeguard the position if a subsequent legislative provision were made altering the tenure of office for the future. At a late stage in the argument I was shown and asked by both parties to look at the royal warrant to the governor, authorising him to seal the letters patent appointing the claimant to his office. This is the warrant contemplated by s. 4 (1) of the 1926 ordinance. It carries the matter no further as it follows the terms of the letters patent to the governor, and requires him to seal letters patent appointing the applicant to hold his office during His then Majesty's pleasure.

In my opinion, it is clear that judges in the Straits Settlements—or Malaya to use the modern nomenclature—hold, and always have held, their office at the pleasure of the Crown. It does not appear to me that there is anything surprising in this. So accustomed are we in this country nowadays to the exceptional position occupied by the judges of the Supreme Court that we are apt, perhaps, to forget that their independence is comparatively modern in the long history of our law. Professor MAITLAND points out in his *CONSTITUTIONAL HISTORY OF ENGLAND* (pp. 68, 69) that it was in the reign of Henry II that a body of professional judges first emerged to cope with the increasing work of the *curia regis*, and from them evolved the superior courts of common law. So from the middle of the twelfth century to the last years of the seventeenth century, so far as any statutory provision was concerned, the judges of the royal courts, undoubtedly, held their office at the pleasure of the sovereign, though, according to HALLAM'S *CONSTITUTIONAL HISTORY OF*

ENGLAND (1869 ed.), p. 736, the commissions of the judges in the reign of William III were made "*quamdiu se bene gesserint*". The great majority of judicial personages in this country do not enjoy the exceptional position of the judges of the Supreme Court. County court judges do not, though they do have a measure of protection by s. 7 of the County Courts Act, 1934, nor do justices of the peace, who deal with something like ninety per cent. of all criminal cases as well as with a multitude of civil matters. They have no security of tenure.

A Stipendiaries hold office during pleasure: see the Stipendiary Magistrates Act, 1863 (26 & 27 Vict. c. 97), s. 3, and the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 161. So do the metropolitan police magistrates by the Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 1. Therefore, it is not fundamental to the office of a judge that he should possess the immunity with which it was found necessary to clothe the judges of the Supreme Court by reason of what was considered the undue subservience of the judiciary in the time of the Stuarts towards the sovereign, and, more particularly, the attitude that they had taken up under fear of dismissal in upholding the exercise of the suspending power by James II. I recognise, of course, that the judicial personages to whom I have referred, with the exception of justices of the peace, are appointed under modern statutes, and the legislature can impose any terms which seem to it appropriate. So here, in my opinion, the legislature has left it to the Crown to determine the tenure of the judges in Malaya, and the Crown has determined it by the letters patent and the royal warrant. It is no reflection on the high standard and learning of the colonial judicial service to say that they hold office during pleasure. It may well be that when setting up courts in colonies, when in their infancy and when communications were difficult and lengthy, the Crown desired to retain a fuller and more speedily exercisable control over the judges of those colonies than existed in this country.

Through the courtesy of the librarian of the India Office library I have been able to see the letters patent which set up the High Courts in India. The first of these were the letters patent of Mar. 26, 1774, issued pursuant to 13 Geo. 3, c. 63, establishing a Supreme Court at Fort William for the province of Bengal. E They provided for a chief justice and two puisne judges to be appointed during pleasure, and men of the quality and standing of Sir Elijah Impey, the first chief justice of Bengal, and Sir Robert Chambers, the friend of Blackstone and his successor in the Vinerian Chair at Oxford, were content to accept office on those terms. Similar courts were established at Madras in December, 1800, and at Bombay in December, 1823, and the first court for Prince of Wales' F Island, Singapore and Malacca was set up by letters patent of November, 1826, the previous court, for Prince of Wales' Island only, having been established in 1807. In the letters patent by which all these courts were established, the same provision as to the tenure of the judges is found. That there has never been a demand to alter the terms of appointment of the judges in the colonial legal service may, indeed, be regarded as a tribute to the general judicial G conduct and quality of those who fill these positions. I may add, before leaving this part of the case, that it seems clear that both the clause in the letters patent of February, 1911, to which I have referred, and the Pensions Ordinance, 1928 (Revised Laws, 1936 (c. 78)), s. 11 (1), which provides that the governor may require the retirement of a judge at a certain age, clearly proceed on the assumption that a judge in Malaya holds his office at pleasure, and it would H seem strange indeed if not only the Secretary of State on whose advice the letters patent are issued, but also the legislative council which passed the ordinances, have all along been under a misapprehension as to the tenure whereby a judge of the colony holds his office. If a tenure equivalent to that conferred by the Act of Settlement were intended, I should expect to find it stated clearly somewhere, and not left to be implied by inference.

Then it is submitted that, even if the judges held office during pleasure,

the effect of the correspondence to which I have referred earlier in this judgment is to constitute a contract between the Crown and the claimant that he should be retained in office till he attained the age of sixty-two. The present court is a creation of the Act of 1866 which, by the section already quoted, gave the Crown complete freedom as to the constitution of the courts and its officers. I have difficulty, therefore, in seeing how the Secretary of State, on whose behalf the letters were written, would have authority to bind the Crown, even if he had purported to do so. So to do would appear to me clearly to constitute a clog on the Crown's right to dismiss at pleasure. I regard this right as a rule of law firmly established by the decisions (for instance, *Dunn v. Reginam* (5), *Shenton v. Smith* (6), and *Rodwell v. Thomas* (7)), and once it is established that the Crown has power to dismiss at pleasure, that right cannot be taken away by any contractual arrangement made by an executive officer or department of State. Counsel for the claimant argued that this doctrine is founded on public policy, and referred to passages in the judgment of the Court of Appeal in *Dunn v. Reginam* (5), and contended that considerations which might apply to the appointment of civil servants or military officers cannot apply to a judge. In my opinion, once a doctrine has become a rule of law, as I think this has, the court is bound to apply it without inquiring into its origin. It was by inquiring into the origin of the rule of law that consideration is necessary to support a simple contract that LORD MANSFIELD fell into error when he held, doubtless to the astonishment of the profession, in *Pillans v. Van Mierop* (8), that an agreement evidenced by a document under hand only, but without consideration, could be supported. As Sir William Holdsworth and Sir Frederick Pollock have shown, historically LORD MANSFIELD'S opinion was correct, but it was too late in 1765 to question what had become a rule of law and so the House of Lords held, thirteen years later, in *Rann v. Hughes* (9). Moreover, I can see no good reason why a judge appointed during pleasure should be in any different position from this point of view from any other person in the service of the Crown. KAY, L.J., in *Dunn v. Reginam* (5), said ([1896] 1 Q.B. 120):

"It seems to me that the continued employment of a civil servant might in many cases be as detrimental to the interests of the State as the continued employment of a military officer. It is impossible not to see that in remote places on the frontiers of our territory the question of peace or war might depend on the action of a civil servant on the spot; and it seems to me that there is as much ground for the possession by the Crown of an unrestricted right of dismissal in the case of civil service as there is in the case of military service."

That he uses the illustration of "the question of peace or war" does not rule out other considerations, and were a colonial judge to exercise his office in a brutal, tyrannical or incompetent manner the consequences might be quite as, if not more, detrimental to the peace and good order of a colony as the action of a civil servant or military officer. I cannot find that this doctrine has been laid down in such terms as would exclude a judge, and, indeed, *Willis v. Gipps* (10) seems directly to apply it to judges. But, as I have said, even if the Secretary of State purported to contract with the claimant he could not, in my opinion, limit the power of the Crown to dismiss at pleasure. He might have advised the withdrawal of the letters patent of February, 1911, and the issue of others giving the governor directions to appoint judges during good behaviour, or he might have advised a royal warrant to be issued under s. 4 (1) of the Courts Ordinance, 1926 (Revised Laws, 1926 (No. 101)), authorising the governor in a particular case to appoint, not at pleasure, but during good behaviour, and then the appointment would be by the Crown, and I have no doubt that if His late Majesty had chosen to appoint a judge on those terms the appointment would have been perfectly valid. But, the claimant having been appointed to

hold office during pleasure, in my opinion, no correspondence which took place before or after the appointment can affect the terms of appointment.

A Apart from this, however, I agree with the learned arbitrator that a judge holds office by royal appointment, and not by contract. I think that the correspondence referred to does no more than inform the claimant of the general conditions applicable to the office. It tells him that at the age of sixty-two he will have to retire and may expect to receive a pension; it does not amount to an agreement that he is to be appointed for a definite period, and not at the pleasure of the Crown. Counsel for the claimant placed great reliance on *Reilly v. Regem* (11), but I do not read that case as going anything like the length for which he contends. The actual point material to this case which the Judicial Committee decided was that, if the terms of an appointment definitely prescribe a term and expressly provide for a power to determine "for cause", that excludes an implication that the appointment is at pleasure.

B The case also shows that there may be contractual rights existing before determination of a contract at will which are not inconsistent with a power to determine. Thus, if a servant is engaged, whether by the Crown or an individual, at a salary, but on the terms that he may be dismissed at will, if he is dismissed he may recover his salary for the time that he has served. Since that case

C I think it may very well be that, if the Crown appoints to an office on the terms that it is to be held during good behaviour or that the holder is only to be removed "for cause"—which is really the same thing—he would be entitled formerly to present a petition of right and now to bring an action if he were removed without cause. The claimant admitted in his reply that he was appointed under art. 14 of the letters patent of 1911 to the governor and sought to rely on that article. Counsel for the claimant argued that that admission was made per incuriam, but, even if it was, it does not, in my opinion, alter the position. In strictness the claimant was appointed by letters patent issued pursuant to the royal warrant which follows the terms of art. 14, and, as I have already said, I regard the correspondence merely as telling him of the age of compulsory retirement and of the pension at whatever age he retired that he might expect. I say "expect", because under the ordinance there

E is no absolute right to a pension. Were I to accede to the argument that these letters amount to a contract, I should be holding, in effect, that every person entering the service of the Crown who is told before he enters that his retiring age will be so and so could say that he has a contractual right to remain in the service till that age, and this would, in effect, override all the cases which

F have decided that a servant of the Crown holds office at pleasure, at least unless his appointment definitely prescribes a term or expressly provides for a power to determine only "for cause". That seems to have been exactly the argument put forward in *Shenton v. Smith* (6), and rejected by the Judicial Committee.

G As I have already held that the claimant's appointment was at pleasure and that there was no contract by the Crown, I do not find it necessary to deal with the questions of estoppel which were argued before me, except to say that, in my opinion, no estoppel here arises, and, in any case, the claimant cannot use an estoppel, even if it did arise, as giving him a cause of action, for, in effect, he is plaintiff, and, though the matter is an arbitration, he is really claiming a declaration that he was wrongly removed and has certain additional pension claims in consequence.

H I ought, however, before parting with the case to say a word with regard to a decision of the lord ordinary (LORD ROBERTSON) in *Mackay v. Lord Advocate* (12). In that case, by virtue of s. 3 (4) of the Small Landholders (Scotland) Act, 1911, members of the Scottish Land Court held their appointments for life or until removed from office for inability or misbehaviour, and, accordingly, it was held that a clause in their appointments imposing the condition that they should vacate office at a particular age was ultra vires. That

is a decision on the terms of a particular statute, though the learned lord ordinary did express views with regard to the general nature of a judge's office and may have thought that provisions of the Declaration of the Convention Parliament of 1689, ch. 13—a Scottish statute only—which altered the tenure of judges and made their offices tenable during good behaviour, applied generally to persons holding a judicial appointment. If he meant to go as far as this, I would respectfully say that, in my opinion, his conclusion was too wide, but, in any case, that decision is not binding on me, and, as I have said, turns really on the construction of the particular Act by which the pursuers were appointed. I, therefore, uphold the award.

Award affirmed.

Solicitors: *G. & G. Keith* (for the claimant); *Treasury Solicitor* (for the Crown).
[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re ADELPHI HOTEL (BRIGHTON), LTD.

DISTRICT BANK, LTD. *v.* ADELPHI HOTEL (BRIGHTON), LTD.

[CHANCERY DIVISION (Vaisey, J.), June 8, 17, 1953.]

Mortgage—Costs—Mortgagee's costs—Scale—Enforcement of security—Mortgagee's costs, charges and expenses properly incurred.

By a mortgage and debenture dated Mar. 6, 1947, a company charged by way of legal mortgage certain of its properties and premises with the payment to a bank of moneys therein covenanted to be paid. The deed provided, inter alia, that there was also thereby secured to the bank "all costs, charges and expenses incurred or paid by the bank in relation to the negotiation for and preparation, completion, realisation, and enforcement of this security". On Sept. 8, 1950, the bank issued a writ against the company to enforce its security, and judgment was by consent given on the same day, the usual accounts and inquiries being directed, and further consideration was adjourned. On Apr. 23, 1953, an order was made on further consideration directing (inter alia) that the costs of the bank of the action including in such costs any costs, charges and expenses of the bank as mortgagee properly incurred be taxed. The bank moved the court for an order that its costs of and in connection with the action (including any costs, charges and expenses of the bank as mortgagee properly incurred by it) should be taxed as between solicitor and own client.

HELD: the bank's costs of the action should be taxed as between party and party, and its costs, charges and expenses as mortgagee should be taxed on the same basis, the rights of the bank in this regard not being enlarged by the terms of the deed of 1947.

The Kestrel (1866) (L.R. 1 A. & E. 78), *Re Queen's Hotel Co., Cardiff, Ltd. Re Vernon Tin Plate Co., Ltd.* ([1900] 1 Ch. 792), and dictum of SIR RICHARD MALINS, V.-C., in *Smith v. Buller* (1875) (L.R. 19 Eq. 475), applied.

Malvern Urban District Council v. Malvern Link Gas Co. (1900) (83 L.T. 326), distinguished.

AS TO MORTGAGEE'S COSTS, CHARGES AND EXPENSES, see HALSBURY, Hailsham Edn., Vol. 23, p. 404, para. 606; and FOR CASES, see DIGEST, Vol. 35, pp. 668-670, Nos. 4041-4056.

Cases referred to:

- (1) *The Kestrel*, (1866), L.R. 1 A. & E. 78; 16 L.T. 72; 35 Digest 695, 4386.
- (2) *Re Queen's Hotel Co., Cardiff, Ltd. Re Vernon Tin Plate Co., Ltd.*, [1900] 1 Ch. 792; 69 L.J.Ch. 414; 82 L.T. 675; 10 Digest 809, 5165.
- (3) *Smith v. Buller*, (1875), L.R. 19 Eq. 473; 45 L.J.Ch. 69; 31 L.T. 873; Digest, Practice, 948, 4882.

- (4) *Avery v. Wood*, [1891] 3 Ch. 115; 61 L.J.Ch. 75; 65 L.T. 122; 13 Digest 228, 685.
- (5) *Irwine v. Reddish*, (1822), 5 B. & Ald. 796; 106 E.R. 1382; Digest, Practice, 881, 4201.
- (6) *Detillin v. Gale*, (1802), 7 Ves. 583; 32 E.R. 234; 35 Digest 668, 4041.
- (7) *National Provincial Bank of England v. Games*, (1886), 31 Ch.D. 582; 55 L.J.Ch. 576; 54 L.T. 696; 35 Digest 669, 4048.
- A (8) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest, Practice, 936, 4756.
- (9) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337.
- (10) *Re New Zealand Midland Ry. Co.*, [1901] 2 Ch. 357; 70 L.J.Ch. 595; 84 L.T. 852; 10 Digest 809, 5166.
- (11) *Cotterell v. Stratton*, (1872), 8 Ch. App. 295; 42 L.J.Ch. 417; 28 L.T. 218; 37 J.P. 4; 35 Digest 696, 4393.
- B (12) *Malvern Urban District Council v. Malvern Link Gas Co.*, (1900), 83 L.T. 326; 25 Digest 494, 130.

MOTION.

- In an action by the District Bank, Ltd., to enforce its security as mortgagee of leasehold premises and pure personal property of Adelphi Hotel (Brighton), Ltd., it was ordered, inter alia, "that the costs of the plaintiff of this action (including such costs, charges and expenses of the plaintiff as mortgagee properly incurred by it) be taxed". The bank now asked that that order be varied by substituting the following order: "Order that the costs of the plaintiff of and in connection with this action (including in such costs any costs, charges and expenses of the plaintiff as mortgagee properly incurred by it) be taxed as between solicitor and own client".
- D

P. J. Sykes for the plaintiff, the District Bank, Ltd.

Denys B. Buckley for the defendant, Adelphi Hotel (Brighton), Ltd.

Cur. adv. vult.

- E June 17. VAISEY, J., read the following judgment. In *The Kestrel* (1), to which I shall be referring presently, the judge, DR. LUSHINGTON, in a reserved judgment, used these words (L.R. 1 A. & E. 79):

- "There is no question that can come before the court which is so disagreeable as that of reviewing the taxation of costs, because it is manifestly clear that, for the greater part, it is impossible to find a clear principle whereon to proceed, and whether the charge be right or wrong depends upon a practice, and upon a practice with which the court cannot be familiar . . ."
- F

- I would apply those observations to the present case, which appears to involve the very important question as to what are the precise rights of a mortgagee in respect of the costs, charges and expenses incurred by him in his dealings with the mortgaged property and the recovery of his money.
- G

- This is a motion on the part of the plaintiffs in the action, the District Bank, Ltd., seeking a variation in that part of an order made on the further consideration of the action on Apr. 23, 1953, which relates to the plaintiffs' costs, charges and expenses. The action was brought by the plaintiff bank against the defendant company, Adelphi Hotel (Brighton), Ltd., to enforce the plaintiff bank's security constituted by a mortgage and debenture created and issued by the defendant company on Mar. 6, 1947. The writ was issued on Sept. 8, 1950, and the judgment in the action was pronounced by consent on the same day, the usual accounts and inquiries being directed, and the further consideration of the action adjourned. By the certificate filed on Dec. 22, 1951, it appeared that an aggregate sum of £13,475 15s. 7d. was due and owing to the bank under its security together with a sum (stated to be not then ascertained)
- H

for its charges and expenses as mortgagee. The relevant part of the before-mentioned order on further consideration directed that the costs of the bank of the action including in such costs any costs, charges and expenses of the bank as mortgagee properly incurred be taxed, and provision was made for the payment of such costs out of a fund now in court and to the credit of the action which was and is sufficient not only to meet such costs, charges and expenses, but also to leave a surplus for the company (which is now in liquidation) or its creditors. The direction in that form giving the bank only its ordinary so-called party and party costs, it is now asking that in lieu of such direction the order should provide that the costs of the bank of and in connection with the action (including in such costs any costs, charges and expenses of the bank as mortgagee properly incurred by it) should be taxed as between solicitor and own client. A

At the hearing of the motion the bank claimed to be indemnified in respect of the whole of its costs, charges and expenses as mortgagee, and argued that some, at least, of the items should be taxed either on an indemnity basis or (which comes to much the same thing) as between solicitor and own client, or, at any rate, as between solicitor and client. There are some words in the bank's security with which I shall deal later, but I propose first to inquire what the law applicable to this matter is, apart from any special provision in the security itself. B

Up to a point, the position seems to me to be entirely free from doubt. In *The Kestrel* (1) it was laid down in clear terms that mortgagees' costs in a mortgage suit would be taxed as between party and party and not as between solicitor and client, that being said in that case to accord with the established practice of the Court of Chancery. There had been a decree that the plaintiffs should receive their costs, charges and expenses properly incurred, and it was argued unsuccessfully that those words meant that their costs should be taxed as between solicitor and client. There is also the clear later authority of *Re Queen's Hotel Co., Cardiff, Ltd. Re Vernon Tin Plate Co., Ltd.* (2), in which it was held that the plaintiff in a debenture holders' action is allowed party and party costs only, COZENS-HARDY, J., in his judgment observing ([1900] 1 Ch. 793) that there was no vestige of authority to the contrary. D E

It cannot, therefore, in my opinion, be doubted that, so far as regards the costs of the present action, they are party and party costs and not costs as between solicitor and client. But what about the other costs, charges and expenses? It would certainly be very strange if they were taxable on any different basis, and I pause here to inquire what is meant by party and party costs. The expression is not, perhaps, a very happy one for, in my judgment, the words do not necessarily imply the existence of a suit or other litigation, and I think that they mean when analysed that the computation has to be made as in a case in which there are two or more parties between or among whom the expenditure has to be apportioned. A definition of the expression is hard to find, but there is a relevant statement by SIR RICHARD MALINS, V.-C., in *Smith v. Buller* (3) (L.R. 19 Eq. 475): F G

" . . . the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them." H

And I think that where there is no actual litigation, the definition applies as though it referred to transacting business as well as to conducting litigation.

It must always be remembered that when costs are referred to they are understood to be party and party costs, and not solicitor and client costs, and it is difficult to see in principle why a mortgagor should be called on to reimburse a mortgagee for anything beyond his necessary expenditure. I think

that a mortgagee is entitled, as against a mortgagor and against the mortgaged property, to his "full costs", but that expression means ordinary party and party costs, and not costs as between solicitor and client: see *Avery v. Wood* (4), following *Irvine v. Reddish* (5), apart, of course, from some special bargain.

A In HALSBURY'S LAWS OF ENGLAND (2nd ed., vol. 23, p. 404) it is said that a mortgagee is entitled to be indemnified against all expenses, citing *Detillin v. Gale* (6) and other authorities, but if this means that he is entitled to costs on an indemnity basis, I think that it is wholly unsupported by authority, nor is *National Provincial Bank of England v. Games* (7), in my judgment, any authority for a taxation on the higher scale.

Unfortunately in a useful recent publication (BUTTERWORTH'S COSTS, 1951, p. 70) there is a statement that a mortgagee under the terms of his security is usually entitled to his charges and expenses as between solicitor and own client. I do not understand what "under the terms of his security" means, but if it means that mortgage deeds and other instruments of security usually provide for indemnity costs, I can only say that I find no support for that either from any text-book or from any book of precedents or in my own experience. Normally such deeds and instruments are silent on the matter of costs and provide for redemption on payment of principal and interest only, leaving the costs to be dealt with by analogy, or according to what DR. LUSHINGTON called the established practice of the Court of Chancery. I am told that the editors of that work do not now adhere to that statement as having any general application. In my judgment, it is not an accurate statement. My view is that the bank in this case is entitled to its costs as between party and party only and not as between solicitor and client, still less as between solicitor and own client, and I so hold.

I should like to add that these various bases of taxation, though conveniently labelled, are difficult to formulate, nor is it easy to discover exactly how they work out in practice. In *Giles v. Randall* (8) BUCKLEY, L.J., said ([1915] 1 K.B. 295):

E "A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor . . . I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs."

F So, too, in my judgment, when a mortgagee learns that he is entitled, as he is, to his "full costs", he may be surprised to know that this does not involve the discharge of every item in his solicitor's bill.

G I do not doubt that taxing masters exercise their discretionary powers with a due regard to the circumstances of each case with which they are dealing, and it may well be that the taxation of a mortgagee's costs would not usually be on a niggardly or markedly ungenerous scale. I do not know. But what a mortgagee is entitled to is that which is covered by the words "costs, charges and expenses properly incurred", and it is for the taxing masters to say what these are, conformably with the principles to which I have endeavoured to give expression. I may here refer to a recent case, *Reed v. Gray* (9).

H There seems to me to be no relevance to the present case in the principle that in a debenture holder's action, where the company's assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to his costs as between solicitor and client and not as between party and party only as laid down and explained in *Re New Zealand Midland Ry. Co.* (10). Nor do I get any assistance from *Cotterell v. Stratton* (11).

Such, in my view, are the general principles which regulate the rights of the

mortgagee against the mortgaged property, or the mortgagor personally, in respect of his costs, charges and expenses. There is here, however, a further point to be considered—whether as between the parties in this case those rights are enlarged by certain words contained in the mortgage and debenture entitling the bank to

“all costs, charges and expenses incurred or paid by [it] in relation to the negotiation for and preparation, completion, realisation, and enforcement of [the] security.”

These are certainly wide and comprehensive words, and it is argued with some force that they cover more than the “full costs” (the meaning of which I have already explained) and amount either to a complete unlimited and unqualified indemnity, or at any rate to such a measure of indemnity as would be ascertained on a taxation as between solicitor and client. I cannot so construe the words.

I thought at one time that *Malvern Urban District Council v. Malvern Link Gas Co.* (12) gave support to the claim of the bank, and certainly the words which were under consideration in that case are very similar indeed to those which I am considering in the present case, but the document in which they appear is of a very different character, viz., a contract of sale and purchase, and not one, like the present, to which a well-established rule normally applies, and it seems to me that, if parties desire to depart from such a rule, they must express themselves in plain and unequivocal language. I read the words as indicative of nothing more than an assertion or reminder of the bank's ordinary right, on realising or enforcing its security, to recover its costs, charges and expenses as well as the principal money and interest. Of course the words do confer additional rights in regard to the costs of negotiating, preparing and completing the security, which are matters occurring before the relationship of mortgagor and mortgagee arose. I need not express any definite view as to how the amount of those particular costs ought to have been ascertained.

It suffices for me to say that I put my judgment on this part of the case, involving as it does a point of construction, on the ground that, as every taxation in which more than one party (in addition to the solicitor) is interested is prima facie a taxation as between party and party, any other basis of taxation is only justified when the party asking for it can show that he is entitled to it, either on some well-recognised principle, or under some contract plainly and unambiguously expressed. I can find no such principle nor any such contract here. The relevant part of the order of Apr. 23, 1953, is framed with sufficient aptness. There is no need to use the words “as between party and party” or any other words to express what is, in my judgment, implied. I should myself have put the direction slightly differently, thus: Let the costs of the plaintiff of this action together with any other costs, charges and expenses properly incurred by it as mortgagee be taxed. But the variation is not of substance; it is merely of form, and the order may properly stand as it is without variation. The motion must be dismissed with costs.

Motion dismissed.

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for the plaintiff); *Solicitor, Board of Trade* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re ENGALL'S AGREEMENT.

[CHANCERY DIVISION (Vaisey, J.), June 19, 1953.]

Land Charge—Vacation of entry in register—Contract for sale registered as estate contract—Failure by purchaser to complete—Summons to vacate entry—Competency.

A By a contract in writing incorporating, with some exceptions, the Law Society's Conditions of Sale, 1934 ed. (1949 revision), the vendors agreed to sell land to the purchaser. The contract provided that completion should take place on Sept. 30, 1952, and that the purchaser should submit the draft conveyance ten days before completion. The draft conveyance was not submitted in due time, and on Oct. 21, 1952, the vendors gave the purchaser notice to complete on or before Nov. 5, 1952. On Oct. 29, B 1952, the purchaser submitted the draft. On Nov. 4, 1952, the purchaser registered a land charge class C (iv) in respect of the land. Completion did not take place on Nov. 5, 1952, and the vendors purported to forfeit the deposit under condition 32 (2) of the Law Society's conditions. On Feb. 25, C 1953, the vendors requested the purchaser to withdraw the registration of the land charge, but the purchaser refused. The vendors now applied under the Land Charges Act, 1925, s. 10 (8), for the removal of the registration.

HELD: the application was misconceived because the question whether or not the entry on the register ought to be vacated depended on whether or not the contract subsisted, and procedure under s. 10 (8) was inappropriate for the determination of the latter question.

D AS TO VACATION OF REGISTER, see HALSBURY, Hailsham Edn., Vol. 19, p. 360, para. 758.

Case referred to:

(1) *Pedigree Stock Farm Developments, Ltd. v. R. Wheeler & Co.*, (1950), 155 Estates Gazette 66.

E ADJOURNED SUMMONS under the Land Charges Act, 1925, s. 10 (8), issued on the application of Barnabas Cecil Engall and Enid Beatrice Engall, his wife, for the following relief: (i) an order that the registration of the land charge C (iv) registered on Nov. 4, 1952, by London United Properties, Ltd., in the name of the said Barnabas Cecil Engall in respect of certain freehold properties be vacated; and (ii) a similar order in respect of an identical entry on the register of land charges in the name of the said Enid Beatrice Engall.

F *Raffety* for the applicants, the vendors.

Stamler for the respondent, the purchaser.

G VAISEY, J.: This is a summons issued under the Land Charges Act, 1925, s. 10 (8), asking for an order that two registered land charges be removed from the register. The applicants are the owners of certain freehold houses at Woking and, by a contract dated July 31, 1952, they agreed to sell those properties to the respondent for £5,875. The contract was in writing and the property was sold subject to the Law Society's Conditions of Sale, 1934 ed. (1949 revision) with certain exceptions so far as the same were applicable to a sale by private treaty and were not inconsistent with or varied by the remaining conditions in the contract. There was a condition as to title and the property H was sold subject to the covenants and conditions contained in the respective conveyances forming the respective roots of title, to any local land charges registered or required to be registered before the date of the contract, to any requirement of any local council or any county council whether registered, registrable, or otherwise, and to the respective tenancies of the properties. A deposit of £587 10s. was payable by the purchaser to the vendors' agent and completion was to take place on Sept. 30, 1952. Condition 24 (1) of the Law

Society's Conditions of Sale provided that the conveyance to a purchaser should be prepared by him at his own expense, and that the draft thereof should be delivered at the office of the solicitors of the vendor at least ten days before the date fixed for completion for perusal and approval on behalf of the vendor and other necessary parties (if any). Condition 32 provides:

"(1) If a purchaser shall fail to perform his part of the contract, the vendor may give to the purchaser or his solicitor at least fourteen days' notice in writing specifying the default and requiring the purchaser to make good the same before the expiration of the notice. (2) If the purchaser does not comply with the terms of the said notice—(a) the deposit money, if any, shall be forfeited to the vendor . . . (b) the vendor may re-sell the property without previously tendering a conveyance to the purchaser; (c) the contract shall, without prejudice to the vendor's right to resume possession (if given up) and recover documents belonging to him, become void, save and except that the following provisions shall apply . . ."

The abstract of title was delivered, the deposit of £587 10s. was paid, and requisitions on title were made and replied to. The purchaser did not submit any draft conveyance ten days before the date fixed for completion, and on Oct. 8, 1952, the vendors' solicitors wrote to the purchaser's solicitors:

"We write to point out that although completion of this matter was fixed for the 30th ultimo you have not yet submitted a draft conveyance and we should be obliged if you would do so without any further delay. In anticipation of completion on Sept. 30, the vendors have given notice of their intention to discharge the mortgage on that day which was accepted and now that time has passed a fresh six months' notice will have to be given and the vendors will have to hold the purchaser responsible for any future interest which is payable as a result thereof."

On Oct. 20 they wrote:

"We cannot understand why you do not submit the draft conveyance to us herein. Completion is now three weeks' overdue and we have today had to take our client's instructions as to whether he wishes us to institute proceedings for specific performance or take the appropriate steps to lead to forfeiture of the deposit."

On the next day they sent a notice to complete, and, on Oct. 29 the purchaser's solicitors submitted a draft conveyance. The notice to complete required that completion should take place on or before Nov. 5, 1952. On Nov. 4 the purchaser caused to be registered against the name of each of the vendors a land charge of class C (iv) in respect of the properties. Completion did not take place on or before Nov. 5 and the vendors wish to sell the properties elsewhere. Accordingly, by letter dated Feb. 25, 1953, their solicitors requested the purchaser's solicitors to withdraw the registration of the land charges, but they did not do so, and by this summons the vendors ask for a separate order in respect of each charge that the registration of it should be vacated, and for an order that the costs and expenses of this application and of the vacation of the registrations be paid by the purchaser.

The notice to complete served by the vendors was to some extent complied with by the purchaser, because on Oct. 29 the purchaser submitted draft conveyances which the vendors' solicitors approved and returned. On Oct. 31 there was a dispute about amendments which had been made, but by Nov. 5 nothing further had happened and in due course the deposit was forfeited.

In the circumstances, it is open to some doubt whether the notice to complete was long enough. It might have been long enough had it been a twenty-one days' notice to pay the purchase money, served after the conveyance had been agreed. When it was served, however, the draft conveyances had not been submitted and the notice required that all this should be done, and the purchase

money paid, within fifteen or sixteen days after service of the notice. It may well be that the notice was too short. There is a good deal to be said for the suggestion that the purchaser has behaved unsatisfactorily in preventing the vendors from re-selling and in attempting to use, possibly wrongly, the procedure under the Land Charges Act, 1925, for the purpose of putting pressure on them. It may well be open to comment that the purchaser never expected to be able to complete. The difficulty that I feel, however, is that an application under

- A s. 10 (8) of the Act of 1925 is not the appropriate method of approaching the matter. When the agreement of July 31 was signed, that, in equity, made the purchaser the owner of the property subject only to the payment of the purchase money. The existence or non-existence of a contract at any relevant time is of the utmost importance, and is a matter which ought to be considered carefully and in an appropriate manner. This summons is an attempt to use
- B the machinery of the Land Charges Act, 1925, to obtain adjudication on the existence or non-existence of the contract at the time when the notice was served, or when it expired, or at the present time. In my judgment, it is not an appropriate way in which to approach the solution of what, in my view, is a somewhat difficult question. Under the contract for sale either party could bring an action for specific performance or for rescission. The existence of
- C the charges is the shadow of the matter, not the substance of it—which is the existence of the contract—and I am being asked to deal with the shadow, not with the substance. That is not the proper procedure to ascertain the existence or non-existence of the contract. To ask that the charges be removed from the register before the point has been decided by an action is wrong. The charges register is only a record. Before the notice to complete was served,
- D the vendors' solicitors stated, accurately, that an action for specific performance was the appropriate remedy. It does not follow that because the deposit has been forfeited the entry on the register ought to be vacated. I am not going to decide the question one way or the other. There is a good deal to be said for the view that the notice to complete is deficient in point of time, but the purchaser might receive little sympathy in an action for specific
- E performance.

The only case which is of any assistance is *Pedigree Stock Farm Developments, Ltd. v. R. Wheeler & Co.* (1). In that case, I called attention to the important point that the procedure which is before me in the present case is not the proper procedure to ascertain the existence or non-existence of a contract. To ask that a charge be removed from the register before the substantive

F point has been decided by the appropriate means of an action seems to me to be putting the cart before the horse. The charges register, in my view, is merely a record, and whether that record of an alleged contract should remain or not depends on the question whether the contract purported to be recorded exists or does not exist. To obtain an order removing a charge from the register is merely the consequence of deciding that there is no contract. If there is

G a contract, the entry in the register will be allowed to remain.

Summons dismissed.

Solicitors: *Champion & Co.*, agents for *Cozens & Moxon*, Hampton (for the applicants); *C. Butcher & Simon Burns* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NOTE.*Re* HOLBERTON'S SETTLEMENT TRUSTS. THORBURN *v.*
HART AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), June 11, 1953.]

Costs—Taxation—Counsel's fees—Settlement negotiated and agreed.

SUMMONS by the plaintiff to review an order of the taxing master disallowing on the taxation of a bill of costs the costs and disbursements relating to the delivery of a brief to leading counsel and the greater part of junior counsel's fees on a summons, issued on July 4, 1950, in the matter of the trusts of a post-nuptial settlement, dated May 26, 1930.

By the trusts of the settlement the income of the trust fund was to be held during the life of the settlor on trust for the benefit of the settlor and his wife and the children of the marriage. After the death of the settlor there were certain trusts for the benefit of the wife if she should survive him, and after the death of the survivor of the settlor and his wife the capital of the fund was to be held on trust for the children and remoter issue of the marriage, and, if there should be no issue who attained a vested interest, on trust for such persons (other than persons related to the settlor on the father's side only), as would have become entitled under the Administration of Estates Act, 1925, if the settlor had died intestate and a bachelor. There were no children of the marriage. The settlor had one sister, Miss Mary Campbell Holberton.

The plaintiff was one of the trustees of the settlement. While he was away on service in His Majesty's forces, the other trustee, Mr. Hart, a solicitor, carried out various transactions which, apparently, amounted to breaches of trust in that they were not performed strictly in accordance with the terms of the settlement. This was a serious matter for the plaintiff as the trust funds were of considerable value, and on Jan. 22, 1948, he took out an originating summons asking for the execution of the trusts of the settlement by the court, and, alternatively, for directions. The defendants were Hart, the settlor, and the settlor's wife. On Mar. 19, 1948, on a motion by the plaintiff, a receiver of the property subject to the trusts was appointed, and on Oct. 20, 1948, an order was made on the summons for the execution of the trusts, for an account to be taken and for certain inquiries to be made. On Dec. 24, 1949, the defendant, Hart, died, and on Mar. 1, 1950, an order was made for the action to proceed. On May 23, 1950, the master's certificate was issued in respect of the accounts and inquiries and it disclosed possible breaches of trust involving between £6,000 and £7,000, a great part of which had been paid to or on behalf of the settlor. On July 4, 1950, the plaintiff issued a summons for the determination of certain questions in regard to the accounts and asking, *inter alia*, whether to institute proceedings against the settlor. On Nov. 15, 1950, an order was made adding the personal representatives of Hart as defendants and the summons was adjourned into court.

In the meantime negotiations were proceeding for a settlement by way of a compromise between the parties. By Dec. 4, 1950, the main terms had been more or less settled, *viz.*, that the settlor's sister would waive any claim in respect of breaches of trust and that an insurance policy should be effected to safeguard the rights of the remaindermen in the event of the sister pre-deceasing the settlor, as the settlor was unable to state who would be the next of kin entitled to the trust fund in such an event. The plaintiff was advised that he could not agree to such a compromise without the approval of the court, and that a scheme could not be formulated until the court had ascertained to what extent the trust fund was deficient. On Dec. 5, 1950, an attempt was made to set down the summons of July 4, but this could not be done as Hart's

personal representatives had not entered an appearance. On Dec. 6 the plaintiff's solicitors delivered briefs to leading and junior counsel. Hart's personal representatives having entered an appearance, the summons was set down on Jan. 24, 1951. By an order, dated Feb. 6, 1951, the settlor's sister was added as a defendant.

On Feb. 26, 1951, the plaintiff learnt from the settlor's solicitors that the settlor had no next of kin on his mother's side other than his sister, so that in the event of her pre-deceasing the settlor the property would devolve on the Crown. It was, therefore, possible for all parties to be brought before the court, thus avoiding the necessity for any insurance policy and making a simplified form of settlement possible. On Feb. 5, 1952, the settlor took out a summons for an order disposing of the action on agreed terms, and on Apr. 28, 1952, the judge in chambers made an order by consent on both summonses, the matter being finally disposed of. By the order the costs of all parties were to be taxed as between solicitor and client and paid out of the capital of the trust fund.

On taxation the taxing master allowed £1,500 costs, but disallowed briefs and brief fees to leading and junior counsel on the grounds, *inter alia*, (i) that the briefs were prematurely delivered, and (ii) that negotiations for a compromise were in progress before they were delivered and terms of settlement were agreed shortly afterwards. On objections being lodged, he allowed a small fee to junior counsel, but dismissed the objections in regard to leading counsel's fees and the greater part of junior counsel's fees. In his answers to objections he referred to the terms of compromise as having been approved by the court on "Apr. 28, 1951," while they were, in fact, approved on Apr. 28, 1952.

Harold Christie, Q.C., and *J. A. Brightman* for the plaintiff.
Wigglesworth for the defendants.

DANCKWERTS, J., stated the facts, and said: The summons in this matter was a serious matter for the plaintiff as he might have become liable for a very considerable sum of money. It was contended on behalf of the plaintiff that the taxing master had made a number of errors of fact and had misdirected himself as to the facts. I think that this contention is well founded and that there are a number of mistakes of fact in his answers. He was in error where he said that the summons for approval of the compromise was heard on Apr. 28, 1951. He made a slip of a year, as it should have been 1952, and the several references which he made to Apr. 28, 1951, should be to Apr. 28, 1952. There are also other matters. The terms of compromise which were provisionally agreed in the first place could not be adopted by the parties until they had been approved by the court. It is by no means certain that the compromise would have been approved, and, therefore, it was not unreasonable to have delivered briefs shortly after agreement of terms. The taxing master, moreover, took no account of the fact that the terms ultimately agreed on were wholly different from the first terms. The negotiations between December, 1950, and April, 1952, were conducted by leading counsel. In the early stages, when it was not ascertainable who were the remaindermen under the settlement, a scheme had to be prepared to safeguard, by a policy of insurance, the interests of all who might be entitled. The cost of this policy proved to be extremely high, about 33½ per cent., which rendered the old terms impracticable. Even if the cost had not been so high, it was not clear that the terms would be approved, and the assistance of leading counsel might well have been necessary. Later, when information was received from the settlor's solicitors that the settlor had no next of kin other than his sister, it became plain that the remainderman under the settlement was the Crown. Then, on the Attorney-General being joined, all the parties could be brought before the court, thus avoiding the necessity for any insurance, a simplified form of settlement could be put forward, and, all parties being fully agreed, it was possible to obtain

an order by consent. No account was taken of the fact that the negotiations after December, 1950, and the final settlement were conducted on behalf of the plaintiff by leading counsel without other remuneration than that on the brief originally delivered. The matter is one for the exercise of my discretion and I allow the fees of leading counsel and junior counsel. Accordingly, I allow the objections to the taxing master's certificate and it will be referred back with a direction to allow. Costs of this application as between solicitor and client are to come out of the trust fund.

Order accordingly.

Solicitors: *Barnett, Tuson & Co.* (for the plaintiff); *Gamlen, Bowerman & Forward* (for the defendants).

R.D.H.O.

KNIGHT *v.* DEMOLITION & CONSTRUCTION CO., LTD.
RANSOM *v.* SAME.

[QUEEN'S BENCH DIVISION (Parker, J.), June 17, 18, 19, 22, 1953.]

Building—Demolition—Need and practicability of safety precautions—Collapse of wall killing workmen—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 79 (7), reg. 94 (2).

By the Building (Safety, Health and Welfare) Regulations, 1948, reg. 94 (2): "Where any work is carried on which is likely to reduce so as to endanger any person employed the security or stability of any part of an existing building or of a building in course of construction all practicable precautions shall be taken . . . to prevent danger to any person employed from the collapse of the building or the fall of any part thereof." By reg. 79 (1): "This regulation shall apply to the demolition of any building or substantial part of a building", and by reg. 79 (7): "Before demolition is commenced and also during the progress of the work precautions shall, where necessary, be taken by adequate shoring or otherwise to prevent, as far as practicable, the accidental collapse of any part of the building or of any adjoining building the collapse of which may endanger any person employed."

Two workmen, who were engaged in demolishing disused gas retort blocks in a retort house, were killed while working under a wall of a brick arch which collapsed on them. The wall was not shored in any way.

HELD: (i) having regard to the object of the regulations, the retort blocks were buildings within the meaning of the regulations even though they could also be described as part of the plant and, therefore, the regulations applied to them.

(ii) regulation 94 applied to the condition of new constructional work before completion, and not to demolition.

(iii) the words "where necessary" in reg. 79 (7) covered cases where, if the dangers of demolition had been appreciated, any reasonable person would have said that precautions were necessary, and "practicable" meant "possible to be accomplished with known means or resources"; the defendants should have appreciated the danger of sending workmen to work under the wall and it would have been practicable, in the sense of the word stated, for them to have taken precautions for the men's safety by way of shoring or otherwise; and, therefore, they were guilty of a breach of the statutory duty imposed on them by reg. 79 (7).

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, regs. 79 and 94, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 239, 245.

Cases referred to:

- (1) *Hutchison v. Cocksedge & Co., Ltd.*, [1952] 1 All E.R. 696 n.
- (2) *Street v. British Electricity Authority*, Not reported; *affd.*, C.A., [1952] 1 All E.R. 679; [1952] 2 Q.B. 399.
- (3) *Aylward v. Matthews*, [1905] 1 K.B. 343; 92 L.T. 189; 24 Digest 921, 152.
- (4) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.
- (5) *Adsett v. K. & L. Steelfounders & Engineers, Ltd.*, [1953] 2 All E.R. 320.

ACTIONS for damages for negligence and/or breach of statutory duty.

In March, 1951, the defendants, the Demolition & Construction Co., Ltd., began to demolish three blocks of disused gas retorts in a retort house at 709, Old Kent Road, London, belonging to the South-Eastern Gas Board, the object of the demolition being to obtain rubble. The blocks of retorts were enclosed in brick arches, and the method of demolition used was by cable and winch. From time to time, as the brickwork was demolished, workmen were sent in to clear away the debris. On Apr. 4, 1951, demolition work was being carried out on the second block under the supervision of a foreman, and had been completed except for the last two arches. These arches did not contain retorts, the end one being used as a passage and the one next to it having a small transverse wall in it. The outer wall of the last arch but one was pulled down and workmen went in to clear the debris and to demolish the transverse wall. When nearly all the debris had been removed and three men were working on the job, the adjoining wall of the last arch collapsed, killing two of the workmen, George Francis Knight and Reginald John Ransom. Their widows, Jane Elizabeth Knight and Kitty Elizabeth Ransom, now sued the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

Levy, Q.C., and *Castle-Miller* for the plaintiff, Knight.

Gardiner, Q.C., and *Dare* for the plaintiff, Ransom.

Benev, Q.C., and *Jukes* for the defendants.

PARKER, J., stated the facts, found that there had been a breach of duty at common law by the defendants, and continued: That being so, it is really unnecessary to consider the case of statutory duty raised under the Building (Safety, Health and Welfare) Regulations, 1948, but, in case I am wrong, I think it is right to deal with that matter. The plaintiffs rely on reg. 79 and reg. 94 of those regulations. Regulation 79 provides:

"(1) This regulation shall apply to the demolition of any building or substantial part of a building. (2) The demolition and operations incidental thereto shall be specifically placed under the supervision of a competent person experienced in demolition operations and appointed for the purpose whose name shall be posted up in a prominent position on the site of the operations . . ."

As regards that provision, I am satisfied that the work was under the supervision of one Ransom [the foreman] and that he was a competent person experienced in demolition. It is true that his name was not posted up in a prominent place; it was, in fact, put on the inside of a little office which he had on the site, but that can have no causative effect whatsoever in regard to this accident. By reg. 79 (5) it is provided:

"The following operations shall be carried out only (i) under the immediate supervision of a competent foreman or charge-hand with adequate experience of the particular kind of work, or (ii) by workmen experienced in the kind of work . . . (b) the actual demolition of any part of a building where there is a special risk of a collapse, whether of that or of any other part of a building, in the course or as a result of the said demolition, so as to endanger any person employed."

Again, I am satisfied that these were competent workmen and that they were working under the immediate supervision of a competent foreman. By reg. 79 (7):

“Before demolition is commenced and also during the progress of the work precautions shall, where necessary, be taken by adequate shoring or otherwise to prevent, as far as practicable, the accidental collapse of any part of the building or of any adjoining building the collapse of which may endanger any person employed.”

That paragraph contains matter for argument, and I will return to it in a moment. Finally, the plaintiffs rely on reg. 94, which, in para. (2), provides:

“Where any work is carried on which is likely to reduce so as to endanger any person employed the security or stability of any part of an existing building or of a building in course of construction all practicable precautions shall be taken by shoring or otherwise to prevent danger to any person employed from the collapse of the building or the fall of any part thereof.”

It is clear, therefore, that that provision *prima facie* applies to the facts of this case if it is applicable to demolition work.

In my view, however, reg. 94 does not apply to the work of demolition. Demolition is dealt with in an earlier part of the regulations, Part V, which deals specifically with demolition, whereas reg. 94 appears in Part VII, under the heading “Miscellaneous”. That, of course, is by no means conclusive, since it might be plain that reg. 94 was intended to apply to demolition work. If, however, one looks at the regulation as a whole, it is clear that the first paragraph has nothing to do with demolition at all. It deals with new constructional work and the condition of the work before the structure is completed. Paragraph (2) applies, not only to a building in course of construction, but also to any part of an existing building. It seems to me, however, that, reading that regulation as a whole, the reference to “any part of an existing building” is really a reference to an alteration in an existing building as opposed to the demolition of it. In other words, but for that provision, if instability were produced in a building which was not going to be pulled down, employers might be free from any such duty as is imposed by reg. 79 in the case of demolition. In my view, reg. 94 does not apply, so that, so far as statutory duty is concerned, the plaintiffs’ case must be based on reg. 79 (7).

The defendants’ first answer to that is that none of the building regulations applies in this case, because what was being demolished was not a building. By reg. 2 the regulations are to apply to certain operations, one of which is the demolition of a building, and reg. 79 (1) provides:

“This regulation shall apply to the demolition of any building or substantial part of a building.”

It is urged on behalf of the defendants that these regulations do not apply to plant, and they say that these brick arches were merely part of the plant. As counsel for the defendants put it, they were really a heat-resisting screen, and they might just as well have been made of iron or asbestos as of brick. Reference was made in that connection to *Hutchison v. Cocksedge & Co., Ltd.* (1), where it was held that a steel platform, some sixteen or seventeen feet above the floor of the plant, was part of the plant and not a building. Reference was also made to *Street v. British Electricity Authority* (2), where *SELLERS, J.*, held that there was no breach of statutory duty, in that what was there in question was not a building. On the other hand, the plaintiffs refer to *Aylward v. Matthews* (3), where, for the purposes of the Workmen’s Compensation Act, 1897, a temporary wooden structure, which was going to be used to support a steam crane, was held to be a building within that Act. It was held that it was a question of fact whether a structure in any particular case was a building, and, in particular, in deciding whether a structure was or was

not a building, it was only right and proper to take into consideration the Act in question. It was pointed out that the Workmen's Compensation Act appeared to contemplate the risks which would arise in the case of the erection or repair of buildings exceeding thirty feet in height and that those risks would be incidental to the erection by means of a scaffolding of a structure of the kind with which the court was then dealing.

A In my view, each case must depend on its own facts, bearing in mind the object of the Act. Here, it seems to me, one would, in ordinary language, describe these retort blocks as buildings. Bearing in mind the object of the Factories Act, 1937, and the Building (Safety, Health and Welfare) Regulations, 1948, it seems to me that a part of the plant may be a building, notwithstanding that it can also be described as plant. Moreover, it is to be observed that reg. 2 of these regulations mentions in the proviso a number of structures B which are not deemed to be buildings for the purposes of the regulation. It is clear, if one reads that proviso, that it was considered that, but for it, the regulations would apply to a great number of structures which might well be thought in ordinary language not to be buildings. For example, it was deemed necessary to exclude pole or lattice work structures designed solely for the support of machinery, plant, or electric light. Accordingly, I C hold that these retort houses were buildings and that reg. 79 (7) applies.

That paragraph contains two phrases of some difficulty, namely, "where necessary", and "as far as practicable". It is urged on behalf of the defendants that "where necessary" means only where found necessary by experience, as opposed to being found necessary, for example, in the light of after events as a result of some latent defect not reasonably anticipated. I do not think I D need go further than to hold that it must, at any rate, cover a case where, if the dangers had been appreciated, as I have held they should have been, any reasonable person would say that precautions were necessary. I am satisfied that, if men were to be sent to work under this wall, precautions to secure their safety were necessary. As regards the phrase "as far as practicable", this has been considered in *Lee v. Nursery Furnishings, Ltd.* (4), E where LORD GODDARD ([1945] 1 All E.R. 389) adopted a definition in the OXFORD DICTIONARY of "Practicable": "capable of being carried out in action", and also in *Adsett v. K. & L. Steelfounders & Engineers, Ltd.* (5), where the Court of Appeal referred (ante, p. 321) with approval to the definition in WEBSTER'S DICTIONARY of "possible to be accomplished with known means or resources". In other words, the test here is not whether it is reasonably F practicable, but merely whether it is possible in that sense. I am satisfied that it was practicable to take some precautions by way of shoring or otherwise, if men's lives were to be put in danger. I am not altogether satisfied with the method proposed by Mr. Galbraith [a constructional engineer], but something, I am sure, could be done—possibly by a girder fastened to the buck stays, as, in fact, was done by the defendants as an experiment after G the accident when working at East Greenwich. The provision of a girder would, no doubt, not meet every case, but it is relevant to observe that its presence in this case would, it is agreed by all witnesses, have prevented the total collapse of this wall in one piece on these two men. Be that as it may, again it is to be observed that there was no necessity whatsoever to send men under this wall to remove debris. I, accordingly, hold that there is also a breach H of a duty imposed on the defendants under reg. 79 (7).

Judgment for the plaintiffs.

Solicitors: *Darracotts & Tringham* (for the plaintiff Knight); *Hepburns* (for the plaintiff Ransom); *J. F. Coules & Co.* (for the defendants).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A. E. FARR, LTD. v. THE ADMIRALTY.

[QUEEN'S BENCH DIVISION (Parker, J.), June 24, 1953.]

Contract—General Conditions of Government Contracts for Building and Civil Engineering Works—Contractor responsible for damage “from any cause whatsoever”—Construction of jetty—Damage by Admiralty vessel—General Conditions of Government Contracts for Building and Civil Engineering Works, condition 26 (2).

By condition 7 (2) of the General Conditions of Government Contracts for Building and Civil Engineering Works: “. . . If in compliance with any . . . of the superintending officer's instructions the contractor properly incurs any expense beyond that provided for in or reasonably contemplated by the contract . . . the contract sum shall be increased by the amount of any such expense . . .” By condition 26 (2): “. . . the works and all materials and things whatsoever including such as may have been provided by the authority on the site in connection with and for the purposes of the contract shall stand at the risk and be in the sole charge of the contractor, and the contractor shall be responsible for, and with all possible speed make good, any loss or damage thereto arising from any cause whatsoever other than the accepted risks . . .”

On May 17, 1950, the plaintiffs entered into a contract with the defendants for the construction of a destroyer jetty at a naval base. The contract included the General Conditions of Government Contracts for Building and Civil Engineering Works. On Aug. 4, 1951, an Admiralty vessel collided with the jetty and damaged it. The defendants, through the superintending officer under the contract, instructed the plaintiffs to repair the damage. On a claim by the plaintiffs for the cost of doing so,

HELD: the words “any cause whatsoever” in condition 26 (2) must be given a wide meaning and included the negligent navigation of a ship belonging to the defendants, and, therefore, under that condition the plaintiffs were liable to make good the damage and could not recover from the defendants the cost of so doing as an “expense” under condition 7 (2).

Dictum of PHILLIMORE, L.J., in *Joseph Travers & Sons, Ltd. v. Cooper* ([1915] 1 K.B. 101), applied.

Case referred to:

- (1) *Travers (Joseph) & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 3 Digest 74, 140.

ACTION for money due under a contract or damages for breach of contract.

On May 17, 1950, a contract was entered into by the defendants, the Admiralty, with the plaintiffs, A. E. Farr, Ltd., a firm of civil engineering contractors, for the construction of a destroyer jetty at H.M. Naval Base at Portland. The contract was constituted by an acceptance by letter by the civil engineer-in-chief, on behalf of the defendants, of a tender made by the plaintiffs on Feb. 9, 1950, whereby the plaintiffs offered to construct the works on terms and conditions contained in certain documents which included the General Conditions of Government Contracts for Building and Civil Engineering Works, known as Form CCC/Works/1, Edition 5. On Aug. 4, 1951, while the plaintiffs were constructing the jetty, an Admiralty vessel, M.F.V. 1006, using Portland harbour, collided with it, causing damage to certain of the concrete piles. In compliance with instructions given in a letter dated Aug. 14, 1951, by the superintending civil engineer, who was the superintending officer under the contract, the plaintiffs were required to repair the damage to the jetty, which they did at a cost of £2,038 12s. 5d. The plaintiffs now claimed that sum from the defendants under condition 7 (2) of the General Conditions of Government Contracts for Building and Civil Engineering Works, or, alternatively, as damages for breach of an implied condition in the contract that the defendants

should not, by their servants or agents, interfere with, or obstruct, the execution of the works by the plaintiffs.

J. S. Daniel for the plaintiffs.

Eustace Roskill, Q.C., for the defendants.

A **PARKER, J.:** This is a claim by a firm of civil engineering contractors against the Admiralty for the sum of £2,038 12s. 5d., as money due under a contract, or, alternatively, as damages for breach of the contract. The facts are not in dispute at all, and the issue depends on the construction of the contract. From the very outset, as the correspondence shows, there was a dispute as to the meaning and effect of condition 26 (2).

B The contract took the form of an acceptance by a letter dated May 17, 1950, by the civil engineer-in-chief of a tender made by the plaintiffs on Feb. 9, 1950, and the contract was made on and included the General Conditions of Government Contracts for Building and Civil Engineering Works in a printed form known as CCC/Works/1, Edition 5. So far as it is material to this action, it is provided, by condition 3, that the works and all materials, plant, and buildings brought on the site shall immediately vest in the Admiralty. No
C doubt, that is to cover the Admiralty in respect of any progress payments they make. By condition 7 the superintending officer is given a number of powers to direct the contractors to suspend or execute the works, and to vary, add to, or omit from the works. It is provided by sub-cl. (2) of that condition that

D " . . . If in compliance with any other of the superintending officer's instructions the contractor properly incurs any expense beyond that provided for in or reasonably contemplated by the contract . . . the contract sum shall be increased by the amount of any such expense . . . ",

E and it is clear that "any other of the superintending officer's instructions" comprises instructions other than instructions given to alter, add to, or omit. It seems to me that the superintending officer's instructions to carry out these repairs were clearly classed as "any other of the superintending officer's instructions". By condition 26 (2), it is provided that "save as above"—and
sub-cl. (1) has dealt with, broadly speaking, the plant and equipment—

F " . . . the works and all materials and things whatsoever including such as may have been provided by the authority on the site in connection with and for the purposes of the contract shall stand at the risk and be in the sole charge of the contractor, and the contractor shall be responsible for, and with all possible speed make good, any loss or damage thereto arising from any cause whatsoever other than the accepted risks and shall deliver up all the works to the superintending officer, in a clean state, complete in every particular . . . "

G The "accepted risks" are earlier defined in condition 1 as risks of fire, storm, tempest, flood and a number of others, and it is conceded that the risk here of the negligent navigation of this ship does not come within those accepted risks.

H However one approaches this matter, one always gets back to what is the true construction of condition 26 (2). It is argued forcibly by counsel for the plaintiffs that, if a party desires to be free of liability for negligence, he must say so in express words. That is, undoubtedly, true, and at first sight, when one looks at the facts of this case, it does seem as if very clear words were needed to make contractors liable for damage caused by the negligent navigation of an Admiralty ship which damages part of the works they have constructed, but it all comes back to the meaning of the words in that clause, and, in particular, to what is meant by "any cause whatsoever".

A number of cases have been cited to me. I do not propose to refer to any of them, because they all depend on their own particular wording, except

Joseph Travers & Sons, Ltd. v. Cooper (1), a decision of the Court of Appeal which has often been quoted and approved. All I need refer to is a passage from the judgment of PHILLIMORE, L.J. The clause there was a clause that a lighterman had inserted, seeking to protect himself from liability, and what he exempted himself from was liability "for any damage to goods however caused which can be covered by insurance". PHILLIMORE, L.J., said ([1915] 1 K.B. 101):

"This then is the distinction. It is a fine one, and I am sorry to think that it is so fine; but it seems to be this. If you say 'any loss' you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean 'any and every loss' irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say 'any loss', 'however caused' or 'under any circumstances', you give sufficient warning, and it is not necessary to say in express terms 'whether caused by my servants' negligence' . . ."

It seems to me that the words in the present case are about as wide as they can be and that I must read "any cause whatsoever" as if it included and expressly said "including damage caused by the negligent navigation by an Admiralty servant of a ship". If one reads the words in that way, there is no possibility of the plaintiffs recovering the sum expended under condition 7 (2) of the contract, because, by condition 26 (2), they are responsible for the damage and have to make it good, and, therefore, the expense which they have incurred in so doing is not an expense beyond that provided for in, or reasonably contemplated by, the contract.

It is, however, said that there is an implied term in the contract that the contractor should have uninterrupted and undisturbed possession of the site, and that the building owner must not come, either negligently or deliberately, and knock down the works, and, accordingly, "any cause whatsoever" must be read subject to that implied term. It seems to me that that is the wrong approach to the matter. Once one realises that condition 26 (2) must be given the wide construction which, I think, it must be given, there is no room for any implied term, however it is worded, which, in effect, destroys the construction ordinarily given to those words. It was faintly argued by counsel for the plaintiffs that, even if he was wrong, it might be a possible view that the provision under condition 26 (2) that the contractor was to make good was merely machinery, and that, having made good, it would be possible for him to obtain the sum that he has expended against the Admiralty for breach of contract or in negligence. It seems to me, however, that condition 26 (2) is plain beyond words that, not merely as a matter of machinery has he got to carry out repairs, but that he is wholly responsible for the loss or damage. In my view, therefore, this claim, however hard it may be on the contractors, must fail.

Judgment for the defendants.

Solicitors: *William Charles Crocker* (for the plaintiffs); *Treasury Solicitor* (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

VINALL v. HOWARD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), June 29, 1953.]

Contract—Illegality—Motor vehicle—Sale in unroadworthy condition—Road Traffic Act, 1934 (c. 50), s. 8 (1)—Road Traffic Act, 1930 (c. 43), s. 3—Motor Vehicles (Construction and Use) Regulations, 1951 (S.I., 1951, No. 2101), regs. 12 (1), 20, 44 (1).

A The plaintiff sold to the defendant a motor car of which the speed indicator, the silencer, and the braking system did not comply with the provisions respectively of regs. 12, 20, and 44 of the Motor Vehicles (Construction and Use) Regulations, 1951. The defendant gave the plaintiff a cheque for the purchase price of the car, but, on discovering the unsatisfactory condition of the vehicle, he stopped the cheque. In an action by the plaintiff to recover the amount of the cheque,

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D HELD: section 8 (1) of the Road Traffic Act, 1934 (which prohibits the sale of motor vehicles which do not comply with the regulations as to the construction, etc., of such vehicles) must be read subject to the provisions of s. 8 (4), but on the facts, if the plaintiff had been charged under s. 8 (3) with an offence under s. 8 (1), the defence provided by s. 8 (4)—namely, that he had reasonable cause to believe that the vehicle would not be used on a road until it had been put in a condition in which it might lawfully be so used—would not have been available to him; the prohibition contained in s. 8 (1) was absolute; the condition of the vehicle in question was such that its use on a road in that condition would be unlawful under the Road Traffic Act, 1930, s. 3, since it failed to comply with the requirements of the regulations of 1951; and, therefore, the sale was unlawful under s. 8 (1) of the Act of 1934, the contract was tainted with illegality, and the plaintiff was not entitled to recover.

E FOR THE ROAD TRAFFIC ACT, 1930, s. 3, and the ROAD TRAFFIC ACT, 1934, s. 8, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 574 and p. 717 respectively.

Case referred to:

(1) *Commercial Air Hire, Ltd. v. Wrightways, Ltd.*, [1938] 1 All E.R. 89; Digest Supp.

ACTION on a cheque.

F In February, 1952, the plaintiff bought for the purposes of re-sale a 1939/40 Morris eight horse-power motor car, registration number CBU 333. The plaintiff having advertised the car for sale, the defendant answered the advertisement, and on Feb. 27, the plaintiff, in accordance with arrangements made earlier, took the car to the defendant's house. He pointed out to the defendant such defects as he knew about, and then took the defendant for a short run in the car. After the run the defendant decided he would have the car, a price of £310 was agreed, and the defendant wrote out a cheque for that amount and gave it to the plaintiff. The defendant then drove the plaintiff in the car nearly ten miles to the plaintiff's house, the plaintiff knowing that the defendant would drive it back to his house. The next day the defendant inspected the car, and found that the chassis was fractured, and stopped the cheque. He told the plaintiff of his discovery and asked him to cancel the contract, but this
H the plaintiff was not willing to do. The plaintiff twice presented the cheque for payment and on both occasions it was dishonoured.

In the present action for the recovery of the amount of the cheque it was contended on behalf of the defendant that (i) there was an implied warranty that the car was in a fit condition for use on the road and otherwise free from mechanical defects; (ii) there was an express term that the cheque had been delivered to the plaintiff as an escrow pending the defendant's proper examination of the car in daylight; and (iii) the contract was tainted with illegality

because the sale by the plaintiff to the defendant constituted a breach of the Road Traffic Act, 1934, s. 8 (1). With regard to the first contention His LORDSHIP found that there was no implied warranty of fitness as alleged, and, with regard to the second, that the cheque was delivered unconditionally, and so decided those matters in favour of the plaintiff. The case is reported on the third contention.

Collard for the plaintiff.

Gazdar for the defendant.

STREATFEILD, J., stated the facts and his conclusions on the first two issues and continued: The third issue which the defendant has raised is whether this contract was tainted with illegality. For that purpose reliance is placed on s. 8 of the Road Traffic Act, 1934. By sub-s. (1) of that section:

" . . . it shall not be lawful to sell, or to supply . . . a motor vehicle . . . for delivery in such a condition that the use thereof on a road in that condition would be unlawful by virtue of the provisions of s. 3 of the [Road Traffic Act, 1930]."

By s. 3 of the Act of 1930:

" . . . it shall not be lawful, to use on any road a motor vehicle . . . which does not comply with the regulations applicable to the class or description of vehicles to which the vehicle belongs, as to the construction, weight and equipment thereof."

It is said that, by virtue of several of the Motor Vehicles (Construction and Use) Regulations, 1951, this vehicle was sold in such a condition that the use of it on the road in that condition would be unlawful by virtue of the provisions of s. 3.

The words in s. 8 (1) of the Act of 1934 stating that to sell a vehicle in the condition mentioned shall be unlawful are governed by the opening words of the sub-section: "Subject to the provisions of this section . . ." It is not laid down in unqualified terms simply that it shall be unlawful to sell a vehicle in that condition, but only that it shall be unlawful to do so "subject to the provisions of this section." Therefore, it becomes necessary to look at the rest of the section. Section 8 (2) has no application to the present case. Section 8 (3) provides:

"If a motor vehicle . . . is sold, supplied, offered; or altered, in contravention of the provisions of this section, any person who so sells, supplies, offers, or alters it . . . shall be guilty of an offence."

Therefore, if a person in fact sells a vehicle in such a condition that it infringes the provisions of the regulations in question, an offence is committed. By s. 8 (4):

"A person shall not be convicted for an offence under this section in respect of the sale, supply, offer, or alteration of a motor vehicle . . . if he proves that . . . he had reasonable cause to believe that the vehicle . . . would not be used on a road in Great Britain . . ."

Obviously that applies to the case of a vehicle which is sold as scrap. Then come these words:

" . . . or would not be so used until it had been put into a condition in which it might lawfully be so used."

In other words, a man may commit an offence by selling a vehicle in an unroad-worthy condition, but he cannot be convicted of that offence, if, among other things, he shows to the court that he had reasonable cause to believe that the vehicle would not be used on a road in Great Britain until it had been put into a proper, roadworthy condition. If he does not prove that, it seems that the words of s. 8 (1) apply in full force.

A I have, therefore, to come to a conclusion whether this sale was illegal in the sense that the plaintiff would not have had a defence, had he been prosecuted for an offence under s. 8 (1). The particulars pleaded, in which it is alleged that this motor car was illegally sold because it was unroadworthy, first of all refer to the speed indicator, and it is admitted by the plaintiff that in fact the speedometer was in breach of reg. 12 (1) of the Motor Vehicles (Construction and Use) Regulations, 1951, which is applicable to the speedometer. Secondly, it is said that the silencer of the car was not in good and efficient working order and was not suitable for reducing the noise caused by the escape of gas from the engine, and it is admitted that that was in breach of reg. 20. Lastly, it is said that the car was not equipped with an efficient braking system, and it is admitted that that was the case and that that was in breach of reg. 44 (1).
B What the plaintiff says, in reply, relating to these matters, is that, so far as the speedometer and the braking system were concerned, the defects were pointed out by him to the defendant before or immediately after the sale was concluded and he received the cheque. He told me that he had no reason to suppose that the defendant would use the car on a road until he had rectified those defects. [His LORDSHIP referred to the facts and continued:] I accept
C the evidence of the plaintiff as a perfectly honest and accurate witness, but it is impossible for me to hold that he did not know that the defendant would be using the car on the road before these defects were remedied.

D I agree with the submission of counsel for the defendant that an absolute prohibition is imposed by s. 8 (1) of the Act of 1934 against the sale, and by s. 3 (1) of the Act of 1930, against the use, of vehicles which are in an unroadworthy condition. I do not think that the condition of the vehicle has to be within the knowledge of the seller or the user. I think that counsel for the defendant is right in the submission he made about that, and also in saying that the only defence which would have been open to the plaintiff had he been prosecuted—that provided by s. 8 (4) of the Act of 1934—would not have been open to him on the facts of this case. I do not think he made good before me that he had reasonable cause to believe that the car would not be so used until the
E necessary repairs had been effected. In those circumstances, in my view, the sale of the car was an unlawful sale in contravention of s. 8 (1) of the Act of 1934. The authorities to which counsel for the defendant has drawn my attention, in particular, *Commercial Air Hire, Ltd. v. Wrightways, Ltd.* (1), make it clear that, if a contract is tainted with illegality, the court must take cognisance of it so that the party who has entered into the contract cannot recover in respect
F of it. On that ground, therefore, the defendant is entitled to succeed.

Judgment for defendant.

Solicitors: *Curwen, Carter & Evans* (for the plaintiff); *Vanderpump & Sykes* (for the defendant).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

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FOSTER v. FOSTER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), June 4, 5, 8, 1953.]

Divorce—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Conduct falling short of cruelty.

Res Judicata—Husband and wife—Persistent cruelty—Dismissal of summons—Fresh summons on ground of constructive desertion.

On Aug. 29, 1952, the wife issued a summons against the husband, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging him with persistent cruelty to her on divers occasions before and on Aug. 16. On Sept. 3 the summons was served on the husband. On Sept. 4 the wife left the matrimonial home. On Sept. 17 the justices dismissed the summons. On Oct. 24 the wife issued further summonses before a different court of summary jurisdiction charging the husband with desertion as from Sept. 4, and wilful neglect to maintain her. At the hearing on Nov. 16 she gave evidence similar to that which she had given in the earlier proceedings, but stated also, *inter alia*, that on or about Sept. 4 the husband had said that he had finished with her, and that on Aug. 28 he had hit her and she had left the house for the night. On Nov. 16 the justices made an order in favour of the wife.

HELD: since the issue decided on Sept. 17 was different from that before the justices on Nov. 16 the wife was not estopped *per rem judicatum* from giving evidence similar to that given in the first proceedings; further, although the wife could not on the same evidence make out a case of constructive desertion, she was entitled to give evidence of other acts justifying her leaving home; there was evidence of other acts from which the court could find that the husband's conduct, being of a different kind from and not merely less than cruelty, justified the wife in leaving the matrimonial home; and, therefore, the wife was entitled to an order.

Observations of BUCKNILL, L.J., in *Edwards v. Edwards* ([1949] 2 All E.R. 149), and of HODSON, L.J., in *Pike v. Pike* ([1953] 1 All E.R. 235), applied.

AS TO CONSTRUCTIVE DESERTION—WIFE FORCED OUT OF MATRIMONIAL HOME, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

Cases referred to:

- (1) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
- (2) *Pike v. Pike*, [1953] 1 All E.R. 232.
- (3) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.
- (4) *Edwards v. Edwards*, [1949] 2 All E.R. 145; [1950] P. 8; [1949] L.J.R. 1335; 113 J.P. 383; 27 Digest, Replacement, 366, 3022.
- (5) *Barker v. Barker*, [1949] 1 All E.R. 247; [1949] P. 219; [1949] L.J.R. 464; 113 J.P. 91; 27 Digest, Replacement, 700, 6699.
- (6) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.

APPEAL by the husband against a maintenance order made by the justices for the petty sessional division of Sutton, Surrey, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds of the husband's desertion and wilful neglect to provide reasonable maintenance for the wife.

The parties were married on Aug. 1, 1927. On Aug. 29, 1952, the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, complaining that on Aug. 16, 1952, and on divers days

prior thereto at the matrimonial home the husband had been guilty of persistent cruelty to her. On Sept. 3, 1952, the summons was served on the husband. On Sept. 4, 1952, the wife left the matrimonial home. At the hearing of that summons before the Dorking justices, the wife stated that the marriage had begun to break up at the beginning of the war; that during the preceding ten years the husband had illtreated her; that he had been associating with other women, particularly a Mrs. D.; that she, the wife, was suspicious of these associations; that she and the husband had quarrelled about them; and that these quarrels often ended by the husband hitting her on the mouth, causing her injury. The husband admitted that he had smacked his wife many times, and that on a date before the service of the summons there had been a "scene". On Sept. 17, 1952, the Dorking justices found that for the previous ten years the wife had been obsessed with the idea that the husband was having affairs with other women, and during the previous year or so had particularly accused him of having an affair with Mrs. D., and they found that there was no evidence that he was guilty of any improper association with Mrs. D. As regards the physical violence, they found that the husband had smacked the wife from time to time when she had been nagging him about going out without her, but that the husband's conduct was not of such a character as to have caused danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. Having seen and heard both parties in the witness box the justices were more impressed by the husband than by the wife, and, therefore, they dismissed the complaint, it not being considered that there was sufficient evidence of persistent cruelty to justify an order being made. On the same day the parties saw the probation officer with a view to a reconciliation, and the probation officer suggested that the wife should have three weeks in which to decide whether to return home. At no time did the wife announce her decision.

On Oct. 24, 1952, the wife issued summonses charging the husband with desertion as from Sept. 4, 1952, and wilful neglect to maintain her. Those summonses were heard by the Sutton justices on Nov. 16, 1952, when the wife gave evidence similar to that given before the Dorking justices, but added that the husband had said to her: "I would not take a thing like you out"; that, if she asked him to take her out, he flew into a rage and hit her; that, if she asked him, as she frequently did, not to take out Mrs. D., he hit her; and that a week before she left he hit her and threatened to "do her in"; that this phrase had been used more frequently recently and had frightened her; that when the husband could not have sexual intercourse he would hit her and say he would go out because he knew where he could "get it"; that on Aug. 28, 1952, there had been a quarrel over a conversation which the wife had had with Mrs. D., and as a result of the quarrel the husband had hit her, causing her injury, and she had spent the night with her sister; and that on Sept. 4, 1952, she had left because the husband said he had finished with her. Neighbours stated in evidence that on Aug. 28, 1952, they had heard the wife scream and had seen her running out of her house with blood on her face. The Sutton justices found that the husband's conduct caused her to leave the matrimonial home, and that he had deserted her and had wilfully neglected to maintain her. They, accordingly, made a maintenance order in the wife's favour and the husband appealed.

D. E. Peck for the husband.

Boydell for the wife.

LORD MERRIMAN, P., stated the facts and continued: There is no escape from the dilemma that we are confronted with rival findings about substantially the same course of events, and that at Dorking, the husband's, and at Sutton, the wife's, evidence, has been preferred by those who had the advantage of seeing and hearing the witnesses. In those circumstances

it is not easy to apply the directions to an appellate tribunal contained in *Watt (or Thomas) v. Thomas* (1). It is true that the charge at Dorking was persistent cruelty before and up to Aug. 16, whereas at Sutton it was desertion from Sept. 4, but the wife gave evidence at Dorking on Sept. 17 that things had got worse recently and that the husband had said to her: "I will do you in before I have finished with you", and that he had threatened to take her life within the previous two months, and that recently it had worried her a great deal and frightened her. Finally, she said that "matters came to a head at the end of August. I left home a fortnight ago tomorrow, on Sept. 4". From this it appears that the Dorking justices had before them the wife's whole story, at least in general terms, up to and including her alleged expulsion from the matrimonial home on Sept. 4. As I have already indicated, it seems to me that there is no escape from the essential conflict between the findings of the two courts. I should have felt happier about this case if the Sutton justices had particularised the conduct which they found had caused the wife to leave home, and if there had appeared in the statement of their reasons any trace of their having appreciated the difficulties created by the decision at Dorking a few weeks before.

It is said on behalf of the husband that the wife was estopped per rem judicatam from making the charge of desertion at Sutton. I must not be taken to assume that it is literally accurate that her evidence was in every respect the same at Sutton as it was at Dorking, but the gravamen of the submission on behalf of the husband is that she is saying, as she alleged that she said to the probation officer, that she could not go back to her husband because of his cruelty, which, ex hypothesi, had been found not to exist as a justification.

With regard to the incident on Aug. 28, it is argued that if this was in the least serious, as part of the course of cruelty, it not only could have been, but ought to have been, included in the wife's complaint of Aug. 29, and, therefore, she should be estopped from relying on it now, but it is also argued that it cannot have been serious because, if it had been, the wife could not have overlooked it when she made her complaint on Aug. 29. Alternatively, it is said that there was no such incident, and that it was only a confused repetition of an incident of Aug. 16. Out of such evidence it was obviously difficult to spell out an estoppel. As regards the suggestion that there was no incident on Aug. 28, and that it is merely a confused repetition of the incident of Aug. 16, it is worthy of note that, although the wife gave no evidence in chief and called no witnesses about the incident of Aug. 28, the husband in cross-examination referred to an incident, which is admittedly identifiable with the incident corroborated at the Sutton hearing by the neighbours, and that is again identifiable as the incident of Aug. 28.

Alternatively, it is argued on behalf of the husband that, if this is not a case of estoppel, it is a case of which, reading from the headnote in *Pike v. Pike* (2), it can be said that

"A charge of constructive desertion cannot be proved by evidence of conduct, alleged to have caused the petitioner to leave the matrimonial home, of the nature of cruelty, but not amounting to cruelty in law."

The point in that case emerges clearly from one passage in HODSON, L.J.'s judgment ([1953] 1 All E.R. 235):

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell v. Russell* (3), where false

charges were made, persisted in, and not withdrawn, or, of course, one can take the simple case of constructive desertion where there is an order or direction by one spouse to the other to leave. If that order is obeyed and the direction is followed and not withdrawn, then, again, desertion may run."

We were also referred to *Edwards v. Edwards* (4), and, in particular, to a passage in the judgment of BUCKNILL, L.J., in which he commented on some observations of HODSON, J. ([1949] 1 All E.R. 250) in *Barker v. Barker* (5), an appeal heard in this court. BUCKNILL, L.J., said ([1949] 2 All E.R. 149):

"Counsel for the husband says that is his case, and that in the present case, the commissioner having found that the husband was not cruel, there was no justification for the wife leaving. If HODSON, J., meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her in refusing to live with her husband, with great respect to the learned judge, it seems to me that that decision is inconsistent with the judgments in *Russell v. Russell* (3) and *Buchler v. Buchler* (6) which this court ought to follow. I myself think that that is not what the judge meant to say. I think he meant to say in effect: 'Here is a case where the blows inflicted by the husband on the wife either amounted to cruelty in that they injured her health, or were likely to injure it, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case to justify desertion, the court ought not to say: "Although they were, in effect, trivial blows, they justify her in leaving the husband."'"

I emphasise the last sentence.

In a nutshell, therefore, the argument for the husband is that this is an attempt to build up a case of constructive desertion by what is really a case of unproved cruelty, and, more particularly, it is an attempt to say that smacks delivered from time to time by the husband, which have been held not to have been such as to amount to cruelty, justify the wife in leaving her husband. But I emphasise, as is apparent from the contexts of both those quotations, that the proposition depends on there being no other evidence in the case. Here it is said that there was other evidence, that is to say evidence of the husband having turned the wife out, in other words, of an order or direction by the husband to the wife to leave, acted on and not withdrawn. In her evidence-in-chief before the Sutton justices the wife said: "I left home on Sept. 4, 1952, because he said he had finished with me. He would not turn me out, but he would go out more". It is said, as the context is alleged to show, that this was all part of the incident of Aug. 28. I am not at all sure that that is so. The note at this part is by no means clear, and it may very well be that this, and an alleged threat to "do her in" of which she speaks, all occurred in what she calls "the week before I left", by which I presume she means the week before she left home. But then it is also said that the husband had withdrawn this direction to her to leave, if it was a direction to leave, at the interview with the probation officer on Sept. 17, and that the wife's failure to communicate her acceptance of that offer cancelled anything that had been said previously about her leaving. As regards the interview with the probation officer, if it was admissible at all, I do not think it can fairly be said to amount to any more than an undertaking by the wife to think it over. I do not think that the justices were bound to accept the evidence given by the husband that the wife was satisfied, and expressed herself to be satisfied, with his promise not to hit her again, which he said he had given after the issue of the first summons. The question still remains, therefore: Was there any evidence to justify a finding that the condition of things on Sept. 4 was such that the husband was expelling the wife from the home?

I will deal first with the allegation of estoppel. If the case before the Sutton justices had been an attempt to make a fresh charge of persistent cruelty by including in the course of conduct relied on an alleged incident of Aug. 28, the day before her complaint to the Dorking justices, I should be inclined to hold that she was estopped from re-opening that charge. Obviously, the mere fact that there was better and more detailed evidence, supported by independent witnesses of that incident, would be irrelevant. But at Dorking there was no charge of desertion on Sept. 4 before the court. It is true that, whether by amendment of the summons after she had left home or by the issue of a fresh summons returnable at the same time, all of which is a mere matter of machinery, a charge of desertion could have been made before the Dorking justices on Sept. 17, but, in my opinion, the wife was not bound to put the charge of desertion before the Dorking justices under the penalty of being estopped from afterwards alleging that she had been deserted before the date of that hearing. I think, perhaps, the matter can best be tested by supposing, for the sake of argument, that those steps had been taken, and that there had been before the justices at Dorking on Sept. 17 both a charge of cruelty up to Aug. 29 and a charge of desertion from Sept. 4. Would the Dorking justices, having found that the charge of cruelty had not been proved, have been bound to dismiss the charge of desertion because it was an attempt to build up a charge of constructive desertion by what was really a case of unproved cruelty? In my opinion, they would not, because of the evidence which, I am assuming for the purposes of the argument, the wife would have given, as she gave at Sutton, about the husband telling her that he had finished with her, and the rest. In other words, I am not prepared to hold that a court could not find that a husband who admittedly had smacked his wife in the face many times, because he said he was sick of being nagged by her about his going out, had neglected her, and "did not remember" having threatened her, as she alleged, but said that, if he did so, he did not mean it seriously, ought not to be taken to mean what he says, if he tells his wife at the end of it all that he had finished with her, even though he said that he would not actually turn her out, but coupled his statement that he had finished with her with the assertion that he would go out more than he did before, thereby implying that things would be worse than they had been before if she remained in the matrimonial home. The wife said, in the passage that I have read from her evidence before the Sutton justices, that she left home because of his saying this, and, although his conduct was held not to amount to cruelty, I cannot say that it is impossible that this statement, coupled with his avowal that he had finished with her, should be held to support a charge of desertion. For these reasons, unsatisfactory as I think it is that the wife's case should have been dealt with piecemeal by two courts which came to opposite conclusions about the credibility of the spouses, it is not, in my opinion, open to us to interfere with the decision under appeal, and, therefore, it is our duty to dismiss the appeal.

COLLINGWOOD, J.: I agree. The grounds of appeal are that the finding is wrong in law, that the issue had previously been decided by the Dorking justices and was thereby *res judicata*, that there was no evidence on which the justices could come to the conclusion at which they arrived, and that the decision was against the weight of the evidence.

I propose to look at the evidence which was given at Dorking on Sept. 17 and to compare that with the evidence given on Nov. 16 before the Sutton justices on the summons alleging desertion. I am not going through it in detail, but I will make an attempt to see how far any additional evidence of any materiality was carried at the second hearing, namely, before the Sutton justices. The wife, having spoken of the marriage on Aug. 1, 1927, said at Dorking that it started to break up at the beginning of the war. The husband worked at a pistol rocket factory near their home, a number of girls were

working at the same factory, which brought him into contact with them, and he stayed out late at night. She said she was suspicious of his association with these girls because he appeared to prefer their company to hers and neglected to take her out, and that, when she challenged him with this, it led to quarrels which often ended in his hitting her in the face. With regard to that aspect of the case, when she was before the Sutton justices she added, with regard to his failure to take her out, that when he was taking the girls out he told her: "I would not take a thing like you out", and she said that, if she asked him to do so, he flew into a rage and hit her with the flat of his hand in the face. Apart from his partiality for girls in general during the last two years or so, the wife spoke of his association with a Mrs. D., and that, she said, got gradually worse and worse, especially during the six months preceding the hearing. With regard to that, she added at Sutton that, if she asked him not to go out with Mrs. D., as she frequently did, he hit her. Again, referring to the Dorking evidence, she said that during these quarrels he indulged in threats to the effect that he would "do her in" before he had finished with her, and that recently this phrase had become more frequent and it worried and frightened her. At the hearing before the Sutton justices she made reference to an express threat to "do her in", which she said was made a week before she left, and that would be this incident of Aug. 28, to which it will be necessary to refer again. Before the Sutton justices she said that, in addition to the conduct to which I have referred, her husband, when he could not get what he wanted (referring to sexual intercourse) would hit her, and would say that he would go out, because he knew where he could get it. Matters came to a head at the end of August, 1952. He had been seeing more and more of Mrs. D., her protests as before had been met by a smack in the face, and before the justices at Sutton she added: "If I asked him not to go out with Mrs. D. or to stay in he would hit me", and she added: "He hit me once a week before I left", and: "Once he sent me across the sink", by which, I imagine, she means that he gave her a smack which made her fall thus.

The incident of Aug. 16 was dealt with by the Dorking justices as being the culminating incident in the list of acts which were alleged to constitute cruelty. On that date the husband went to Brighton, returning late in the evening, something after eleven o'clock, having been to Brighton with Mrs. D., though admittedly with that lady's husband and son as well. This led to an argument, and the argument led to the usual smack in the face, which on this occasion made her lip bleed. She was in bed at the time, and she got up to wash her mouth out with water and her husband accompanied her downstairs. She added nothing to that incident in her evidence given at Sutton, except that she said that he had refused to take her to Brighton although she had wanted to go. Of the incident of Aug. 28 the wife gave no evidence before the Dorking justices, but that there was an incident on that day, that is, the day before the wife's summons was taken out, is clear from the evidence of the husband in the course of his cross-examination, because he says that at a date before the summons was served there was a scene. It is clear from the other evidence that the summons was served on him on Sept. 3, and that when he speaks of this scene he is speaking of the incident of Aug. 28. In the course of his cross-examination at Dorking he said: "Before summons was served there was a scene. She screamed and neighbours interfered". He explained the origin of the scene by saying that his wife had cycled down to the bus stop, seen Mrs. D. there, and had insulted her. At the hearing before the Sutton justices, the wife dealt in some detail with this incident of Aug. 28. It arose out of a visit by the husband to Redhill, and he had, his wife says, assured her that Mrs. D. was going to work that day. However, she saw Mrs. D. and spoke to her, the conversation being passed on later to the husband and described as being insulting. The wife went on to say: "At tea-time he came back. He got up",

presumably meaning thereby out of a chair, "and asked me what I had said to Mrs. D. I said I told her she was to be at work", meaning thereby, "I understood you were going to be at work". Thereupon, she says, her husband hit her on the mouth and made a mark on her lip. She added: "It was Thursday or Friday evening" when this occurred "and we were in bed". August 28 was a Thursday, but it is difficult to associate this blow with the parties being in bed at the time when it was administered, because later in her evidence she says: "I called someone. He pushed me into a chair. I screamed. A Mr. B. came in and said something to him. I went to a neighbour. I was frightened of him and afraid to go to bed. He said he would do me in". Then, apparently asked again with regard to when that threat to do her in had been made, she said: "It was a week before we left", meaning thereby, "before I left the matrimonial home", which would be Aug. 28. I think she left with her sister, which would account for the plural.

I agree with LORD MERRIMAN, P., that this is not a question of *res judicata*. It is not estoppel, because the issue before the Sutton justices was an issue different from that before the Dorking justices. But it has been further contended that in this case, as in *Pike v. Pike* (2), in the words of DENNING, L.J., ([1953] 1 All E.R. 236): "... the husband's conduct was either cruelty or it was not. It was not something different from cruelty". HODSON, L.J., makes the same distinction when he says (*ibid.*, 235):

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty",

and it is urged here that, cruelty having been negatived by the Dorking justices at the first hearing, it followed that the wife's case on the ground of desertion failed also. That is the same argument as was presented in *Edwards v. Edwards* (4). The material passage in the judgment of BUCKNILL, L.J., has already been read by my Lord. Applying the criteria in that case, the question which I ask myself is: Is there in the words of BUCKNILL, L.J. ([1949] 2 All E.R. 149), "no other evidence . . . to justify desertion?" Is this a case where, if one negatives the wife's allegations of cruelty, the blows in the face, the threats to do her physical injury, if one finds that these blows and these threats were not of sufficient gravity to comply with the test in *Russell v. Russell* (3), and that they neither did nor were calculated to injure her health, mental or physical, is there anything left which can be said to justify her in leaving the matrimonial home? In my opinion, there was something in addition to the charges of cruelty simpliciter. In the first place, there was the husband's persistent preference for other women, carried to the length of his saying: "I would not take a thing like you out" to his wife. There was the persistent association with Mrs. D. in particular, insisted on over a period of between two and three years despite the wife's repeated protests, while at the same time he was insisting on intercourse with his wife and coupling that with the intimation that if he could not get it he knew where he could get it outside the house. There was no evidence that there was any impropriety in his association with her, but, nevertheless, he insisted on going out with her despite his wife's repeated protests and requests that he should cease to do so. Further, there was his habit of staying out late at night, again persisted in, although he knew the perfectly natural objection his wife had to it; and all these matters were getting worse and worse until the end of August, when the wife said that matters came to a head. He was seeing more of Mrs. D., and hitting the wife in the face when she protested, albeit not blows which injured her health or were calculated so to do. Finally the wife says: "On Sept. 4 I left home because he said he had finished with me. He would not turn me out, but he would go out more himself". In other words, the cause of all the wife's unhappiness for the past

year or two was to be accentuated; what he knew to be the cause of his wife's unhappiness he was going to make worse, and deliberately make worse.

In those circumstances it is, in my opinion, impossible to say that there was no evidence on which the justices were entitled to find as they did, namely, that his conduct caused her to leave and justified her in leaving the matrimonial home. In my opinion, the conduct which did so cause her to leave was of a different kind from, and not merely something less than, cruelty. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Langhams & Letts*, agents for *Hart, Scales & Hodges*, Dorking (for the husband); *Kinch & Richardson*, agents for *Pringle & Co.*, Redhill (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

HARTLEY v. MAYOH AND CO. AND ANOTHER.

[MANCHESTER ASSIZES (Barry, J.), March 20, 23, 24, 28, 1953.]

Negligence—Fire—Fireman electrocuted—Liability of occupiers—Invitee—Mains supply of electricity to lighting circuit not cut off—Obsolete type of mechanism—Unusual danger.

Factory—Fire—Fireman electrocuted while fighting fire—"Persons employed"—Electricity (Factories Act) Special Regulations, 1908 and 1944 (S.R. & O., 1908, No. 1312, as amended by S.R. & O., 1944, No. 739), definitions.

Electricity Supply—Faulty installation—Fireman electrocuted—Liability of electricity board—Failure to test circuit—Negligence—Breach of statutory duty—Electricity Supply Regulations, 1937, reg. 25 (a).

The second defendants were the authority responsible for the supply of electricity to a factory occupied by the first defendants. On Sept. 24, 1950, a fire broke out at the factory and the fire brigade were summoned. As soon as they arrived, the deceased, an officer in the brigade, asked the first defendants' manager where the electric switches were so that he could cut off the mains supply of electricity. He was directed to a main switchboard on the ground floor, and, in his presence, another fireman knocked off the handles of two ironclad switches, contained in boxes adjoining the switchboard, which were obviously mains switches. They all thought that the whole supply of electricity to the premises was then cut off, as the manager did not know, and the firemen did not realise, that the lighting circuit was controlled by two old-fashioned tumbler switches, situated near the main switchboard, and unconnected by any form of link-bar. Notwithstanding that these tumbler switches were not turned off, no current should have been flowing through the lighting wires on the upper floor of the premises, where the fire was blazing, as the master switch which controlled the lighting circuit on the upper floor was turned off, but the polarity of the lighting system had been reversed by the crossing of the two leads between the tumbler switches and the meter and neutral bar, with the result that the neutral wire was alive throughout the whole circuit. When the deceased entered the room where the fire was, a live wire came into contact with his arm and he was electrocuted. The accident could not have occurred if the tumbler switches had been in the "off" position or if the leads had not been crossed. When, and by whom, they were originally crossed was not known. In January, 1950, the second defendants had fitted a new meter, but had not tested the circuits. The widow of the deceased claimed damages against the first and second defendants in respect of his death, the claim against the second defendants being based mainly on their failure to test the circuits in January, 1950. By their defence the second defendants pleaded that the accident was

caused, either wholly or in part, by the negligence of the deceased or of some other officer of the fire brigade.

HELD: (i) although a fireman should understand the usual and normal methods of cutting off the electricity supply in premises in which a fire had taken place, he was not required to possess a detailed knowledge of obsolete mechanism which might, at some period, have been installed for this purpose in buildings within his area; in the circumstances the deceased was justified in concluding that the operation of the two modern ironclad switches cut off the whole of the electricity supply to the premises; and neither he nor any other member of the fire brigade was to blame for the accident.

(ii) the status of the deceased on the premises was that, or equivalent to that, of an invitee; a fireman attained this status whether his brigade had been summoned to the fire by the occupiers of the premises or by some other person.

Merrington v. Ironbridge Metal Works, Ltd. ([1952] 2 All E.R. 1101), followed.

(iii) the first defendants should have been aware of the way in which the mains supply to the lighting and power circuits could be switched off; the fact that the lighting supply was controlled by a switch which, in the absence of a link-bar between the two tumbler switches, did not appear to be a mains switch, and that electric current could circulate through the circuit when the only switches which appeared to be mains switches were turned off, constituted an unusual danger to persons in the situation of the deceased, against which such persons ought to have been warned; and, therefore, the first defendants, as the occupiers of the premises, had failed in their duty to the deceased, as an invitee, to give him due warning of an unusual danger of which they ought to have been aware, and they were liable in damages for negligence.

(iv) on the facts, the first defendants had failed to comply with the requirements of the Electricity (Factories Act) Special Regulations, 1908 and 1944, reg. 1, reg. 7 and reg. 9; their liability to persons injured by a breach of the regulations was not confined to persons in their own employment, notwithstanding that "danger" was defined in the regulations as meaning danger of various kinds "to persons employed"; the reference to persons employed was merely part of that definition, and, once the definition was fulfilled (i.e., once a breach of the regulations caused danger to "persons employed" on the premises), other persons lawfully on the premises were afforded the right of protection; alternatively, the words "persons employed" were not confined to persons employed by the occupiers, but included all other employed persons on the premises; and, therefore, the first defendants were in breach of their statutory duty to the deceased.

(v) when the second defendants installed the new meter on the first defendants' premises in January, 1950, they should have realised that the first defendants would assume that the mains supply was properly connected to the phase wire and not to the neutral wire of the lighting circuit; no intermediate examination by the first defendants could be reasonably contemplated and, in the absence of any such examination, the second defendants should have been aware that their omission to make a proper test would be likely to cause damage to any persons lawfully on the premises who had occasion to come into contact with any part of the wiring of the lighting system; and, therefore, the failure of the second defendants to test the circuits in January, 1950, was a negligent omission on their part and constituted a breach of the legal duty which they owed to the deceased.

M'Alister (or Donoghue) v. Stevenson ([1932] A.C. 562), applied.

Semble, that the second defendants were also in breach of the Electricity Supply Regulations, 1937, reg. 25 (a).

(vi) the fault of the first defendants being comparatively venial, the liability for the damages awarded to the widow should be borne, as to ten per cent. by the first defendants, and as to ninety per cent. by the second defendants.

A

AS TO STANDARD AND DEGREE OF CARE ORDINARILY REQUIRED, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571-576, paras. 825-827; and FOR CASES, see DIGEST, Vol. 36, pp. 12-17, Nos. 33-76.

B

FOR THE REGULATIONS FOR THE GENERATION, TRANSFORMATION, DISTRIBUTION AND USE OF ELECTRICAL ENERGY IN PREMISES UNDER THE FACTORY AND WORKSHOP ACTS, 1901 AND 1907, 1908, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 86.

Cases referred to:

C

(1) *Merrington v. Ironbridge Metal Works, Ltd.*, [1952] 2 All E.R. 1101; 117 J.P. 23.

(2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

ACTION for damages for negligence and breach of statutory duty.

D

The plaintiff, Mrs. Doris Hartley, was the widow and administratrix of Reginald Dingle Hartley, a divisional officer of the Salford Fire Brigade, who died through electrocution on Sept. 24, 1950, when he was engaged in extinguishing a fire at a factory occupied by the first defendants, Mayoh and Co. The second defendants, the North-Western Electricity Board, were the authority responsible for the supply of electricity to the factory. The plaintiff claimed damages against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband.

E

The deceased was the officer responsible for ensuring that the mains supply of electricity and gas was cut off from any building at which the fire brigade were called on to work. On Sept. 24, 1950, the brigade were summoned to deal with a fire which had broken out on the upper floor of the first defendants' factory, and, as soon as they arrived, the deceased and another fireman, named Bigland, asked the first defendants' manager where the main electric switches were situated and were directed by him to the main switchboard on the ground floor. By this switchboard were two ironclad switches contained in boxes, both being obviously mains switches. Bigland, in the presence of the deceased, knocked off the handles in both these switchboxes and they all thought that the whole of the electricity supply to the premises was then cut off. The lighting circuit, however, was controlled by two small tumbler switches,

F

unconnected by any form of link-bar, which were situated on one side of the main switchboard. These tumbler switches were not turned off, as neither the manager nor the firemen realised their function. The master switch, which controlled the whole of the lighting circuit on the upper floor of the premises, and the switch controlling the lighting in the room in which the fire was blazing were both turned off, but, owing to the fact that the leads between the tumbler

G

switches and the meter, on the one hand, and the neutral bar, on the other hand, were wrongly crossed, the polarity of the lighting system was reversed, the current passed through the neutral wire instead of through the phase wire, and the neutral wire remained charged with electricity even after the master switches were off. Having received a slight shock from an electric wire in the neighbourhood of the fire, Bigland returned to the switchboard with the first defendants' manager, who assured him that there were no other switches on the circuit. After re-examining the switchboard, the manager assured Bigland

H

that all the switches were off. Shortly afterwards the deceased entered the room in which the fire was blazing, a "live" electric wire came into contact with his forearm, and he was killed. The plaintiff based her claim against each of the defendants on negligence at common law and breach of statutory duty.

Brabin, Q.C., and P. Curtis for the plaintiff.

Laski, Q.C., and T. M. Backhouse for the first defendants, Mayoh and Co.

Nelson, Q.C., and C. M. W. Elliott for the second defendants, the North-Western Electricity Board.

Cur. adv. vult.

March 28. **BARRY, J.**, read a judgment in which he stated the facts and said: This accident, I think, could never have happened if the tumbler switches had been in the "off" position, nor could it have occurred if the current had been flowing, as it should have done, through the phase wire, which was controlled by the master switch and the switch controlling the lighting in the room where the fire was blazing, and not through the neutral wire. Before considering the liability, if any, attributable to the two defendants, or either of them, it will be convenient to deal with the plea raised by the second defendants that the accident was caused, either wholly or in part, by the negligence of the deceased himself or of some other officer of the Salford Fire Brigade. For this purpose I will assume that firemen should have some general knowledge of gas, electric and water installations, and, in particular, they should, I think, understand the normal and usual methods of cutting off the gas and electricity supply in premises in which a fire takes place. In my judgment, however, they are not required to possess a detailed, historical knowledge of obsolete and highly unusual pieces of mechanism which may at some period have been installed for these purposes in buildings within their area. In the circumstances of this case I am satisfied that, in the absence of any information to the contrary, both Sub-Officer Bigland and the deceased were justified in concluding that the operation of the two modern ironclad switches cut off the whole of the electricity supply to the building. It would, I think, be grossly unjust to convict them of negligence because they failed to realise during the progress of a fire that the two old, unconnected tumbler switches might control the mains supply to the lighting circuit. After all, both the deceased and Bigland were there to fight the fire and not to make a detailed examination into the wiring system of the switchboard. I accept the evidence of the many witnesses who told me that without such a detailed investigation any ordinary fireman would assume that two unconnected tumbler switches controlled some local lighting point and not the mains supply. The use of tumbler switches for controlling the mains supply, even when connected by a link-bar, was a wholly obsolete practice. Since 1930 the second defendants, or their predecessors, had been advising the owners of old installations to change over to modern ironclad switches of the interlocking type. Despite this fact, I have little doubt that, if the two tumbler switches had been connected by a link-bar, the deceased and Bigland would have turned them off, as they would have suspected, at least, that these two connected switches might have some connection with the mains supply. In the absence of any form of linkage joining the two, these two tumbler switches were almost, if not quite, unique as a device for cutting off the mains. Having exonerated, as I do, the deceased and other members of the fire brigade from any blame, I must now consider the legal position of the two defendants.

The first defendants were the occupiers of the premises in which the accident occurred and their common law and statutory obligations to the deceased have both got to be taken into account. At common law, the first defendants' duties to the deceased depended on the capacity in which the deceased entered on their premises. I am satisfied that the status of the deceased on the premises was that—or was, at least, equivalent to that—of an invitee. In reaching this

conclusion I respectfully follow, and agree with, the decision of HALLETT, J., in *Merrington v. Ironbridge Metal Works, Ltd.* (1). I also share that learned judge's opinion that a fireman attains this status whether his brigade has been summoned to the fire by the occupiers of the premises or by some outside person who happens to observe that a fire has broken out.

A is to use proper care to ensure that his premises are free from any unusual danger, or, alternatively, to give due warning of any unusual danger of which he knows or ought to know. With this standard in mind I am quite satisfied that the first defendants failed to fulfil their common law duties towards the deceased. It is, however, right to say that I acquit them of any conscious default. I am also far from satisfied that they ought to have known that the polarity of the lighting system had been reversed by the crossing of the leads between the tumbler switches and the meter and neutral phase. On the other hand, I consider that the occupiers of premises of this kind ought to have been aware of the way in which the mains supply to the lighting and power circuits could be switched off. I am fortified in this view by the evidence of Mr. Holland, the first defendants' manager. He told me that he knew that the two tumbler switches did not control any local lighting points. This should, I think, have put him on inquiry as to their true function. Neither Mr. Holland nor anyone else in the employment of the first defendants warned the deceased of the unusual danger which existed in these premises for firemen or other persons who might come into contact with the electric wires, this unusual danger being, of course, the fact that the lighting supply was controlled by a switch which did not appear to be a mains switch and that electric current could circulate through the electric circuit when the only two switches which appeared to be mains switches were turned to the "off" position. Put in another way, the first defendants ought, I think, to have realised that the absence of any link-bar between the two tumbler switches constituted an unusual danger to persons in the situation of the deceased, against which such persons clearly ought to have been warned. If no warning was to be given, the first defendants should have fulfilled their alternative duty, i.e., they should have rendered their premises safe and eliminated this unusual danger by the simple means of fitting a link-bar between the two tumbler switches or fixing some label or notice in the neighbourhood of the switches indicating that they controlled the main lighting supply to the building.

F The plaintiff's case against the first defendants is also founded on a breach of their statutory duties under the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, 1908 (S.R. & O., 1908, No. 1312), which are still in force.* If these regulations are, in truth, designed to afford protection to those employed in a factory other than the direct employees of the occupiers of that factory, the plaintiff's cause of action under the regulations is not, and, indeed, could not be, in dispute. The occupier of the factory is responsible for compliance with the regulations, and a substantial number of them have, clearly, been infringed in the present case, including reg. 1, reg. 7 and reg. 9, which are specifically referred to in the pleadings. Counsel for the first defendants, however, contended that the regulations afforded protection only to the direct employees of the occupier of the factory. In support of this argument he drew attention to the fact that in the regulations the word "danger" is defined as meaning danger of various kinds "to persons employed." He contrasted the phrase "persons employed" with the more general words used in certain sections of the Factories Act, 1937—e.g., s. 12 (3), s. 13 (1), s. 14 (1) and s. 23—which more general

* These regulations were amended by the Electricity (Factories Act) Special Regulations, 1944 (S.R. & O., 1944, No. 739), and the two sets of regulations may be cited together as the Electricity (Factories Act) Special Regulations, 1908 and 1944.

words, he said, were used by the legislature when it was intended to extend the protection of the Act to persons working on premises who were not, in fact, employed by the occupiers. This is a formidable argument, but, with some hesitation, I think that it ought to be rejected. The regulations of 1908 are quite general in their terms, although it is true they are made under powers contained in the Factory and Workshop Acts. It would, I think, be a strange course of construction to limit the application of any code of regulations by reason of the definition of a single word which is only to be found in a proportion, and not a large proportion, of the regulations concerned. This is particularly so when the word in question has not, in itself, any conceivable bearing on the extent of the application of the regulations. It would, of course, be absurd to find that those regulations which contained the word "danger" were of narrower application than those in which that word did not appear. Having regard to the scope, and, particularly, to the purpose, of these regulations and the danger which they were designed to prevent, I think that I should give them the most liberal interpretation which their wording will allow. This can be done by regarding the reference to "persons employed", in the definition of "danger", as merely part of that definition, and by so doing one can construe the regulations as meaning that, once this definition has been fulfilled—i.e., once some act or omission causes danger to "persons employed" on the premises—other persons lawfully on those premises are afforded the right of protection. Alternatively, and, to my mind, perhaps more attractively, it can be said that the words "persons employed" should not be given a more limited meaning than the words actually express, and it can be said that these words are not confined to persons employed by the occupiers but can also include all other persons who are employed on the premises. On the whole, therefore, I think that the plaintiff has established her case against the first defendants under the regulations of 1908, but I reach that conclusion with very much less confidence than I reached the conclusion that she has established against them a breach of their common law duties.

The liability of the first defendants having thus been established, I must now consider the position of the second defendants, the North-Western Electricity Board. For the sake of brevity, I shall not differentiate between the board and their predecessors prior to 1948 when the board took over the undertaking from the Salford Corporation and other authorities. I am satisfied that, when an electricity supply was first brought to these premises, the occupiers were responsible for supplying the cables, or leads, or lengths of wire, of sufficient length to enable the installation on the premises to be attached on the meter and neutral bar provided by the second defendants. The subsequent attachment of the leads provided by the occupiers, and their subsequent sealing within the meter and the neutral bar, were within the responsibility of the second defendants. [HIS LORDSHIP reviewed the evidence which showed that the original installation had been interfered with on four occasions. On the first occasion the number of lighting points had been increased, the work being done by independent contractors employed by the first defendants. On the other three occasions the work had been done by the second defendants: in 1934 they had supplied a new meter, in 1946 they had installed a bottle-washing machine, and in January, 1950, after a burst pipe had flooded the switchboard, they had put in a new three-terminal meter and connected it up to the lighting circuit. The work of putting in the new meter was carried out by Mr. Oddy, a meter-fixer employed by the second defendants. HIS LORDSHIP was satisfied that Mr. Oddy was not responsible for crossing the wires, as, to carry out his work, he would only have disconnected the leads between the meter and the switches, and the leads were of such lengths that it was impossible to interchange them at the ends where they were connected with the second defendants' apparatus. HIS LORDSHIP continued:] I am,

however, forced to the conclusion that, on a strong balance of probability, the original crossing of the two leads from the tumbler switches to the second defendants' apparatus was the fault of some unknown employee of the second defendants. This fault was committed on some previous occasion which it is wholly impossible to identify. The original responsibility for the crossing of these two leads is, however, a question, I think, of, comparatively, slight importance. The plaintiff's case against the second defendants is primarily based on their failure to test the circuits when they fitted the new meter in January, 1950—about eight months before this accident took place. The fact that the current was passing through the neutral instead of the phase wire could have been ascertained by more than one very simple test, the simplest of which was, perhaps, the use of a neon testing instrument, which would have detected this fault in a matter of seconds. There has been a considerable body of expert evidence to the effect that a test of this kind should be made by a supply authority whenever there has been any interference with the mains supply, such as by the fixing of a new meter. It was the normal practice of some boards to make such a test, although it was not, at that time at least, the practice of the second defendants. The failure of the second defendants to make any test on this occasion was, I think, a negligent omission on their part. The second defendants pointed out that Mr. Oddy himself could not have crossed the wires and was, therefore, entitled to assume that they were correctly connected. After fixing a meter and re-establishing a mains electricity supply on the premises, the second defendants, realising the extreme danger which may arise from any fault, should not, I think, have been satisfied with a probability—or even a high probability—that the circuits were correctly connected. I think that they should have satisfied themselves, as they so easily could have done, that they were, in truth and in fact, correctly connected.

It does not, however, assist the plaintiff to establish that the second defendants were what has been described as "negligent in the air". She must also satisfy me that they were in breach of some legal duty which they owed to the deceased. I have little doubt that such a duty did, in fact, exist. The plaintiff relied on the well-known principles enunciated by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (2): see the observations of LORD ATKIN ([1932] A.C. 580). I am satisfied that those principles are applicable in the present case. In 1953 it is unnecessary for me to cite any passages from the well-known speeches so often referred to in that case. The second defendants should, I think, have realised that, when they installed a new meter which measured the electric current passing into the lighting system of the occupiers of any premises, these occupiers would assume that the mains supply was properly connected to the phase wire and not to the neutral wire of their lighting circuit. No intermediate examination by the occupiers could, I think, be reasonably contemplated, and in the absence of any such examination the second defendants should, in my judgment, have been aware that their omission to make a proper test of the circuit would be likely to cause damage to any persons lawfully on the occupiers' premises who had occasion to come into contact with any part of the wiring of the lighting system. Such persons, in my judgment, included the deceased. No useful purpose would, I think, be served by a further elaboration of this part of the case.

The plaintiff further relied, as against the second defendants, on a breach by them of the Electricity Supply Regulations, 1937, made by the Electricity Commissioners under the Electricity (Supply) Acts, 1882 to 1936. Here, again, I think that the plaintiff's case under these regulations is very much less secure than it is under the common law of this country. None the less, I ought to express an opinion about the matter, but again do so with some considerable hesitation. On the whole, I take the view that the plaintiff has established a breach of reg. 25 (a) of the regulations of 1937. Regulation 25 reads:

"(a) The undertakers shall be responsible for all electric lines and apparatus placed by them on the premises of a consumer and either belonging to the undertakers or under their control (whether forming the whole or part of the consumer's installation or not) being installed and maintained in a safe condition and suitable for their respective purposes and being so fixed and protected as to prevent so far as is reasonably practicable leakage to any adjacent metal. (b) The standard of construction and installation adopted by the undertakers in complying with para. (a) hereof in so far as it relates to the whole or any part of a consumer's installation shall not be lower than that which the undertakers would be prepared to accept under reg. 27 to reg. 30 (inclusive)."

The matter seems to me to be extremely doubtful, but although the two leads from the tumbler switches were originally, as I have found, provided by the occupiers of the premises, none the less, in one sense, they were placed by the undertakers on the premises—in the sense that the undertakers utilised these wires and wholly controlled them for the purpose of connection with their apparatus, i.e., the meter and the neutral phase on the switchboard. I think that is a possible construction of the matter, and, although I am extremely doubtful about it, I think, on the whole, were I forced to decide this matter, I should find in favour of the plaintiff. Clearly, if the regulations are applicable to these two leads there has been a breach of the requirements placed on the undertakers—in this case, the second defendants—as those two leads were certainly not installed or maintained in a safe condition.

In the result, I find that each of the defendants are responsible to the plaintiff in respect of this accident, each being responsible for one of the two causes in the absence of which no accident could have occurred. I have, therefore, to turn to the question of damages.

I have been asked by counsel for the first defendants to apportion the blame for this accident between the defendants. I have considered the matter carefully, and I have no doubt that by far the greater responsibility in this matter rests on the second defendants. The first defendants are pickle manufacturers and they are not experts in electrical supply. Their fault—although it was a fault, as I have found—was, I think, a comparatively venial one, and I think that the fair apportionment as between the defendants should be that the first defendants bear ten per cent. of the loss and the second defendants bear the remaining ninety per cent. of the loss. By "loss" I mean the damages awarded to the plaintiff.

Judgment for the plaintiff against both defendants.

Solicitors: *George Davies*, Manchester (for the plaintiff); *Shaw, Smith & Co.*, Manchester (for the first defendants); *James Chapman & Co.*, Manchester (for the second defendants).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

NOTE.

DRYDEN v. DRYDEN.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), June 23, 1953.]

A *Divorce—Desertion—Termination—Adultery by deserted spouse—Onus on deserted spouse to show that adultery did not affect desertion.*

APPEAL by the wife from an order of His Honour JUDGE REWCASTLE, dated Dec. 18, 1952, made on an undefended petition by the wife for divorce on the ground of her husband's desertion.

B The husband deserted the wife in 1948, and in 1949 she obtained magistrates' orders in respect of her own maintenance and that of the two children of the marriage. In her discretion statement the wife admitted committing adultery in July, 1950, and in September, 1950, as a result of which a child was born in June, 1951. According to the evidence the husband, on hearing of her adultery, took proceedings to have the order for the wife's maintenance discharged. The learned commissioner dismissed the petition.

C *Stranger-Jones* for the wife.

The husband did not appear.

Case referred to:

(1) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest, Replacement, 360, 2978.

D **HODSON, L.J.**, said that the learned commissioner seemed to have based himself on the view that the husband's proceedings to discharge, on the ground of the wife's adultery, the order which the wife obtained against him had the automatic effect of showing that the desertion was terminated. He (HIS LORDSHIP) did not think that was the right view. It was open to the wife to discharge the burden of proving that desertion still continued notwithstanding that proceedings were taken by the husband to have the order discharged. The law applicable to that situation was stated in *Herod v. Herod* (1) in terms which had been repeatedly approved by the Court of Appeal, namely, that the adultery of the wife did not automatically terminate desertion, but it was an obstacle in the way of proving that it continued. That obstacle was often removed by the petitioner's giving evidence tending to show that in all probability the other party had no knowledge of the adultery, but once it was clear that the petitioner had committed adultery it was not an easy matter for him or her to show that that adultery had no effect on the continuance of the desertion. No attempt had been made in the present case before the learned commissioner to discharge that part of the burden. The commissioner had been asked to draw the conclusion that the husband's determination to desert was fixed and unshakable and that the adultery had had nothing to do with it. He (HIS LORDSHIP) thought the burden was not so easily discharged as that. In the circumstances HIS LORDSHIP had come to the conclusion that there ought to be an opportunity for the wife to have a re-hearing.

G *Appeal allowed in part.*

Solicitors: *T. D. Jones & Co.*, agents for *Hargreaves*, Barking, Essex (for the wife).

P.P.

MILLS v. ALLEN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
June 17, 18, 1953.]

Limitation of Action—Landlord and tenant—Possession—Suspension of warrant—Non-enforcement for more than twelve years since date of issue—Small Tenements Recovery Act, 1838 (c. 74), s. 1—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 4 (2)—Limitation Act, 1939 (c. 21), s. 2 (4).

A

Rent Restriction—Death of tenant—Order for possession during tenant's lifetime—Conditional suspension of order—Effect on rights of member of tenant's family—Form of order—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

B

In 1922 a dwelling-house to which the Rent Restrictions Acts applied was let to A. at a rent of £1 6s. 8d. per month. In May, 1935, the landlord gave A. notice to quit in June, 1935, when the contractual tenancy was effectually determined. On July 16, 1935, the landlord obtained from a court of summary jurisdiction a warrant for possession under the Small Tenements Recovery Act, 1838, s. 1, subject to the provision that the warrant should not be executed as long as A. paid the rent regularly and made a monthly payment towards the arrears of rent, and it was ordered that the warrant should remain in force for three months or for such further period as the court should from time to time direct. On Jan. 31, 1939, the landlord applied for the enforcement of the order of July 16, 1935, but the court suspended the warrant for a further period of three months, and on Apr. 25, 1939, the operation of the order was suspended sine die. Rent was paid by A. and accepted by the landlord until, on Oct. 5, 1952, A. died intestate. The landlord now claimed possession against A.'s niece who had lived with A. since 1922. The county court judge made an order for possession on the ground that the order of the justices dated July 16, 1935, put an end to the statutory tenancy of A. and prevented the transmission of the statutory tenancy to the niece under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On appeal,

C

D

E

HELD: assuming that the directions of the justices were all effectively made, nevertheless, having regard to the Limitation Act, 1939, s. 2 (4), the justices' order ceased to be effective at least one year, and possibly five years, before A.'s death, and, therefore, A.'s continuing in possession for a period before her death and paying rent, and the landlord's acceptance of that rent, was conduct referable only to there being in A. a contractual or a statutory tenancy, and it followed that, whatever the nature of A.'s tenancy, A.'s niece, as a member of A.'s family within s. 12 (1) (g), was entitled to remain in possession as tenant.

F

G

Moodie v. Hosegood ([1951] 2 All E.R. 582), applied.

Per curiam: An order for possession suspended so long as certain conditions are complied with is not necessarily the most satisfactory form of order to make. Where it is desired, in effect, to suspend the order for possession for an indefinite period, there is much to be said for making an order that the defendant should be required to agree to pay the rent and arrears, or perform whatever other conditions the court may think proper; that the agreement should be recited in the order; and that the court should make no order for possession, but should give liberty to apply for an order for possession on breach or non-fulfilment of the conditions. If any order for possession is then made, it is likely to be an absolute order, and nobody is left in doubt as to its effect.

H

Per SIR RAYMOND EVERSLED, M.R.: There is strong ground for suggesting that a warrant under the Small Tenements Recovery Act, 1838, s. 1,

can be comprehended within the Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (2), as being a judgment, so as thereby to confer on the justices powers at the time of making their order to direct that it should not be executed so long as some conditions are fulfilled.

Observations of SIR RAYMOND EVERSHERD, M.R., relating to the effect of the existence of a conditional order for possession on the right of a member of a deceased tenant's family to be deemed to be the tenant by virtue of s. 12 (1) (g) of the Act of 1920.

American Economic Laundry, Ltd. v. Little ([1950] 2 All E.R. 1186), considered.

Quaere whether, where a statutory tenancy is to be treated as terminated by an order for possession, it would revive when the order ceased to be effective, or whether a statutory tenancy is capable of co-existing with the operation of the order.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-335, paras. 392-401; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 658-666, 695-698, Nos. 7600-7649, 7871-7894.

C Cases referred to:

- (1) *American Economic Laundry, Ltd. v. Little*, [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 31 Digest, Replacement, 665, 7645.
- (2) *Lougher v. Donovan*, [1948] 2 All E.R. 11; *sub nom. Donovan v. Lougher*, [1948] L.J.R. 1383; 31 Digest, Replacement, 721, 8044.
- (3) *Moodie v. Hosegood*, [1951] 2 All E.R. 582; [1952] A.C. 61; 2nd Digest Supp.
- (4) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 31 Digest, Replacement, 661, 7624.
- (5) *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest, Replacement, 694, 7865.
- (6) *Tideway Investment & Property Holdings, Ltd. v. Wellwood*, [1952] 2 All E.R. 514; [1952] Ch. 791.
- (7) *Bell London & Provincial Properties, Ltd. v. Reuben*, [1946] 2 All E.R. 547; [1947] K.B. 157; [1947] L.J.R. 251; 176 L.T. 92; 31 Digest, Replacement, 700, 7903.
- (8) *Merrick v. Lenihan*, [1950] E.G.D. 277.
- (9) *Lee Haven Estates, Ltd. v. Daley*, [1950] E.G.D. 274.

F APPEAL by a defendant, Bessie Jane Allen, from an order of His Honour JUDGE RAWLINS at Redruth County Court, dated Mar. 12, 1953. The landlord claimed an order for possession of a dwelling-house to which the Rent Restrictions Acts applied from (inter alios) the defendant, a niece of a Mrs. Allen. In 1922 Mrs. Allen became a contractual tenant of the dwelling-house, and her contractual tenancy was determined in June, 1935. On July 16, 1935, the landlord obtained from a court of summary jurisdiction a warrant for possession suspended for three months. In 1939 the operation of the warrant was suspended sine die. The county court judge held that the order of the justices put an end to Mrs. Allen's statutory tenancy and prevented the transmission of the tenancy to the appellant on Mrs. Allen's death on Oct. 5, 1952, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g).

H *Tilling* for the defendant, Miss Allen.

Petherick for the plaintiff, the landlord.

SIR RAYMOND EVERSHERD, M.R.: This appeal has given rise to considerable argument on certain points of great difficulty, and, I think, importance, though, in the event, the matter can, in my judgment, be determined, and should be determined, on a relatively simple point. The action is one for possession brought by Mrs. Mills, the landlord, against some seven persons

who were and, I take it, are in occupation of the premises known as 33 Centenary Street, Camborne. At the trial, the substantial defence was to the effect that the first of the defendants, Miss Bessie Jane Allen, was entitled to be regarded as the statutory tenant of those premises by virtue of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), as amended. The county court judge decided in favour of the landlord, and made an order for possession. Although the notice of appeal appears to have been served on behalf of all the defendants, it has been agreed before us (and we have proceeded accordingly) that the first defendant only, Miss Allen, is the appellant and she alone of the seven defendants claims any right to remain on the premises.

In September, 1922, these premises were let on a contractual tenancy to Miss Allen's aunt, a Mrs. Andrews, at a rent of £1 6s. 8d. per month, and thenceforward Mrs. Andrews, together with a number of her relatives, including Miss Allen, have occupied the house. In May, 1935, the then landlord, the predecessor in title of the plaintiff, gave notice to quit to Mrs. Andrews. That notice duly expired and was effective to determine the contractual tenancy in June, 1935. The next step—and it is the first of the matters which has given rise to great difficulty and not a little obscurity—was that the then owner, one William Vivian, made an application to the justices of the petty sessional division of East Penwith for the issue of a warrant for possession under the terms of the Small Tenements Recovery Act, 1838, s. 1. To the form of the order which was made, according to the notes with which we have been supplied, I shall presently have to return. Suffice it to state that the justices appear to have made an order in exercise or purported exercise of their powers under s. 1 of which the intended effect appears to have been that possession was to be given within twenty-one days, subject to the provision that so long as Mrs. Andrews paid regularly the monthly rent of £1 6s. 8d., together with a further sum of 14s. 4d. on account of arrears, the warrant should not be executed, and it was, subject to those directions, to remain in force for three months or for such further period as the court should from time to time direct. Those last few words, as will later appear, are a reflection of the terms of the Rent and Mortgage Interest Restrictions Act, 1923, s. 4 (4). That order was made on July 16, 1935.

The provisions for payment of rent and arrears do not appear to have been closely adhered to, and although we have no note of any further order extending the period of three months mentioned in the first order, on Jan. 31, 1939, Mr. William Vivian applied again to the petty sessional court of East Penwith for enforcement of the order for possession made on July 16, 1935. On that occasion, it appears that the order was "suspended" (whatever may be the precise effect of that direction) for a further period of three months on the same conditions as those which I have already stated in reference to the first order—at least, so it has been assumed. From that time onwards, however, the performance of Mrs. Andrews in paying her rent and arrears was much improved, so that in April, 1939, the landlord himself communicated with the court and invited the court to make a further suspension. The note of what was then done on Apr. 25, 1939, is that the operation of the order was suspended sine die. I assume again that the intention was that for an indefinite period the execution of the warrant was to be suspended, provided that Mrs. Andrews punctually paid her rent and regular instalments of the arrears.

In 1943 the present plaintiff acquired the property from William Vivian. Finally, on Oct. 5, 1952, Mrs. Andrews died intestate, and no grant of administration of her estate has been made.

During the whole period of her occupation, from 1922 until 1952, the appellant (hereinafter called Miss Allen) was residing with her aunt, and it is conceded by counsel for the landlord that the judge was entitled to find and correctly

held that if all other points were decided in Miss Allen's favour, she ought to be treated as a member of Mrs. Andrews' family within s. 12 (1) (g) of the Act of 1920, but, in order that she may, by fulfilling that condition, be entitled now to remain in occupation by virtue of the Rent Restrictions Acts she must show that when her aunt, Mrs. Andrews, died, she was either a contractual or a statutory tenant of 33 Centenary Street, Camborne.

A I have already intimated sufficiently what the real point was which presented itself to the county court judge, viz., whether the making of the order in 1935 by the justices, the operation of which was suspended first until April, 1939, and then sine die, was such as to put an end altogether to the statutory tenancy which Mrs. Andrews formerly enjoyed, and thereby to prevent the operation in Miss Allen's favour of the definition in s. 12 (1) (g).

B On that issue the county court judge concluded as follows:

C "Following the reasoning of the Court of Appeal in *American Economic Laundry, Ltd. v. Little* (1), I find that the plaintiff, the landlord, is entitled to an order for possession. For the purpose of this decision I am assuming that the defendant is a member of the tenant's family within the meaning of s. 12 (1) (g) of the Act of 1920 as amended by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 13, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, s. 1. The fact that the warrant cannot be enforced does not in my opinion affect the right of the landlord. I respectfully agree with SOMERVELL, L.J., when he says ([1950] 2 All E.R. 1188): ' . . . a tenant in that position, with an absolute order made against him, notwithstanding that it may be suspended, is not a tenant within the meaning of s. 12 (1) (g) of the Act of 1920. That, I think, is in accordance with a common-sense application of the section. It would be an illogical result if that section gave protection to a widow which the court had expressly taken away from the husband whose tenancy she relies on, that tenancy having been brought to a suspended end by the order for possession' . . . In view of my opinion that the order was a final order, and not a conditional one, it is unnecessary for me to consider what would be the position if the order had been conditional."

E Before I refer further to *American Economic Laundry, Ltd. v. Little* (1), it may be convenient to deal with certain other points which have arisen and which have themselves caused no little difficulty. The terms of the Small Tenements Recovery Act, 1838, s. 1, so far as relevant are as follows:

F " . . . and upon proof of service of the notice [by the landlord for the determination of the tenancy], and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent . . ."

H There is no question but that these premises are within the scope of the Act of 1838. From the part of the section which I have read it is plain that the only jurisdiction conferred on the justices by the Act of 1838 is to issue a warrant for possession. It is, therefore, one difficulty in the way of the landlord in this case that, according to the notes of what took place in the petty sessional court of East Penwith, there is no express reference to the issue of a warrant at all. In the rather longer note which was before the county court judge, which

the clerk certified, the court appears on July 16, 1935, to have made an order for possession, and then the note continued: "The warrant to be suspended", on the terms which I have already mentioned, but to remain in force for three months. In the rather shorter certificate with which we have been supplied the note is:

"Order made for possession within twenty-one days, not to be executed so long as respondent pays £2 a month on account of current rent accruing and arrears owing."

Judging solely from the evidence of those notes, it appears, therefore, at least doubtful whether any warrant under the hands and seals of the justices and addressed to the constables ever was, in fact, issued at all. That point, however, was not taken in the court below. In the particulars of claim the landlord pleaded that a warrant had been issued, and although it is true that the defence put the landlord to proof of the whole of her claim, no point, in fact, was made calling on the landlord strictly to prove the issue of a warrant. According to his notes of judgment, the learned judge, possibly proceeding, as he was entitled to do, on the principle that everything should be assumed to have been correctly done, opened his judgment thus: "The following facts were admitted or were proved to my satisfaction", and then No. 8 out of a total of 11:

"In July, 1935, the then landlord took proceedings under the Small Tenements Recovery Act, 1838, against Mrs. Annie Andrews and a warrant for possession was issued."

Counsel for Miss Allen has said that although the point that no warrant was ever issued was not taken below, it should be open to him in this court on the ground that we are here dealing with a rent restriction matter, and that by the imperative words of the Act of Parliament the court cannot make an order for possession unless the court is satisfied that the conditions on which alone an order can be made have been satisfied. I do not think, however, that that argument would suffice to enable this point to be taken here when it had not been taken below. The question whether a warrant was or was not issued was a question of fact, and if Miss Allen in the court below has chosen to concede, expressly or implicitly, that matter of fact, so that the judge was entitled to conclude as he did, it seems to me that the provisions of the Rent Restrictions Acts are not such as to empower or authorise us to go afresh into a matter of fact—which, indeed, we would be quite unable to do, having now no material available to enable a conclusion to be reached. Whatever doubts, therefore, the form of the clerk's notes might give rise to, I think we are entitled to assume, and must assume, that the judge rightly held that a warrant for possession had been issued.

That, however, is not entirely the end of the difficulties arising out of the justices' orders, because, as has been pointed out, the impact of the rent restriction legislation on the Small Tenements Recovery Act, 1838, leaves some obscurity in the consequences. Two sub-sections of s. 4 of the Act of 1923 are relevant. Sub-section (2), so far as is necessary for these purposes, is as follows:

"At the time of . . . the making or giving of any order or judgment for the recovery of possession of any such dwelling-house . . . or in the case of any such order or judgment which has been made . . . and not executed . . . the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits or otherwise as the court thinks fit, and, if such conditions

are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

That, in terms, does not refer to warrants under the Small Tenements Recovery Act, 1838, but I will come back in a moment to explain how it is suggested that it nevertheless applies. Sub-section (4) is directly concerned with these warrants:

A "Notwithstanding anything in s. 143 of the County Courts Act, 1888, or in s. 1 of the Small Tenements Recovery Act, 1838, every warrant for delivery of possession of, or to enter and give possession of, any dwelling-house to which this Act applies, shall remain in force for three months . . . or, in the case of a warrant under the Small Tenements Recovery Act, 1838, from the date of the issue of the warrant, and . . . for such further period or periods, if any, as the court shall from time to time, whether before or after the expiration of such three months, direct."

B To deal first with sub-s. (4), it seems to me plain enough that, notwithstanding the limits of time stated in the Small Tenements Recovery Act, 1838, s. 1, viz., that the warrant must be executed within a period not less than twenty-one nor more than thirty clear days from the date of the warrant, the warrant in the case of a rent-restricted house remains in operation for three months.

C What, however, happens to it during the three months if it is not, in fact, executed or—if it is permissible for the justices so to do—if the justices give some direction whereby it could not properly be executed? So far as I can see, though the matter is not one on which it is necessary for me to express a final view, the answer to that question appears to be provided by sub-s. (2). Counsel for the landlord observes, and I think counsel for Miss Allen agrees,

D that the issue of a warrant of this nature is not merely an administrative act comparable to the issue of a warrant for the purpose of executing some earlier judgment; it is in itself both the judgment and its form of execution, and, therefore, combines both the judicial and the administrative functions of the justices who order its issue. If that is so, there is at any rate strong ground for suggesting that a warrant also can be comprehended within sub-s. (2) as being

E a judgment, so as thereby to confer on the justices powers at the time they make their order to direct that it should not, in fact, be executed so long as some conditions which they impose are fulfilled.

It is, no doubt, not uncommon in the case of houses falling within the scope of the Small Tenements Recovery Act, 1838, for applications to be made to the justices, and where the premises are also within the Rent Restrictions Acts, it seems necessary, and certainly sensible (if effect is given to what appears

F to be the intention of Parliament) that the justices, at the time they direct the issue of the warrant, should be entitled to state that during the three months of the warrant's efficacy it should not be executed so long as the tenant performs such terms and conditions as they may direct, but, unless it is extended by the court—and I assume that that must mean the court that orders its original

G issue—the warrant would appear to expire and come to an end, so far as any efficacy is concerned, at the end of three months. In the present case, there was a substantial gap from July, 1935, until the next order in 1939—three and a half years later, when the same petty sessional bench directed that the original order should be suspended for a further three months from Jan. 31, 1939. I assume that it was competent for them, if nothing had happened

H in the meantime, to make that direction so as to preserve the efficacy of the warrant for three months from Jan. 31, 1939, though *prima facie* it would appear to have expired on Oct. 16, 1935. As I have said, before the three months from Jan. 31, 1939, had come to an end, a further order was made directing the suspension of the original order *sine die*.

What is the effect of those directions, assuming that they were all effectively made and within the jurisdiction of the justices? The answer to that problem seems to me to be reasonably clear, in view of the contentions put before us

by counsel. The warrant has, in my judgment, ceased to have any efficacy, ceased entirely to be enforceable, and it has so ceased to have efficacy as the result of the Limitation Act, 1939, s. 2 (4). In that Act the definition section, s. 31, defines "action" in this way: "'Action' includes any proceedings in a court of law . . ." Section 2 (4) provides:

"An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable . . ."

According to counsel for Miss Allen, the judgment must have become enforceable at some date after the expiry of the original three months and before the second order of Jan. 31, 1939, was made, for it is apparent that that second order was made because of the failure on Mrs. Andrews' part to comply with the terms of the original order, so that, if it remained efficacious at all, the landlord would have been enabled forthwith to apply for enforcement. As at present advised, however, I think the warrant ceased to be enforceable before that date for *Lougher v. Donovan* (2) seems to be authority for saying that in the case of a warrant of this nature the statute operates from the date of the warrant itself. If that is so, of course, it ceased to be effective so much the earlier. In any event, the warrant, in my judgment, ceased to be capable of execution, the original order of 1935 ceased to have any efficacy, at the latest on some date appreciably before the date of Mrs. Andrews' death. If counsel for the landlord is right—and it is, of course, his case to contend that the warrant remained alive as long as possible—then it ceased to be efficacious some five years or more before Mrs. Andrews died.

What, then, is the result? The result seems to me to be that there was a period of time—possibly a year, possibly five years—during which Mrs. Andrews continued in possession of these premises, paying rent which was accepted by the landlord before she died. Her occupation, the payment by her of rent, and the acceptance of that rent by the landlord, can be referable to one of two causes. It can be referable to Mrs. Andrews' right to remain in occupation as what is called a statutory tenant. If, as the argument of counsel for Miss Allen has run, the statutory tenancy came to an end once and for all when, on July 16, 1935, the justices made their first order, then it seems to me that the ordinary rules of the common law must apply, and that the continued occupation, etc., can only be referable to a contractual relation. There is, in my judgment, no room here on the evidence for the view that she was a licensee.

On one ground or the other, therefore, it seems to me inevitable that Mrs. Andrews, when she died, was a tenant, statutory or contractual, and, in either case, once it is conceded that Miss Allen is a member of the family within s. 12 (1) (g) of the Act of 1920, Miss Allen must be entitled now to claim to be a tenant by virtue of that section. It was, of course, at one time thought that the definition section applied only where what one might call the predecessor was a statutory tenant, but it has been held in *Moodie v. Hosegood* (3) that that is not so. It matters not, therefore, for the purposes of this case whether Mrs. Andrews was a contractual or a statutory tenant at her death. For the reasons I have indicated, she must have been, I think, one or the other, and it follows necessarily that the appeal must succeed on that ground.

But the case has raised a point of great difficulty and argument of some nicety about the effect, for the purposes of applying this definition section, s. 12 (1) (g), of orders for possession, and a distinction has been drawn in the argument between what have been called final or absolute orders for possession and what have been called conditional orders for possession. In the circumstances of the case, out of respect to the arguments and in the hope, perhaps, of rendering some useful service to those county court judges whose duty it is to administer these Acts, I would like to make a few observations on the arguments.

It is not, however, necessary for me to express a conclusion on the really difficult point which has emerged from the argument, viz., what happens so far as a member of the family otherwise within s. 12 (1) (g) is concerned if his or her predecessor (to use again that word) should die during the time that a conditional order for possession is in effective operation with regard to the premises?

A If the order for possession is absolute, then *American Economic Laundry, Ltd. v. Little* (1), to which I referred when reading the judge's judgment, indubitably applies, and in such case it has been held by this court that there is no room for the application in favour of the member of the family of the definition section. But SOMERVELL, L.J., expressly left open the question whether the same result would follow if the order for possession were conditional. In that case, it is important to note, the order which had been made was an order for possession to take effect on a future date, the point of the time lag being merely to give to the tenant an opportunity to remove himself and his belongings. In point of fact, the period was extended, but the case came on for hearing after the expiration of the extended period. The order was, however, always an order otherwise unqualified in terms; it was an order that the defendant must give up possession on the future date named. SOMERVELL, L.J., noted the learned judge's decision that the defendant was, within the words in s. 12 (1) (g) of the Act of 1920, a member of the tenant's family and could claim to remain in possession and continued ([1950] 2 All E.R. 1188):

"The learned judge said, and I agree with him, that the point is not free from difficulty . . . he referred, first, to *Brown v. Draper* (4), and cited the following passage of LORD GREENE, M.R. ([1944] 1 All E.R. 248):

D ' . . . the only ways in which he [the tenant] can be deprived of the protection of the Acts are (a) by giving up possession, in which case no order for recovery of possession against him is required; or (b) by having an order for recovery of possession made against him . . . ' Those words, read literally, might be taken to indicate that the order for possession in itself deprived him of the protection of the Act. On the other hand, the learned county court judge referred to a statement of SCRUTTON, L.J., in *Keeves v. Dean, Nunn v. Pellegrini* (5) where the learned lord justice said ([1924] 1 K.B. 694): ' I take it that he [the tenant] has a right as against all the world to remain in possession until he is turned out by an order of the court . . . ' The difference between the literal meaning of those statements of the law becomes apparent in the present case. I agree with the learned judge in that I do not think LORD GREENE, M.R., had in mind the point which we have to consider here, viz.: What is the position of a statutory tenant (I am not begging the question by using the word 'tenant' but it is useful to use it) between the time when the order for possession is made and the time when it falls to be executed having regard to a suspension under s. 5 (2) ? "

G Section 5 (2) is a reference to that section of the Act of 1920 now replaced by s. 4 (2) of the Act of 1923. I next note that lower down the page the learned lord justice said (*ibid.*):

H "I agree with what was said by JENKINS, L.J., in the course of the argument, that the position of someone against whom an order for possession has been made and suspended at common law or under s. 5 (2) of the Act of 1920 is *sui generis*. The problem which we have to solve is not assisted by considering in what respect his position is the same quoad the landlords as it was before the order was made. Obviously it is fundamentally different in the respect, that, whereas before he was entitled to the protection of the Acts until successful proceedings were taken, he is now in the position of proceedings having been taken and an order for possession having been made. All that he has is a right to apply for a postponement under s. 5 (2)."

Finally, the learned lord justice said (*ibid.*):

"I am not deciding what the position would be in a case of this kind where a conditional order had been made against the deceased. It may be that the result would be the same; it may be that it would be different. There seems to me, at any rate, scope for argument . . ."

—an observation which experience has proved to be amply justified.

JENKINS, L.J., agreed, and he said (*ibid.*, 1190):

"During the period intervening between the date of such an order and the date fixed for delivery of possession the statutory tenant has obviously certain rights and certain obligations. For instance, during that period, he would have to pay the equivalent of the rent. That is not to say, however, that he is still a statutory tenant for all purposes . . . Thus, in the present case, assuming in the defendant's favour that, notwithstanding the existence of the final order for possession, she could still become statutory tenant of the premises by virtue of s. 12 (1) (g) of the Act of 1920, it seems to me clear that the tenancy to which she would succeed could be no more than the limited interest remaining to run between the date of her father's death and the expiration of the date fixed for possession by the order [and that had passed when the case came before the court.] For these reasons, and those stated by my Lord, I agree that the appeal should be allowed."

BIRKETT, L.J., confined himself to stating his agreement with what had been said.

It is clear from those passages that the question is left open what is the effect of a conditional order, so long as it remains an efficacious order capable of being enforced on fulfilment or non-fulfilment of the condition, on what is called the right of succession under s. 12 (1) (g). What happens if the tenant dies when such an order remains in operation? As I have already indicated, it is not necessary to determine that question in this case. It has, however, been strenuously argued by counsel for Miss Allen that there is in this respect a real and fundamental distinction between an absolute order, i.e., an order which is to take effect on some fixed date without qualification, and a conditional order or what has been called a suspended order, i.e., an order which will not take effect at all so long as certain things are done, for in the latter case it is contended that the true object of the court in making the order was to avoid the very thing which an order for possession would achieve. It is the purpose of the court to say: "So long as you now faithfully comply with this, that or the other obligation, we will not evict you." It is said that, the intention lying behind the two classes of order being different, their results will be different.

As it is not necessary to decide the question, I do not propose to do so, but I venture to indicate some difficulties in the way of what may appear at first sight, perhaps, to be the common-sense view of the so-called conditional form of order when the present problem arises (as it is apt to do though it may not frequently do so) on the death of the tenant leaving somebody who claims the benefit of the definition section. I begin by observing that, though the original order be absolute, nevertheless, as I read s. 4 (2) of the Act of 1923, it may not only be discharged on application, but it may, in effect, be converted thereafter into a conditional order, for the language at the end of the subsection seems to contemplate that possibility. But if in a particular case an order is made and suspended so long as the rent is punctually paid and X shillings a week are paid off arrears and, perhaps, off taxed costs as well, the right of the tenant to remain in possession may be said not to be (at least exclusively) referable to the Rent Restrictions Acts, because the terms on which occupation is retained are not merely the terms in the original contract, but are the terms

in the contract plus the further terms imposed by the court. The truer view may be that the tenant's continued occupation is referable to the permission granted by the order, or, alternatively, to the combined operation of the order and the Act.

A But there is a further technical difficulty which counsel for Miss Allen indicated, and it is this. The phrase "statutory tenant" is not one which is defined in the Acts, but is a phrase which long usage has made convenient for describing the person who is entitled to remain in occupation by virtue of the Acts. That right is specified in s. 15 (1) of the Act of 1920:

B "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . ."

C Putting it interrogatively, is a tenant whose right to remain in possession is dependent on compliance with the terms of an order of the court which may go beyond, and in the case I have supposed would go beyond, the terms of the original contract, within that sub-section? The right to remain in possession provided that the terms of s. 15 (1) are otherwise complied with depends on what was s. 5 of the Act of 1920, now re-enacted in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1933. It is so well known that I do not take time to read it, except to observe that it begins:

D "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . shall be made or given unless . . ."

E In a case of a person against whom a so-called conditional order for possession has been made, the argument is that s. 5 is no longer really applicable. So long as the tenant satisfies the conditions of the order, he is entitled to remain by virtue of the order. If he does not satisfy the conditions, the order already made operates. No further order is required. Therefore, either the making of the order has already determined the statutory tenancy, or he is not a statutory tenant because no further order for dispossession is required.

F Finally, there is this problem. Section 12 (1) (g) is, as I have said many times, a definition section; it does not give any independent right to the relative, but it provides that a relative complying with the conditions of the paragraph shall be deemed to be a tenant within the meaning of s. 15. Again, I put the argument of counsel for Miss Allen interrogatively: Can it be said that a relative is a tenant within s. 15 if it has to be conceded—though I am aware that in spite of the observation of JENKINS, L.J., in the *American Laundry* case (1) it may not be conceded—that the right of the relative must be limited to the right which the predecessor had, or, in other words, that the relative cannot claim any better right to remain in possession than was possessed by the person he or she has succeeded? If the person he or she succeeded was bound as a condition of retaining occupation to pay something more than the rent, then should not the relative be similarly bound? But is the relative so bound? He or she is not a party to the order, and it does not appear clear to me that it is enforceable against him or her, and if it is, is he or she then a "tenant" within s. 15?

H These arguments are formidable, but I give no answer to them, because it is unnecessary in this case so to do. I have referred to them for another reason. Before stating it, I would like to say that I start, I confess, with some reluctance to give support to fine distinctions which may be of vital importance to many people but which depend on the difference between what may be on its true construction, on the one hand, an absolute order, and, on the other, a conditional order. Orders are sometimes made by county court judges in somewhat informal terms, and it is possible to imagine long arguments on the question whether

a particular order, a little peculiar in its terms, was in truth absolute or conditional.

I was fittingly reminded by counsel for Miss Allen of an observation of my own in a case not long ago before this court, *Tideway Investment & Property Holdings, Ltd. v. Wellwood* (6). That was a very peculiar case, as appears from the form of the judgment which HARMAN, J., had given. His order was ([1952] 2 All E.R. 524):

"This court doth order that upon the execution by the [tenant] of an agreement in terms to be agreed between the parties or in the alternative to be settled by the judge within twenty-one days of the date when its terms are agreed or settled by the judge and upon the deposit and payment [of certain sums of money,] this court doth not think fit to make an order for possession but in default of such execution deposit and payment it is ordered that the [landlords] do recover . . . possession . . ."

I said (*ibid.*):

"In cases of this kind I also think it is more desirable, as a rule, to make an order for possession and suspend it on certain terms than to follow the converse, which has been adopted in this case . . ."

I had referred to what MORTON, L.J., said in *Bell London & Provincial Properties, Ltd. v. Reuben* (7), which attained some notability because the whole case turned on whether the tenant was justified in keeping a dog. MORTON, L.J., said ([1946] 2 All E.R. 551):

"I think that, if I had been trying the case, I might have inserted some safeguard for the assistance of the landlords. I have not thought out the exact form of words, but I might have ordered that possession should be given, the order not taking effect so long as the defendant satisfied the landlords, perhaps monthly or every two months, by some medical certificate, that her health still required the presence of the dog."

It is, I think, plain that neither MORTON, L.J., nor I had this very difficult and intricate point arising from s. 12 (1) (g) in mind. Having it in mind, and having heard the arguments, and having stated the sort of difficulties which arise, it seems to me that that form of order, viz., an order for possession suspended so long as certain conditions are complied with, is not by any means necessarily in all cases the most satisfactory form of order to make. I think it may well be, if the intended suspension is likely to be short, that such a form of order is satisfactory and saves further application. It would, I imagine, be made in expectation that the conditions would be complied with so that in due course the order would naturally run off or, perhaps, subsequently be discharged. But I cannot think that an order for possession suspended indefinitely, as was done in this case, or an order for possession which is likely to be in suspense for a very long period of time, is by any means necessarily a satisfactory or, as I venture to think, the best form of order, particularly if, as may be the case, the circumstances indicate at least the possibility of a claim to what I will call succession being made under s. 12 (1) (g). I confess I should have thought that in those cases, and, perhaps, in many others, there is much to be said for a form of order to the effect that the defendant should be required to undertake or agree (for I do not suggest save, perhaps, in exceptional cases that the defendant should be exposed to the penal consequences of an undertaking to the court) to pay the rent and arrears, or perform whatever other conditions the court may think proper; that that undertaking or agreement should be recited in the order; that the court should then make no order for possession, but should give liberty to apply for an order for possession on breach or non-fulfilment of the conditions. Then, if an order is made at all, it is likely to be an absolute order operating at once or certainly, and nobody is left in doubt as to its effect. By that form of order this extremely

difficult problem would be avoided. I hope that possibly the judges who have the difficult task of administering this legislation may think it a more convenient course in many cases to adopt that form of order, which at any rate is to me familiar and to some extent hallowed by its use in comparable form in the Chancery Division, in which I was fortunate to be brought up.

A I have said so much out of respect for the arguments, but I have not decided, and have carefully avoided deciding, a point which does not here arise. In particular, I do not want, in what I have said, to create doubts where the obvious intention has been to keep alive the existing statutory tenant's rights so long as the conditions imposed are complied with. I only add that whatever be the answer to these difficulties, it is far from clear to me that even if a statutory tenancy is to be treated as terminated by the making of any order for possession, it would not properly revive when the order ceased to be effective, or that the statutory tenancy is not capable of co-existing with the operation of the order. In the latter case it seems to me that obscurities of construction arise and doubts as to the precise obligations of the person who may succeed to the tenancy, all of which are avoided if the form of order be that which seems to me in appropriate cases to be preferable.

B
C With those observations, however, I return whence I came, to state, on the short point, that Mrs. Andrews must either have been a statutory tenant or a contractual tenant, that, in my judgment, this appeal ought to be allowed, and that the order for possession against Miss Allen discharged.

D BIRKETT, L.J. (having stated the facts): I would like to express my very strong agreement with what SIR RAYMOND EVERSHED, M.R., said in his judgment about the form of the order. In this case the judge decided that the order made in 1935 was a final order. The expressions that are used are:

E "I am satisfied that the effect of the issue by the justices in 1935 of a warrant for possession was to grant to the then landlord a final order for possession, the execution of the warrant being suspended, ultimately sine die. I am satisfied that the warrant could have been revived by the court under s. 5 (4) of the Act of 1920, but that the Limitation Act, 1939, made it impossible for such revival."

F He then refers to *American Economic Laundry, Ltd. v. Little* (1), and, following the observations of SOMERVELL, L.J., in that case about the effect of the final order, as he described it, he came to the conclusion in this case which he recorded and against which appeal is made.

G The argument that was addressed to us, at some length necessarily, was that the learned judge was wrong about that, that this was not a final order, and the consequences spoken of by SOMERVELL, L.J., did not, therefore, follow, but that this was plainly a conditional order. The difficulty about that is that the order recites: "Order for possession to be given; warrant to be suspended." It is said on the one side: "Well, however one frames it, one begins by saying that there is an order for possession."

In *American Economic Laundry, Ltd. v. Little* (1) SOMERVELL, L.J., said ([1950] 2 All E.R. 1189):

H "Counsel for the landlords referred to the fact that under s. 5 (2) of the Act of 1920 orders for possession may take either of two forms. There may be, as here, an absolute order the execution of which is suspended, or there may be a conditional order, that is to say, the order for possession does not become operative so long as certain conditions are fulfilled—it may be payment of rent or abatement of a nuisance . . . I am not deciding what the position would be in a case of this kind where a conditional order has been made against the deceased. It may be that the result would be the same; it may be that it would be different. There

seems to me, at any rate, scope for argument, which would require serious consideration, that a different result would be arrived at, and, therefore, it is better to leave it to be decided if and when it arises."

If the order went in the form which my Lord suggested in his judgment, that kind of situation would not arise, and I observe that the practice has been to use words like "absolute", "final", "conditional", "suspensory". They lead to the kind of discussions which have occupied very much time in this appeal. For example, it is said that the true effect of an absolute order is to say: "We make an order for possession", and then the tenancy comes to an end, but, if the order may be properly termed a conditional order, then, in truth, there is no ending of the tenancy, and what the court is seeking to say, though for administrative purposes it may use this particular form of words, is: "We have power to determine this tenancy on the facts proved before us, but we do not choose to do so; we leave the tenancy untouched, and we say so long as you fulfil these conditions about payment of rent or whatever it may be, so long will the tenancy continue, but if you do not, then in truth we shall make an order for possession."

I observe that in MEGARRY ON THE RENT ACTS, 7th ed., the learned author adopts that attitude towards the practice which has grown up with regard to absolute, conditional, final and suspensory orders. He says at p. 230:

"In considering the effect of an order for possession made under these provisions, a distinction must be made between the two forms of order which the court can make, namely, an absolute order for possession which is suspended in its operation, and a conditional order for possession (sometimes somewhat misleadingly called a 'suspensory order'). Notwithstanding the suspension, an absolute order forthwith determines the statutory tenancy, so that although the former tenant is in possession during the period of suspension on terms which in general are identical with those of his former statutory tenancy, his position is *sui generis*, in some ways resembling that of a licensee by indulgence of the court. A conditional order, on the other hand, leaves the statutory tenancy still in being, though shadowed by a Damoclean sword."

He cites in support of that *Merrick v. Lenihan* (8) and also *Lee Haven Estates, Ltd. v. Daley* (9).

It is plain that the use of this term "conditional order" gives rise, as it has given rise in this case, to many speculations and to many doubts which would be resolved entirely if the form of order suggested by my Lord were in common use, that is to say: "We make no order; we lay down certain conditions about the payment of the rent; and we give the landlord power to come and say: 'Those conditions about the payment of the rent have not been fulfilled, I now ask you to make an order' ". I should have imagined that a great deal of ambiguity might be avoided if that method were adopted.

It is one of the remarkable facts in the case that this order of 1935, at any rate some time in 1947 at the latest, could not possibly be enforced. Argument again arose on that matter. Is the order a nullity now? It was suggested by counsel for the landlord that it could be used in some way as a shield, but for my own part I do not quite see the efficacy of the shield. Down to 1952, so far as the evidence went, during a period of probably five years before Mrs. Andrews died, Mrs. Andrews was in possession, and she was paying the rent all that time. No question about the rent had been raised since 1939. The landlord, who became the landlord in 1943, had been accepting rent down to 1952. I should have thought, therefore, that the conclusion was irresistible that, if there was not here a statutory tenancy, there was certainly a contractual tenancy. In order to defeat this claim by the landlord, Miss Allen must claim to come within s. 12 (1) (g) of the Act of 1920. So far as the technical side

of the matter is concerned, it is not in issue, and not in question, that she is a member of the family. She has been residing there for well over thirty years, and she says: "I am within the definition in s. 12 (1) (g), and there was here either a statutory tenancy which enables me to continue in occupation, or there was a contractual tenancy; I do not mind which it is". In my view, therefore, this appeal succeeds.

A ROMER, L.J.: I agree that the appeal must be allowed. After the judgments which have been delivered, I have very little to add. The ratio decidendi of the learned judge's decision appears from the following sentence in his judgment:

B "I am satisfied that the effect of the issue by the justices in 1935 of a warrant for possession was to grant to the then landlord a final order for possession, the execution of the warrant being suspended, ultimately sine die."

C On that view he decided the case. But the point was not presented to him, as it has been presented to us, that, if that view be right, the inevitable result, having regard to the operation of the Limitation Act, 1939, and to the payment and acceptance of rent, was to constitute Mrs. Annie Andrews a contractual tenant prior to and at the time of her death. If, on the other hand, the learned judge was wrong in the view that he took, then, for the reasons which have been stated by my Lord, it would follow that Mrs. Andrews was a statutory tenant at the time when she died. On either view Miss Allen would succeed in this appeal.

D That being so, I propose not to express any concluded view either on the question whether the order of 1935 operated as a final or as a conditional order for possession, or on the question as to what rights Miss Allen would have had, if the order was a conditional order, to succeed her aunt if Mrs. Andrews had died while the order was still in operation. It seems to me that each of these questions gives rise to difficulties which have been stated in the arguments before us, and which have been indicated in the judgments of my brothers.

E I express no definite view on either of them, but I certainly agree that justices should not make orders for possession, and then suspend their operation for what may be a considerable period of time. So to do leads to trouble. It has led to trouble in this case.

F I entirely agree, with respect, to the form of the order which my Lord has indicated as a desirable form to adopt, only premising that in using the word "undertaking" I apprehend that my Lord meant no more than to place on record an agreement by the tenant and not an undertaking in the technical sense of the word, a breach of which might lead to penal consequences. I agree that the appeal should be allowed.

G SIR RAYMOND EVERSHED, M.R.: I agree with what ROMER, L.J., has said about the use I made of the word "undertaking".

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Peter, Bray & Harris*, Redruth (for Miss Allen); *Coope, Kingdon & Co.*, agents for *Walters & Barbary*, Camborne (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PRACTICE NOTE.

TURNER v. JACARANDA CLUBS, LTD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), June 22, 1953.]

County Court—Costs—Action for breach of contract transferred to High Court—Recovery by plaintiff of less than £100—Discretion to award costs on High Court scale—County Courts Act, 1934 (c. 53), s. 47 (1) (b) (i).

The plaintiff brought an action, in which he claimed damages for wrongful dismissal, in the county court, limiting his claim to £200. The defendants then exercised their right under the County Courts Act, 1934, s. 44, to have the case transferred to the High Court where the plaintiff recovered £87. On an application by the defendants that s. 47 (1) (b) (i) of the Act, applied, and, therefore, the plaintiff was only entitled to costs on the county court scale,

HELD: section 47 (1) (b) (i) did not apply as the action had been commenced in the county court and not in the High Court, although it had subsequently been transferred to the High Court, and, therefore, the question of costs was governed by s. 73 of the Act which gave the court a complete discretion.

Pellas v. Breslauer (1871) (L.R. 6 Q.B. 438), not applied.

FOR THE COUNTY COURTS ACT, 1934, s. 47, AND NOTES THERETO, see HALSBURY'S STATUTES, Second Edn., Vol. 5, pp. 42, 43.

Case referred to:

(1) *Pellas v. Breslauer*, (1871), L.R. 6 Q.B. 438; 40 L.J.Q.B. 161; 24 L.T. 762; 16 Digest 451, 3199.

APPLICATION by defendants as to costs.

F. Whitworth for the defendants.

Bloomfield for the plaintiff.

STREATFEILD, J.: The question of costs in this action of contract raises an interesting point. After I had given judgment for the plaintiff for £87, counsel for the defendants submitted that this was a case within s. 47 of the County Courts Act, 1934, being an action commenced in the High Court which might have been brought in the county court, and, therefore, the usual consequences should flow under the Act, the plaintiff having recovered less than £100. There is, of course, under sub-s. (3) a discretion to the court to award High Court costs if, in the opinion of the court, there was sufficient reason to bring the action in the High Court.

In fact this action was not commenced in the High Court; it was commenced in the county court. It was then an action in which, by abandoning a slight excess, the plaintiff confined his claim to £200, the extended jurisdiction of the county court, and, under s. 44 of the Act of 1934, the defendants exercised their right of having the case transferred to the High Court. Counsel for the defendants submitted that, although commenced in the county court and then transferred in those circumstances to the High Court, it, nevertheless, was an action to which s. 47 applied, and he quoted as his authority for that proposition *Pellas v. Breslauer* (1), in which the corresponding provision of the County Courts Act, 1867, was considered. The Court of Queen's Bench held that it applied to an action which had been removed from the county court to the High Court by way of certiorari. I think that counsel for the defendants was misled by a note in the County Court Practice, 1953, p. 55, in which it is stated:

"The section [that is, the present s. 47] applies . . . to an action . . . which has been removed from the county court by certiorari."

In HALSBURY'S STATUTES, 2nd ed., vol. 5, p. 43, it is stated:

"This section applies to an action brought in the High Court . . . or which has been removed from the county court by certiorari (*Pellas v. Breslauer* (1871), L.R. 6 Q.B. 438, at p. 440; 34 Digest 537, 115) . . ."

A With the greatest possible respect for the learned editors of both those valuable works, I am of opinion that their notes are wrong, for the reason that the wording of the Act of 1867 is quite different from that of the Act of 1934 or any of the intermediate County Courts Acts. In *Pellas v. Breslauer* (1) the words of s. 5 of the Act of 1867 to be construed were:

"if in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding £20 . . ."

B It was there ruled by the Court of Queen's Bench, consisting of BLACKBURN and HANNEN, JJ., that the words "commenced after the passing of this Act" must be regarded as being in parenthesis and referring only to the time at which the action had commenced. In effect, HANNEN, J., put it in this way (L.R. 6 Q.B. 440):

C "It is only necessary to read the words, 'commenced after the passing of this Act,' as if in a parenthesis, and the section then applies to all actions in the superior courts, however they may have got there, whether originally commenced there or brought there by certiorari;"

D Therefore, the enactment applied to all actions in any of the superior courts, the only saving being that they must have been commenced after the passing of that Act.

The County Courts Act, 1888, was quite different. That Act, as it originally appeared, in s. 116, read as follows:

E "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply . . ."

That Act was amended, and by the County Courts Act, 1919, s. 11, and the Administration of Justice Act, 1925, s. 20, the new s. 116 of the Act of 1888 was made to read: "Where an action is brought in the High Court which could have been commenced in a county court . . ."

F Those are the intermediate Acts, and then we come to the present Act of 1934, where the words of s. 47 (1) are: "Where an action is commenced in the High Court which could have been commenced in a county court . . .", then certain consequences follow. It seems to me impossible to put the same construction on those words as the court did on the different words in *Pellas v. Breslauer* (1). If I were to treat the word "commenced" in the way in which it was treated in that case, I should not only be omitting the words "commenced in the High Court", but I should also be omitting the words "which could have been commenced in a county court."

G Therefore, it seems to me quite clear, on the construction of the Act of 1934 as well as on that of its predecessors since the Act of 1867, that the sub-section applies to actions which have been commenced in the High Court but could have been commenced in the county court.

H The present action was commenced in the county court even though it was transferred to the High Court in the way which has been described. For those reasons, therefore, I am of opinion that s. 47 does not apply and that the jurisdiction of this court over the question of costs is governed by s. 73 of the County Courts Act, 1934, which gives the court a complete discretion. With regard to the exercise of the discretion, in the circumstances of this case it seems to me that this is a case where the court ought to exercise its discretion in favour of the plaintiff. I should say that on the merits of the case alone, but, in my

opinion, it ill fits the defendants, who had the action transferred to the High Court to say that it was really all along a county court action and ought not to have been brought in the High Court. It was the defendants, although they were exercising a statutory right, who chose the particular tribunal, and I think that they must pay for that luxury. Even under s. 47, if, in my judgment, it had applied, I still would have been prepared to make the order that there were sufficient reasons for bringing the action in the High Court.

Order for plaintiff's costs to be on High Court scale.

Solicitors: *Mawby, Barrie & Letts* (for the defendants); *Goodman, Monroe & Co.* (for the plaintiff).

M.M.

OZZARD-LOW v. OZZARD-LOW AND WONHAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), June 4, 5, 8, 9, 10, 11, 1953.]

Document—Admissibility in evidence—Evidence of person beyond the seas—“Not reasonably practicable to secure attendance”—Attendance at trial—Discretion of judge sitting without jury to admit evidence—Evidence Act, 1938 (c. 28), s. 1 (1), proviso.

On Oct. 28, 1951, the wife left Burma, where the parties were living, and returned alone to England. On Mar. 24, 1952, the husband wrote to her informing her of his intention to institute against her proceedings for divorce on the ground of her adultery. On Apr. 11, 1952, he caused sworn statements to be taken in Burmese from three Burmese servants. The husband returned to England, and on July 11, 1952, he filed a petition for divorce on the ground of the wife's adultery. During the hearing of the suit the husband tendered the three statements as evidence under the Evidence Act, 1938, s. 1 (1), but it was objected by the wife that, although the witnesses were beyond the seas, the husband had taken no steps to secure their attendance at any time during the suit to give evidence before an examiner or on commission, and, therefore, he had failed to show that it was “not reasonably practicable to secure [their] attendance” within the meaning of the proviso to s. 1 (1). Further, she contended that the court had a discretionary power to refuse to admit the statements.

HELD: (i) “attendance” in the proviso did not mean attendance to give evidence at any time during the suit, as, for instance, before an examiner or commissioner the words of the proviso imposed on the court the duty of deciding whether at the moment when the statement was tendered in evidence the maker of the statement “is beyond the seas and it is not reasonably practicable to secure his attendance”; in the present case the conditions contained in the proviso were fulfilled, and, therefore, the documents were admissible in evidence.

(ii) if the conditions laid down by the proviso were satisfied, the documents were admissible and a judge sitting without a jury had no discretionary power to reject them.

Infields, Ltd. v. Rosen ([1939] 1 All E.R. 121), not followed.

FOR THE EVIDENCE ACT, 1938, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 626, 627; and FOR CASES, see DIGEST, Replacement Vol. 22, pp. 243-246, Nos. 2408-2427.

Case referred to:

(1) *Infields, Ltd. v. Rosen*, [1939] 1 All E.R. 121; 108 L.J.Ch. 163; 22 Digest, Replacement, 243, 2408.

PETITION by husband for dissolution of marriage on ground of adultery.

The parties were married on May 28, 1934, and there were two children of the marriage. On Oct. 28, 1951, the parties separated, the wife leaving the husband in Burma, where they were living, and returning to England. On Mar. 24, 1952, the husband wrote to the wife informing her of his intention to institute proceedings for divorce against her on the ground of adultery.

- A On Apr. 11, 1952, he went to a Burmese solicitor who took statements in Burmese from two Burmese motor car drivers and a Burmese night watchman. These statements were translated into English and taken to another firm of solicitors and translated back into Burmese for purposes of verification. They were then sworn and certified at the British consulate. The husband returned to England, and on July 11, 1952, he filed a petition for divorce, dated
- B July 9, 1952, in which he alleged that the wife had committed adultery with the co-respondent in Burma on various occasions in April, May and June, 1951. The wife and the co-respondent filed answers denying the adultery, and the wife filed a petition dated Oct. 24, 1952, for dissolution of the marriage on the grounds that her husband had committed sodomy on her and had been cruel to her. The petitions were consolidated and during the
- C hearing of the husband's suit his counsel tendered the three statements in evidence in support of the allegation of adultery under the Evidence Act, 1938, s. 1 (1). DAVIES, J., ruled that these statements were admissible, but, in his judgment at the conclusion of the hearing, he stated that, in so far as there was any disagreement between those statements and the other evidence, he refused to place any reliance on them. He dismissed the husband's petition
- D and dismissed the co-respondent from the suit, and he also dismissed the wife's petition. This report deals with the ruling as to the admissibility of the statements.

Beufus, Q.C., and *Fairweather* for the husband.

Temple, Q.C., and *H. S. Law* for the wife.

Melford Stevenson, Q.C., and *Scarman* for the co-respondent.

- E DAVIES, J.: In support of his case the husband seeks to put in evidence three affidavits by Burmese servants, a night watchman and two drivers. He has told me that these affidavits were sworn for the express purpose of tendering them in evidence under the Evidence Act, 1938, on the hearing of the petition for dissolution of marriage which he was then minded to commence against
- F his wife. He was, apparently, told by his legal advisers in Burma that the statements would be admissible. The affidavits, at which I have not yet looked, are now tendered in evidence by counsel for the husband.

- It is admitted by counsel that the husband has at no time made any attempt to bring any one of these three Burmese to this country. The husband took the view that on the ground of expense it was not reasonably practicable to
- G bring them here to give evidence. It is also clear that at no time has any application been made in this suit on behalf of the husband for an order that the evidence of these men should be taken before an examiner or by whatever is the procedure appropriate in Burma at the present time. With some hesitation I have come to the conclusion that the husband's submission that it is not reasonably practicable to secure the attendance of these witnesses
- H in this court is right. Therefore, at first sight, as the witnesses are admittedly beyond the seas, the proviso to s. 1 (1) of the Evidence Act, 1938, applies and the condition that the maker of the statement shall be called as a witness need not be satisfied.

It is, however, argued by counsel for the wife and counsel for the co-respondent that that does not conclude the matter. "Attendance", it is argued, means not only attendance in court at the hearing, but also attendance as a witness at any time in the suit, and, if it is at any time reasonably practicable to secure

the attendance of a witness before an examiner or on a commission or by any other means to give oral evidence and subject himself to cross-examination, and that is not done, then, it is said, the person who is seeking to tender the written statement of the witness fails to show that "it is not reasonably practicable to secure his attendance" within the meaning of the proviso. I do not think that that is the correct interpretation of the section. It is true that the words of s. 1 (1) (ii)—"if the maker of the statement is called as a witness in the proceedings"—would plainly be satisfied if the witness had given evidence before an examiner, but, in my judgment, the words of the proviso impose on the court the duty of deciding whether at the moment when the statement is tendered in evidence the maker is beyond the seas and it is not reasonably practicable to secure his attendance. The use of the present tense seems to me to indicate this conclusion with reasonable clearness. In my opinion, therefore, the proviso is satisfied in the present case, and s. 1 (1) (ii) does not apply.

It is further argued by counsel for the wife that, even so, I have a discretion to reject these statements on the grounds, (i) that their contents are likely to be controversial, and (ii) that the husband ought to have taken other and more satisfactory steps to obtain the evidence of these witnesses. That argument is based on a decision of SIMONDS, J., in *Infields, Ltd. v. Rosen* (1), where he said ([1939] 1 All E.R. 121):

"I will assume, for the purpose of my ruling upon this matter, that Mrs. Emma Veith [a person, living in Germany, whose statement was tendered in evidence] is beyond the seas and that it is not reasonably practicable to secure her attendance . . . This is a statement which appears to me to have been made expressly for the purpose of its being given in evidence in this suit. Although, according to the language of the Act, that is within its purview, I have no doubt that that is the class of document to which the section is not primarily intended to apply, and the court must be exceedingly careful in allowing such a document to be used as evidence. Further, I have to bear this in mind. This is a statement in a document made by a lady who is in Germany and available for examination and cross-examination so far as that is permissible under letters of request. The party seeking to adduce that document in evidence did not so inform the other party to the suit . . . Then I have also to bear in mind the circumstance that this is a case in which there is an acute controversy of fact . . . In these circumstances, I shall, in the exercise of my discretion, decline to allow this declaration to be adduced in evidence in this case."

With the utmost respect and with natural hesitation, I feel that I am unable to follow that decision. It seems to me to be plain that, if the conditions laid down by the statute are satisfied, the document is admissible and a judge sitting alone has no discretionary power to reject it. That view is, in my judgment, fortified by a consideration of s. 1 (5) of the Act which provides that:

" . . . where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

If a discretionary power is expressly given in the case of a trial with a jury, it seems to follow necessarily that when a judge is sitting alone there is, if the requirements of the section are satisfied, no discretion and the document is admissible.

In my judgment, therefore, these documents are admissible, but, of course, in deciding that I am saying nothing as to what weight I shall give to them when I have read them. Section 2 (1) of the Act plainly directs the court to exercise caution in regard to statements such as these, and the fact that the husband or his legal advisers could have obtained an order—as I imagine they certainly could have done—for the examination of these Burmese witnesses may well be a factor which should weigh heavily when I am considering what, if any, importance should be attached to these statements.

Documents ruled to be admissible.

Solicitors: *W. F. Foster, Hedge & Clare* (for the husband); *Butt & Bowyer*, agents for *J. F. Latimer & Hinks*, Darlington (for the wife); *Loxley & Preston* (for the co-respondent).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

KEMP v. KEMP.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), June 10, 11, 1953.]

Divorce—Desertion—Constructive desertion—Association by husband with woman not resulting in adultery—Revival of condoned adultery.

Justices—Husband and wife—Majority decision—Need of dissenting justice to give reasons.

The parties were married in 1945. In 1949 the husband committed adultery, but the wife forgave him and they continued to live together as man and wife. Towards the end of 1952 the husband began to stay out late at night, coming home two or three times a week between 3 a.m. and 8 a.m. The husband knew that this conduct would arouse the wife's suspicions, but the only explanation that he gave at first was that he had been out with friends. Later, he said that there was a woman, but that there was nothing wrong in the association, and that she, the woman, was going away after Christmas. The wife went, with the husband's consent, to spend Christmas with relatives and did not return. On a summons by the wife alleging that the husband had deserted her,

HELD: although the husband's present association with the other woman was not found to have been adulterous, it was sufficient in law to revive the condoned adultery in 1949, and was serious enough to justify the wife in withdrawing from cohabitation and to found a charge of desertion.

Observations of SIR J. P. WILDE in *Winscom v. Winscom & Plowden* (1864) (3 Sw. & Tr. 382), applied.

Per LORD MERRIMAN, P.: I do not think that, even if it is made clear at the hearing or is expressly stated at the time when the finding is made, that the decision of justices in a case relating to a matrimonial dispute is not unanimous, it entitles the parties to demand that the dissentient justice or justices shall furnish a written statement of the reasons for the dissent, and I certainly deprecate encouraging the establishment of any such practice.

AS TO REVIVAL OF CONDONED MATRIMONIAL OFFENCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 680-682, paras. 1006-1009; and FOR CASES, see DIGEST, Replacement, Vol. 27, pp. 406-412, Nos. 3347-3404.

Cases referred to:

(1) *England v. England*, [1952] 2 All E.R. 784; [1953] P. 16.

(2) *Winscom v. Winscom & Plowden*, (1864), 3 Sw. & Tr. 380; 33 L.J.P.M. & A. 45; 10 L.T. 100; 164 E.R. 1322; 27 Digest, Replacement, 409, 3378.

- (3) *Tilley v. Tilley*, [1948] 2 All E.R. 1113; [1949] P. 240; [1949] L.J.R. 929; 27 Digest, Replacement, 405, 3346.
- (4) *Ridgway v. Ridgway*, (1881), 29 W.R. 612; 27 Digest, Replacement, 397, 3268.
- (5) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest, Replacement, 408, 3369.
- (6) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest, Replacement, 367, 3040.

APPEAL by the wife against the dismissal on Jan. 9, 1953, by the Leeds city justices of her summons alleging that her husband had deserted her.

The parties were married in 1945 and there was one child of the marriage. In 1949 the husband had committed adultery, but the wife forgave him and they continued to live together as man and wife. It was the custom for the husband to hand his weekly wages to the wife and to receive back a certain sum as pocket money. On Dec. 24, 1952, the wife went, as previously arranged with the husband, to spend Christmas with her relatives in Nottingham. On the same day she took out summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that her husband had deserted her and had wilfully neglected to provide her with reasonable maintenance. At the hearing before the justices the wife stated that during the latter part of 1952 the husband had been keeping very late hours, coming home several times a week between 3 a.m. and 8 a.m., and refusing to give any explanation other than that he had been staying with friends; that she was suspicious and was not satisfied with his refusal to explain his conduct, and when she had taxed him with having been seen walking arm in arm in Leeds with another woman he had said there was "nothing in it" and had continued his habit of staying out "practically all night"; that the husband had kept her short of money; that on Dec. 23, 1952, the husband came in at 11.30 p.m. saying that he had been at his mother's, but she found that that was not true, and, having challenged him about it, asked him if he was going to mend his ways, to which he had replied "After Christmas" and had added that the other woman was going away after Christmas and that there was nothing wrong in the association; that she had replied that if that was all the satisfaction she was going to get she would not come back after Christmas; and that on Dec. 24, she went, as agreed with her husband, to spend Christmas with her relatives in Nottingham and had not returned home. The husband admitted in evidence that he had committed adultery in 1949 and that his wife had forgiven him, and that he knew that when he began to stay out late at night his wife would be suspicious. He also stated that his wife had said that she wanted to be near her relatives in Nottingham, but that he did not want to go there as he was settled in Leeds, and that, although he had been out with another woman, he had not committed adultery. He then said:

"The address I have been at is . . . and the name is [M.] . . . I used to go to dances and then go to the house for supper. Mr. and Mrs. [M.] . . . and her daughter live at the house. Mr. and Mrs. [M.] . . . used to go to bed. I used to sleep on the couch. I do want to live with my wife and I will mend my ways. The name of the other woman is Mrs. [B.] . . . and she is the daughter of Mr. and Mrs. [M.] . . . She has not left Leeds. I did say that after Christmas I would not stay out late any more. The woman is a married woman and I think she is separated. She is living apart from her husband . . . We [he and his wife] could go out together in Leeds. The woman won't be here in Leeds for long. I did tell my wife the woman was leaving Leeds".

He denied that he had told his wife that he would come in at a proper time when the woman had left Leeds.

The justices, by a majority of two to one, dismissed the summons for desertion and stood over the summons for wilful neglect to maintain pending the wife's appeal against the dismissal of the first summons.

Baskerville for the wife.

The husband did not appear.

A LORD MERRIMAN, P.: It appears that of the three justices sitting, two were in favour of dismissing the summons and one was of the contrary opinion. In other words, the decision was by a majority, and it is evident that when the question arose of stating the reasons for the decision, the wife's solicitors were anxious to obtain the statement of the reasons for the dissenting justice's view. The clerk was reluctant to call on the dissenting justice, who happened to be the chairman, to give, as it were, a separate judgment, and attention was called to an observation I am reported as having made in *England v. England* (1) ([1953] P. 19): "The justices found by a majority (a fact which is irrelevant, in my opinion, if it ought to have been disclosed at all) . . ." My recollection is that our attention had been called to some observations by the Lord Chief Justice, when, on a Case Stated in some criminal matter, it was recorded that the decision was that of a majority and he had said that he thought that ought not to be mentioned. The observation does not appear in any of the regular reports, and probably it was a remark which was quoted in some newspaper at or about the time we gave our judgment in *England v. England* (1). However that may be with regard to a Case Stated in some criminal matter, I see no reason why, in some way or another, it should not be indicated in cases relating to matrimonial disputes that the decision was not unanimous. But I do not think that, if that is made clear during the hearing or when the finding is announced, it entitles parties to demand that the dissentient justice or justices shall furnish a written statement of their reasons for the dissent, and I certainly deprecate encouraging the establishment of any such practice. I think we must approach this case on the basis of the reasons given by the majority as the reasons for the decision, albeit we know that they did not command the assent of one member of the court. I do not think it would be right for us to weigh up the two rival judgments and say we prefer the one to the other. What we have to decide is whether the reasons for the decision commend themselves to us.

E [HIS LORDSHIP stated the facts and continued:] The majority of the justices find that on account of the husband's admission of adultery on a former occasion the wife had been suspicious of him. They say that, while the wife was silent on sex matters, the husband was sincere when he said: "She has not been a willing wife to me for years. If she will have more affection for me, I will mend my ways." That quotation, which they accept, assumes that his ways need mending, and the evidence to that effect was given, of course, in the context of the wife's allegation of this association with another woman, the details of which were first revealed in his cross-examination before the court —an association on which the wife founded her grievance. They go on to say that the wife's complaint of shortage of money was not justified, that she had tacitly admitted that he gave her his wages, and that she gave him money back. There follows a finding which requires careful consideration:

H "We can only reconcile this to the statement—and, indeed, admission—that he was staying out late several times a week, coming in between 3 a.m. and 8 a.m.—by the inference that the wife was not at all averse to his doing so, for it is inconceivable to us that the ordinary wife with such a grievance would continue to put the means into her husband's hands to enable him to carry on his nocturnal habits . . . The intention of the wife has been to coerce her husband against his own wishes, as she well knew, to leave Leeds and live nearer to her relatives in Nottingham.

We, therefore, find that there was no intention on the part of the husband to desert his wife. It was not reasonable for the wife to expect her husband to join her in a new matrimonial home at Nottingham, and he was entitled to refuse reconciliation on these grounds."

I pause there to observe that, in my opinion, they are adopting a wrong test. Let it be assumed that the wife would prefer to live in Nottingham near her people rather than in Leeds. To my mind, the real point is that a situation had arisen in which she might be thought to object justifiably to continuing in Leeds, wherever else they might live. Let it be assumed that adultery had not been committed (and it is not found to have been committed), but that an association of an improper character, of which the wife could complain, had been going on, right up to the moment when the wife left home on Dec. 24, with this woman who was still in Leeds at the time of the hearing. To my mind, the question is not whether the wife was entitled to lay down conditions that a resumption of cohabitation must be in Nottingham, but whether she was entitled to say: "I will not go on living with my husband in Leeds while this thing is going on". The justices then say:

"We are satisfied that the break in consortium as it existed during the last two or three months rests with the wife, and her husband's conduct was not such as to compel her to leave the house, nor was his intention to break off matrimonial relations."

In other words, the question of the husband's intention in this matter has been decided adversely to the wife, because they say that it is she who broke up the consortium. I think it right to point out that the next finding was made against the wife without its ever having been put to her at all, so far as I can see. They say:

"The wife had one object in view—the removal of the matrimonial home to Nottingham, which she realised her husband would not consent to. She has not only shown little affection for her husband, but, despite her complaints, has continued to supply him with the wherewithal to carry on his admittedly frequent nightly absences with a view to paving the way to these proceedings, and thereby either (i) securing the removal of the matrimonial home to Nottingham, or (ii) enabling her to obtain an order so that she could return to Nottingham alone and be maintained by her husband. She is therefore not entitled to an order."

I do not ignore that it is a strong thing to differ from any conclusion of justices who have seen and heard the witnesses, but, in my opinion, that inference, which lies at the root of their finding that there was no intention of the husband to desert his wife, is an inference which ought not to have been drawn on the evidence, and is, in my opinion, unjustifiable, the more so as it was never put to the wife. Let it be assumed that she would be glad to live at Nottingham rather than at Leeds; the question still remains whether or not she has ample grounds for wishing not to continue to live in Leeds, where she has been the victim of a fresh association. But I go further. The suggestion that she has deliberately provided the husband with the means to carry on this association (for that is the implication of what is said), in other words, that she has corruptly connived at the association by providing the means for him to carry it on, for the indirect motive of getting her way about a change in the matrimonial home, seems to me monstrous in the circumstances. I am not prepared to accept that inference as justified. It vitiates the whole conclusion that this husband had no intention to drive his wife away. He was carrying on a clandestine association, to which the wife had every right to object, having regard to the circumstances in which she had taken him back before, and I am not prepared to accept the conclusion, which the justices have founded on the suggestion that she was promoting this association, that this is a case

in which it can be said that the husband had no intention to drive his wife away. I appreciate, of course, that her merely telling him, as she did, that if he did not behave better and keep better hours, and the like, she would leave him, does not of itself entitle her to complain of something which is not a just cause of complaint.

A But I think that this matter can be tested on authority. Here is a case in which admittedly, as recently as four years ago, an adulterous association with another woman had been condoned. Of course, that adultery could not possibly be the subject of a charge in a court of summary jurisdiction because of the statutory limitation, but I think that what has happened in this case in connection with the fresh association with Mrs. B. might very well be held, in any court in which the matter is open, to have revived the condoned adultery.

B In *Winscom v. Winscom & Plowden* (2) the headnote reads:

“Semble, condoned adultery may be revived, so as to found a sentence of dissolution, by subsequent misconduct and improprieties, short of, but tending to adultery”,

C though, in fact, the charge of adultery was found not to be established. It was assumed, though the matter was not subjected to investigation in that case, that the wife had committed adultery some five years before with a man who was not a party to this particular suit. The husband discovered that she was carrying on an association with a second man, but, after going into the question as fully as he could and taking the advice of a senior officer, he came to the conclusion that adultery had not been committed and took his wife back in respect of the second association, and it was with reference to

D that that SIR J. P. WILDE said (3 Sw. & Tr. 382):

E “The petitioner then made the co-respondent promise not to speak to his wife again, and resumed cohabitation with her. He continued from that time to cohabit with her, sleeping in the same bed for upwards of a month. I think it right to pause here, and remark, that if the petitioner had taken a different course, he might probably have entitled himself to relief from the court; for it is alleged that his wife had, in 1853, been guilty of adultery with a person named Clark, which he had condoned. We know nothing of the circumstances, and the fact is proved only by implication. But condonation would hardly have been an answer to a suit founded on that adultery in the face of these familiarities with Lieutenant Plowden, had he not condoned them also. It is not necessary to decide the point; but, as at present advised, I am of opinion that this latter conduct would have enured to revive the original guilt, if that had been made out to the satisfaction of the court.”

F

G It is important to note that that was not a case of resuming an association with the original adulterer; it was a fresh association of a familiar character, but not established as having included the commission of adultery.

H It is only necessary to say that that case has been followed, and, so far as I know, never doubted. It was recently commented on with approval in *Tilley v. Tilley* (3), and I need only read one short passage from the judgment of DENNING, L.J., with reference to resumption or continuance by the wife of an association with the man with whom she had committed adultery. He says ([1948] 2 All E.R. 1125):

“The circumstantial details do not matter, but the continuing intimate association does matter. It is one thing to forgive a wife for past adultery when the association is over and done with. It is quite another to forgive her when the association is still continuing. There is little hope of any true reconciliation if a wife, while pleading with her husband to his face for forgiveness, still keeps seeing her lover behind his back. No man can be expected to condone his wife's adultery whilst that is going on. Even

if the wife did not actually commit adultery during those three weeks (as to which I say nothing) the intimate association itself was a material fact. Such an association has been held sufficient to revive an antecedent condoned adultery: *Winscom v. Winscom & Plowden* (2); *Ridgway v. Ridgway* (4); *Beard v. Beard* (5); and to justify a husband in separating from his wife, *Glenister v. Glenister* (6)."

In my opinion, the majority of the justices below have completely failed to realise the grave significance of the association with Mrs. B., and when I say "grave" I am not suggesting, and must not be taken to be suggesting, that adultery was actually committed. In my opinion, that is not the point. The point is that a man whose previous adultery had been condoned was, to use the phrase used in the headnote in *Winscom v. Winscom & Plowden* (2), conducting another association with a married woman living separate from her husband "tending to adultery", and, if that sort of thing is sufficient in law to revive condoned adultery, surely it ought to be considered serious enough to justify the wife in withdrawing from cohabitation, and, until that state of things is brought to an end, to found a charge of desertion and to justify her in withdrawing from cohabitation for the purpose of entitling herself to maintenance. In other words, I think that, by finding that it is the wife who broke up the consortium and not the husband, and that, for indirect motives, she actually promoted the association in order that she might take advantage of it, the justices have misdirected themselves in coming to the conclusion that this is a case in which it can truly be said that the husband had no intention to desert his wife. I think that nothing is to be gained by sending the matter back for further investigation, and that we must do that which we are entitled to do, namely, to draw inferences which we think the court below ought to have drawn, and to say that this is a case in which desertion is proved and the wife is also entitled, perhaps even more clearly, to succeed on the charge of wilful neglect to provide reasonable maintenance.

COLLINGWOOD, J.: I agree.

Appeal allowed.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Denis Lyth*, Leeds (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

GREGORY v. FEARN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
June 24, 1953.]

Estate Agent—Sunday observance—Contract to effect sale of land on commission entered into on Sunday—Validity—Sunday Observance Act, 1677 (c. 7), s. 1.

A Per curiam: an estate agent is not a “tradesman or other person” within the meaning of the Sunday Observance Act, 1677, s. 1, and, therefore, a contract entered into on a Sunday to employ an estate agent to effect the sale of land in consideration of the payment to him of a commission on the price obtained is not prohibited by that section.

Palmer v. Snow ([1900] 1 Q.B. 725), applied.

B FOR THE MEANING OF TRADE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 303-307, paras. 487-490; and FOR CASES, see DIGEST, Vol. 43, pp. 5, 6, Nos. 1-9.

FOR THE SUNDAY OBSERVANCE ACT, 1677, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 509.

C Case referred to:

(1) *Palmer v. Snow*, [1900] 1 Q.B. 725; 69 L.J.Q.B. 356; 82 L.T. 199; 64 J.P. 342; 43 Digest 5, 5.

APPEAL by the plaintiff from a decision of His Honour JUDGE CAPORN at Nottingham County Court, dated Apr. 24, 1953, dismissing the plaintiff's claim for commission.

D The plaintiff was an estate agent, and the defendant was the owner of certain property which he wished to sell. The defendant told the plaintiff that the property to be sold was not available for business purposes, and the sum of £1,000 was fixed as the purchase price. On Sunday, Apr. 20, 1952, the plaintiff and the defendant entered into an agreement whereby the plaintiff undertook to effect the sale of the land and the defendant agreed to pay the plaintiff

E “a commission of £100 when sold and the said property shall be deemed to be sold and the commission payable on the receipt of a deposit or on a purchase agreement being entered into by a purchaser.”

One Owen, who wished to use the land for business purposes entered into an agreement for the sale of the property, but paid no deposit. The plaintiff

F claimed against the defendant £100 as his commission due under the agreement of Apr. 20, 1952, and the learned county court judge dismissed the claim on the grounds, inter alia, (i) that the agreement of Apr. 20, 1952, having been made on a Sunday fell within the prohibition of the Sunday Observance Act, 1677, s. 1; and (ii) that Owen was induced by the misrepresentation of the plaintiff to enter into the purchase agreement, and that, therefore, the plaintiff

G could not rely on such an agreement for the recovery of his commission. The plaintiff appealed.

T. R. Heald for the plaintiff.

The defendant did not appear.

H SIR RAYMOND EVERSLED, M.R.: The first point which is to be noticed is that Apr. 20, 1952, was a Sunday, and the learned judge in the court below concluded against the plaintiff on the ground, among others, that the agreement fell within the prohibition of the Sunday Observance Act, 1677, s. 1, as having involved the doing of business or work in his ordinary calling on the Lord's day by a tradesman, to wit, an estate agent. On the view I take, it is not strictly necessary to decide that point, but it seems to me, as at present advised, that counsel for the plaintiff is right when he says that an estate agent is not a tradesman within the contemplation of that section, even if the execution

by him of a contract of this kind was the doing of business or work in his ordinary calling. At first sight, counsel's argument appeared to be difficult, because the formula in the Act is "noe tradesman artificer workman labourer or other person whatsoever", and assuming that an estate agent is not a tradesman, he would, *prima facie*, be within the formula "other person whatsoever". It has, however, long been established that the words "other person whatsoever" are to be construed *eiusdem generis* with those that precede them, so that for the defendant to succeed on this point, it must be shown that an estate agent is a tradesman or something sufficiently like a tradesman to be covered by the *eiusdem generis* rule. *Palmer v. Snow* (1), which has the added force of being a decision of CHANNELL, J., shows that one who carried on the profession of a barber was not a tradesman, since a barber (so it was there said) does not commonly buy or sell things. If that be the kind of criterion to be applied, it would appear to me to exclude an estate agent from the formula in the Sunday Observance Act, 1677, s. 1, but, as I have said already, it is not strictly necessary to express a concluded view on that matter, since there is another ground on which the learned judge decided against the plaintiff, and against that part of the decision, as it seems to me, counsel for the plaintiff battles in vain.

The form of the contract which was made on this Sunday in April, 1952, was not quite the usual form of an estate agent's contract. For one thing, there was a lump sum commission and not a percentage, and the obligation was expressed thus:

"I agree to pay him a commission of £100 when [the property is] sold and the said property shall be deemed to be sold and the commission payable on the receipt of a deposit or on a purchase agreement being entered into by a purchaser."

There was no deposit in fact received by the plaintiff and it would, therefore, be necessary, in order that he should succeed, for him to show that a purchase agreement was entered into by a purchaser within the meaning of the contract. It may be (and I will assume that it is, because we have heard no argument about it) open to counsel for the plaintiff to contend that a purchase agreement does not necessarily mean an agreement enforceable in the courts, but counsel concedes that, if the only agreement which he can rely on was one which the purchaser was induced to enter into by the plaintiff's own misrepresentation, even though that misrepresentation was quite innocent, then the plaintiff cannot rely on such an agreement as having earned his commission.

Since an agreement, on the face of it binding, was in fact entered into, there remains only the question of fact: Was the purchaser induced to enter into that agreement by a misrepresentation on the plaintiff's part? [HIS LORDSHIP considered the evidence and continued:] I feel no doubt that the judge found, and there was evidence to support the finding, that the purchaser was misled by what he had been told by the plaintiff, and he was misled into entering into the contract in the belief that this land would be available to him or would be likely to be made available to him for some of his business purposes, and that, in leading him so to think, the plaintiff misrepresented (albeit quite innocently) the true position. On those facts it follows, first, that the purchaser could not have had this contract enforced against him, and, secondly, as counsel concedes, that the plaintiff cannot rely on such a contract as having earned his commission. On those grounds, it seems to me that this appeal must fail and be dismissed, and it becomes unnecessary for me to say any more about the possible third problem of the construction of the contract itself.

BIRKETT, L.J.: I am of the same opinion. Of the two points which have been raised and argued in this court, so far as the first point is concerned (that under the Sunday Observance Act, 1677), although it is not strictly

necessary for a decision of the appeal in view of our decision on the second point, I should like to say that I agree with the observations of my Lord, and that an estate agent, in my opinion, could not be a tradesman within the meaning of the statute and the interpretation in the decided cases. I regard the second point as entirely a question of fact which has been rightly decided by the judge and the conclusions of law follow.

A ROMER, L.J.: I also agree, and I should like to associate myself with the view that an estate agent is not within the purview of the Sunday Observance Act, 1677, s. 1. *Appeal dismissed.*

Solicitors: *Corbin, Greener & Cook*, agents for *Huntsman, Donaldson & Tyzack*, Nottingham (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

B

Re A DEBTOR (No. 10 of 1953). *Ex parte THE DEBTOR v. AMPTHILL RURAL DISTRICT COUNCIL AND ANOTHER.*

[CHANCERY DIVISION (Harman and Upjohn, JJ.), June 15, 29, 1953.]

C *Bankruptcy—Petition—Time for filing—Bankruptcy notice—Application to set aside—Dismissal by registrar—Appeal by debtor to High Court and Court of Appeal—Appeal dismissed—Petition filed by judgment creditor—Bankruptcy Act, 1914 (c. 59), s. 4 (1) (c)—Bankruptcy Rules, 1915 (S.R. & O., 1914, No. 1824), r. 141—Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 139.*

D On Apr. 26, 1951, a local authority obtained against the debtor judgment for a debt of £2 15s. 6d. On Aug. 22, 1952, the local authority served a bankruptcy notice in respect of the judgment debt, and, pursuant to the Bankruptcy Rules, 1915, r. 140, the debtor filed an affidavit in opposition (which operated as an application to set aside the notice). On Sept. 1, 1952, under r. 141 of the rules of 1915 the registrar fixed the hearing of the application for Sept. 10, 1952, and extended to the date of the hearing the duration of the bankruptcy notice. On Sept. 10, 1952, the registrar dismissed the debtor's application, and on Oct. 18, 1952, the debtor appealed by leave to the Divisional Court of the Chancery Division, which on Nov. 10, 1952, allowed his appeal. On Feb. 10, 1953, the Court of Appeal restored the decision of the registrar. The debtor thereupon immediately sent to the local authority a cheque for the appropriate sum, but it was refused. On Mar. 10, 1953, the local authority filed a petition in bankruptcy against the debtor, and on May 1, 1953, the registrar made a receiving order on the petition on the ground of the debtor's failure to comply before Feb. 10, 1953, with the notice served on him on Aug. 22, 1952.

G **HELD:** the act of bankruptcy was, *prima facie*, complete on Sept. 10, 1952, when the registrar made his order, and, having regard to the Bankruptcy Act, 1914, s. 4 (1) (c), it was not available to found a petition of bankruptcy more than three months thereafter, *viz.*, on Mar. 10, 1953; neither the notice of appeal filed by the debtor on Oct. 18, 1952, nor the order of the Divisional Court of Nov. 10, 1952, discharging the order of Sept. 10, 1952, operated to suspend the running of time, because, under r. 141 of the rules of 1915, only the registrar or his deputy could extend the time for compliance with the notice; and, therefore, the petition was out of time.

H

AS TO BANKRUPTCY NOTICE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 32-47, paras. 44-57; and FOR CASES, see DIGEST, Vol. 4, pp. 94-108, Nos. 852-972.

Cases referred to:

- (1) *Re A Debtor* (No. 48 of 1952). *Ex p. Amphill Rural District Council v. The Debtor*, [1953] 1 All E.R. 545; [1953] Ch. 335; 117 J.P. 174.
- (2) *Re McGreavy. Ex p. McGreavey v. Benfleet Urban District Council*, [1950] 1 All E.R. 442; [1950] Ch. 269; 114 J.P. 185; 2nd Digest Supp.
- (3) *R. v. London JJ.*, [1899] 1 Q.B. 532; *sub nom. R. v. London JJ. Ex p. Bayne*, 68 L.J.Q.B. 383; 80 L.T. 286; 63 J.P. 388; 18 Digest 422, 1602.
- (4) *Nitrate Producers S.S. Co., Ltd. v. Short Bros., Ltd.*, (1922), 91 L.J.K.B. 871; 127 L.T. 726; Digest, Practice, 611, 2506.

APPEAL by the debtor against a receiving order dated May 1, 1953, made by the registrar of the Brentford County Court.

Muir Hunter for the debtor.

Showan for the respondents, the Amphill Rural District Council.

Cur. adv. vult.

June 29. **HARMAN, J.**, read the following judgment of the court. This is an appeal against a receiving order made by the registrar of the Brentford County Court on May 1, 1953, on the petition of the respondents. The act of bankruptcy relied on was the appellant's failure to comply before Feb. 10, 1953, with a notice served on him on Aug. 22, 1952, in respect of a judgment debt of rather over £2 under an order of the petty sessional court at Amphill dated Apr. 26, 1951. The dates of the judgment and the bankruptcy notice and the amount concerned are sufficiently remarkable: more remarkable still is the fact that this bankruptcy notice has already received the attention of this court and of the Court of Appeal, the former having set it aside, and the latter having restored it by a considered judgment delivered on Feb. 10, 1953: *Re A Debtor* (No. 48 of 1952). *Ex p. Amphill Rural District Council v. The Debtor* (1). The facts are stated in the Court of Appeal's judgment. It appears that the £2 15s. 6d. represents water rates for two half-yearly periods in 1950 or thereabouts, aggregating £2 12s. 6d., which have admittedly remained unpaid, and 3s. costs. There has been, in fact, a long and protracted dispute between the respondents and the appellant about rates. The importance of the judgment for water rates was, as the Court of Appeal has held, that it was a good basis for a bankruptcy notice (because, unlike other rates, it is recoverable as a civil debt), thus enabling the council, having regard to the decision in *Re McGreavy. Ex p. McGreavey v. Benfleet Urban District Council* (2) to present a petition supported by its judgment for general rates, although the latter could not have been the subject of a bankruptcy notice.

As before stated, the bankruptcy notice was served on Aug. 22, 1952. In due course, the appellant filed an affidavit in opposition, pursuant to the Bankruptcy Rules, 1915, r. 140. This operated as an application to set aside the notice: see r. 141. Accordingly, on Sept. 1, 1952, the registrar, as r. 141 required, fixed Wednesday, Sept. 10, 1952, for the hearing of the application. This date was later than the date of expiration of the bankruptcy notice and, therefore, the registrar, as obliged to do by the same rule, extended to the date of the hearing what he called "the completion of the act of bankruptcy". On Sept. 10, 1952, the registrar dismissed the appellant's application on the ground that there was no good counterclaim or set-off under the Bankruptcy Act, 1914, s. 1 (1) (g), and he at the same time (but, as it was conceded, without jurisdiction) added a sum of £7 18s., consisting of costs and expenses, to the bankruptcy notice.

On Oct. 18, 1952, the appellant in person appealed by leave to this court, which heard his appeal on Nov. 10 and allowed it, not on the ground taken before the registrar, but on a different ground later disapproved of and explained by the Court of Appeal ([1953] 1 All E.R. 547). It appears that directly the Court of Appeal gave its decision the appellant sent by registered post to the

respondents a cheque for the sum in question. There is no reason to suppose that the cheque would not have been met. It appears, however, though the evidence on this point is most unsatisfactory, that the cheque was not received by the respondents till the next day, when they refused to accept it. They maintain in this court that they were justified in so doing.

- The grounds of the appeal as argued before us are, first, that the receiving order and the petition are bad on their face in stating as the act of bankruptcy
- A a failure to comply with the bankruptcy notice "before" Feb. 10, 1953. This point is admittedly good as matters stand and we were asked to give leave to amend the petition by adding the words "on or" immediately before the word "before". The second ground taken was that the act of bankruptcy was complete on Sept. 10, 1952, when the registrar made his order, and, therefore, was not available as a foundation for a petition filed more than three
- B months thereafter, viz., on Mar. 10, 1953; Bankruptcy Act, 1914, s. 4 (1) (c). The third ground was that the bankruptcy court ought to have looked behind the judgment for £2 12s. 6d. and costs, and, if it did so, the judgment would be found to be unsatisfactory for the following reasons: First, it was a judgment by default, the defendant not being present, as he was ill and sent a doctor's certificate to the bench, but they refused to adjourn the matter.
- C Secondly, there was no effective appeal from that judgment. The debtor appealed to quarter sessions against two judgments, one involving the water rate already mentioned and the other certain general rates. The appeal committee at quarter sessions dismissed both appeals as premature. So far as the appeal against general rates was concerned, that was correct, as there had been no distraint for the rates in question: see *R. v. London JJ.* (3). The
- D committee also by inadvertence dismissed at the same time and apparently on the same ground the part of the judgment relating to water rate, although *R. v. London JJ.* (3) had no application to that part, as that rate was recoverable as a civil debt. In the result, the truth of the matter seems to be that the debtor's defence against the claim for water rates has never been heard. Fourthly, it is said that the registrar misdirected himself, in that he took
- E the view that, having regard to the finding of the Court of Appeal, it was no longer open to the debtor to take the point that he had a counterclaim or set-off, whereas the fact that there is no cross-claim to satisfy the Bankruptcy Act, 1914, s. 1 (1) (g), does not decide the question whether the debtor may not be able, on the hearing of the petition, to set up a cross-claim. These last two grounds are not covered by the notice of appeal and we have been asked
- F to give leave to amend in that respect. There are other grounds of appeal stated in the notice which were not proceeded with before us.

- As to the first point, we were asked to refuse leave to amend the petition, it being argued with force that this was not a technical matter, because the appellant was in a position to pay and did, in fact, send a cheque which reached the respondents on the morning of the day following the Court of Appeal's
- G decision. It was said that, as the respondents were relying on two technical points, first, that the cheque was sent a few hours too late, and, secondly, that a tender by cheque is not a tender in law, they ought not to be allowed to amend. In many cases we should agree with that argument, but this case is only one step in a long and highly technical piece of litigation between the appellant and the respondents in respect generally to rates said to be due from him,
- H and we think that in the circumstances the respondents may properly rely on any technical matters and at the same time should be allowed to amend what is plainly a verbal slip. Though the ultimate outcome of the litigation may depend on highly technical matters, it would be wrong to let it be decided on a mere slip.

As to the second point, it is enough to remember the two dates appearing on the face of the receiving order, viz., Aug. 22, 1952 (the date of service of

the notice) and Feb. 10, 1953 (the date of failure to comply) to suggest at once the conclusion that the interval is too great. The notice in the ordinary course expired on Aug. 29, and it was admittedly extended by the registrar, under the Bankruptcy Rules, 1915, r. 141, to Sept. 10, 1952. On that date, prima facie the act of bankruptcy was complete and the three months then began to run. It was, however, argued for the respondents that either the notice of appeal filed by the appellant on Oct. 18, 1952, or the order of this court on Nov. 10, 1952, discharging the order of Sept. 10, 1952, and setting aside the bankruptcy notice, in some way suspended the running of time, and that time remained so suspended until the final determination of the matter by the Court of Appeal on Feb. 10, 1953. That order allowed the appeal, rescinded the order of this court of Nov. 10, 1952, and restored the registrar's order, and it is said that the respondents had three months from that date to enter their petition, and complied by filing it on Mar. 10, 1953. We are unable to accede to this argument. In our judgment, it follows from the terms of r. 141 of the rules of 1915 (replaced now without material alteration in this respect by the Bankruptcy Rules, 1952 (S.I., 1952, No. 2113), r. 139), that the only person who can extend the time for complying with the bankruptcy notice is the registrar, or, having regard to the definition in r. 3, his deputy. The rule is directory and compels the registrar to extend it "until the application has been heard and determined". These words can only apply, in our judgment, to the determination before the registrar of the application to set aside the bankruptcy notice made by filing the affidavit mentioned in the rule, and cannot apply to its determination either by this court or by the Court of Appeal. It seems to us, therefore, that the time began to run at the latest on Sept. 11, 1952. There were in fact, on any view, two months during which the registrar's order stood and in which a petition could have been presented. Of course, when this court set aside the bankruptcy notice it would also have set aside the petition, but the order of the Court of Appeal would have restored both.

It was pointed out to us on behalf of the appellant that under R.S.C., Ord. 58, r. 16, which applies to a Divisional Court in Bankruptcy under r. 134 of the rules of 1915 (to which r. 132 of the rules of 1952 corresponds), an appeal does not operate as a stay of execution or of proceedings under the decision appealed from unless the court so orders. The only case touching on this matter to which we were referred was *Nitrate Producers S.S. Co., Ltd. v. Short Bros., Ltd.* (4). The immediate point is not relevant, but LORD BUCKMASTER in the course of his speech, in which the other Lords concurred, said (127 L.T. 727):

"It is, of course, a totally different proposition where the effect of an order in this House is to restore a judgment of the court of first instance which has been reversed by an order of the Court of Appeal. In that case the judgment of the court of first instance is expressly restored and remains standing as from the date when it was given."

So here the Court of Appeal reversed the Divisional Court and restored the registrar's judgment, which, accordingly, remains standing as from the date when it was given, viz., Sept. 10, 1952. In our judgment, therefore, the appeal succeeds on this ground.

This makes it unnecessary to consider the third and fourth grounds argued before us. Formally, in case this matter should go further, we grant leave to amend the notice of appeal to raise these points. We think, however, that there is no substance in either of them. As to the third point, the court of bankruptcy can, of course, look behind a judgment, but, so far as we are aware, the only defence to the summons before the justices would have been that the appellant had some counterclaim. This, however, was never put forward by him until after the bankruptcy proceedings had been started. We

do not see, therefore, that any injustice can have been done to him by the original decision of the petty sessional court or on the appeal.

A With regard to the fourth point, the evidence as to what took place before the registrar was most unsatisfactory, but we are not satisfied that he misdirected himself on this matter. The information given to us leads us to suppose that the general rates paid by the appellant to the respondents were voluntarily paid by him in order to obtain some advantage for himself, viz., to clear the title of some property which he had sold, and, therefore, were not paid in circumstances in which he could succeed in an action for money paid under a mistake of fact or under some undue pressure. We think that this is not a case for the exercise of the powers given by the Bankruptcy Act, 1914, s. 5 (5): it is a matter which could be determined in the bankruptcy itself.

B However, as, in our view, the bankruptcy notice is no longer available as an act of bankruptcy, this appeal must be allowed and the petition dismissed. The respondents must pay the appellant's costs of the petition and of this appeal, and the £20 in court must be paid out to the appellant. Of course, as the appellant was in person below, there will only be such costs, if any, as an appellant in person is entitled to.

Appeal allowed.

C Solicitors: *Shelton, Cobb & Co.* (for the appellant); *Crossman, Block & Co.*, agents for *Sharman & Trethewey*, Bedford (for the respondents).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

D STERN v. FRIEDMANN.

[CHANCERY DIVISION (Danckwerts, J.), June 26, 1953.]

Practice—Appearance—Appearance after judgment—Ex parte application for leave to enter—Defendant's claim based on allegation of fraud.

E Until the outbreak of the war in 1939, the parties carried on a business in partnership. On July 18, 1940, the plaintiff issued a writ in an action for the dissolution of the partnership, and on Oct. 22, 1940, notice of the writ was served on the defendant in the United States of America. The defendant did not enter an appearance, and on Feb. 18, 1941, judgment was given for the dissolution of the partnership. On Jan. 22, 1943, an order was made in chambers approving the sale of the goodwill to the plaintiff for £10, and on Nov. 19, 1943, the final order on further consideration in the action was made and the action was at an end. On June 4, 1953, the defendant entered an appearance in the action, having obtained leave to do so on an ex parte application to the master, and on June 15, 1953, he served on the plaintiff a short notice of motion to set aside the order of Jan. 22, 1943. The plaintiff applied, under R.S.C., Ord. 70, r. 1, for the appearance to be struck out on the grounds that it was entered after judgment and that he had received no notice of the application for leave to enter an appearance. The defendant thereupon applied, by notice of motion, for leave to enter an appearance. On the hearing of the motions, the defendant alleged that the order of Jan. 22, 1943, had been obtained by fraud.

H HELD: (i) an application for leave to enter an appearance after judgment should be by special motion or summons, notice of which had been served on the plaintiff; leave to enter such an appearance could not be granted on an ex parte application; and, therefore, the appearance was irregular and should be set aside.

(ii) the defendant could not be allowed to raise an issue of fraud on a notice of motion in an action which was at an end; the proper method of raising the matter was by a separate action in which pleadings would have

to be delivered and the rules of evidence to be obeyed; and, therefore, leave to enter an appearance would not be granted to him.

AS TO TIME FOR ENTRY OF APPEARANCE, see HALSBURY, Hailsham Edn., Vol. 26, p. 37, para. 55.

MOTIONS in an action for the dissolution of a partnership.

The action was commenced by writ on July 18, 1940. The defendant failed to appear, and on Feb. 18, 1941, the plaintiff obtained judgment. On Jan. 22, 1943, an order was made in chambers approving the sale of the goodwill of the business to the plaintiff for £10, and on Nov. 19, 1943, the final order on further consideration in the action was made. On June 4, 1953, the defendant entered an appearance, having obtained leave to do so on an ex parte application to the master. On June 15, 1953, he served on the plaintiff a notice of motion to set aside the order of Jan. 22, 1943, and the plaintiff thereupon served a notice of motion that the appearance of June 4 be struck out. The question having arisen whether leave to enter appearance after judgment could be granted on an ex parte application, the defendant applied, by notice of motion, for leave to enter an appearance. All three motions were now before the learned judge.

T. A. C. Burgess for the plaintiff.

C. Lawson for the defendant.

DANCKWERTS, J.: This is a case of some difficulty in which there are three motions before me, one by the plaintiff and two by the defendant, in an action which was begun by writ on July 18, 1940, and which is, in form, an action for the dissolution of a partnership. Service of the writ was effected on the defendant in the United States on Oct. 22, 1940. The defendant, believing that the business (viz., the importing of provisions), which had been carried on in partnership between him and the plaintiff, had come to an end at the outbreak of the war, and for other reasons connected with the war, never took any steps to appear. On Feb. 18, 1941, judgment ordering dissolution of the partnership as from Dec. 31, 1939, was given in the action with the usual directions which are made in a partnership action of this kind. Subsequently, the question arose of the sale of the goodwill of the business, and, on the suggestion, apparently, that the goodwill was of little, if any, value, the plaintiff was allowed to purchase it for the sum of £10. This sale was approved by an order made in chambers in the action on Jan. 22, 1943. On Nov. 19, 1943, the final order on further consideration in the action was made, and thereupon it was clear that the action was at an end. Now, ten years later, the defendant wishes to enter an appearance. On June 4, 1953, he was allowed, by an order of the master, to enter an appearance, and on June 15, 1953, he served on the plaintiff a short notice of motion to set aside the order of Jan. 22, 1943. As a result of suggestions which were made as regards the practice in obtaining leave to enter an appearance after judgment has been obtained, he also asks for leave to enter an appearance. The plaintiff, on the other hand, has served a notice of motion, pursuant to R.S.C., Ord. 70, r. 1, that the appearance on June 4 by the defendant may be struck out on the grounds that such appearance was entered after judgment in the action and that no notice of any application for leave to enter an appearance was given to the plaintiff.

The practice is not entirely clear in regard to this matter. By R.S.C., Ord. 12, r. 22:

"A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the court or a judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ."

In the ANNUAL PRACTICE, 1953, p. 141, this note appears under the rule:

"Appearance after judgment. In Chancery Division leave to enter appearance after judgment is obtained on special motion or summons: DANIELL'S CHANCERY PRACTICE, p. 295; DANIELL'S CHANCERY FORMS, p. 129. Order, SETON'S DECREE AND ORDERS, p. 23. In Queen's Bench Division appearance tendered after judgment signed will be accepted if the defendant desires to enter it. Such appearance would stand in the event of the judgment being set aside."

In DANIELL'S CHANCERY PRACTICE, 8th ed., vol. 1, p. 295, the practice is stated in this way:

"After judgment an appearance cannot be entered by a defendant except by leave of the court, which may be granted either with discharge of the judgment leaving the defendant free to defend on payment of costs thrown away, or without setting aside the judgment on defendant's submitting to be bound by it. The application for leave may be made by petition of course if the plaintiff will consent, and if he will not by special motion or summons, notice of which must be served on him. In the latter case the notice of motion or summons asks that the defendant on submitting to be bound by the judgment and proceedings already had may be at liberty to enter an appearance to the writ of summons, and may have the like benefit of the judgment, and may be at liberty to attend the subsequent proceedings as if he had appeared at the hearing. On production of the order to the proper officer an appearance for the defendant may be entered in the usual way, and notice thereof must be given on the same day to the plaintiff or his solicitor, and the action thenceforth proceeds against such defendant in the ordinary manner."

It is suggested that the practice has grown up whereby the master will make an order giving leave for appearance merely on an ex parte application by the defendant who wishes to appear after judgment. In my view, that practice (if it exists) is not correct. It seems to me that the practice is as stated in DANIELL'S CHANCERY PRACTICE in the passage I have read, and that it would be very undesirable that such an appearance should be allowed to be entered on ex parte application. In a case like the present when the matter is very much out of time after the judgment, it might be that the plaintiff would have a right to put forward submissions to the court why appearance should not be allowed to be entered at such a late stage, or, if it is allowed to be entered, that certain terms should be put on the defendant. In those circumstances it seems to me quite wrong that the defendant should be allowed to obtain leave to enter an appearance ex parte, and, accordingly, it seems to me that in the present case the order made by the master was irregular and the appearance must be set aside.

I now come to the question whether I should accede to the defendant's application by notice of motion for leave to enter an appearance in this action, and for that purpose I must consider the circumstances to some extent. The first point which is very much against the defendant is that it is ten years since the order was made, and that, in itself, is a circumstance which naturally causes some surprise at his application. He does, however, explain in an affidavit why he has not made an application previously or has not entered an appearance in the proper way, and there is some justification for what he says. It was really on account of the war. He had supposed that the business had come to an end, and, in particular, he was unaware of a circumstance which he now says was of the greatest importance, namely, that the National Egg Distributors Association, Ltd., was formed on June 30, 1941, under the Companies Act, 1929, and that the plaintiff, by virtue of having been in the business of importing food before the war in partnership with the defendant, was able

to become a member of this company, with an allocation of six hundred and eighty units, and thereby obtained dividends which, the defendant says, amounted, over the period in which this procedure operated, to a considerable sum. The defendant alleges that the circumstance that the plaintiff would be entitled, by virtue of the partnership business, to acquire membership in the company was not disclosed to the court when the order was made approving the sale of the goodwill of the business to him, and that, therefore, it was obtained by fraud. That is a substantial point, and a matter of considerable importance which would, one would think, give the defendant some ground for claiming that he ought to have a right to re-open the matters which had been dealt with in this action. A

The difficult question then arises whether the defendant is going about the matter in the right way. If he is now allowed to enter an appearance, can he, merely on a motion, re-open this matter in the action which came to an end as long ago as Nov. 19, 1943? It is to be observed that he is not desirous of setting aside the order, made in 1941, for the dissolution of the partnership, or the order on further consideration, made on Nov. 19, 1943. He merely desires to set aside the order of Jan. 22, 1943, approving the sale of the goodwill—an order which was made over ten years ago in an action which is now at an end. It seems to me that that is not a proper way of proceeding. If there is an allegation of fraud and the allegation can be substantiated, it can, and should, be pursued in another way. Fraud is a serious matter. It has always been regarded by the court as a matter so serious that the precise allegations should be laid before the court in the form of pleadings and that it should not be decided on summary application, such as is a notice of motion. In the ANNUAL PRACTICE, 1953, p. 699, there is this note: B C D

“Fraud. It is the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation established by strict proof. Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.” E

Thus, it seems that, notwithstanding the orders which have been made in this action, the defendant, if his claim of fraud is justified, is in a position to bring an action to set aside the sale, which was not a sale by the court, but merely a sale to which the approval of the court was obtained in the order of Jan. 22, 1943. Therefore, it is really unnecessary that he should be allowed now to enter appearance in the action, and it seems to me very inconvenient that he should be allowed to do so, and to demand to bring the matter of fraud before the court, merely on notice of motion. F

Reliance was placed by the defendant on R.S.C., Ord. 27, r. 15, which reads: G

“Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit, and, where an action has been set down on motion for judgment under r. 11 of this order, such setting down may be dealt with by the court or a judge in the same way as if judgment by default had been signed when the case was set down.” H

It would appear that the order approving the sale was not a judgment, and, consequently, r. 15 does not apply in the present case. The defendant also relied on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 62, which provides:

“Subject to the provisions of this Act with respect to appeals in matters

of practice and procedure, every order made by a judge of the High Court in chambers, except orders as to costs only which by law are left to the discretion of the court, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the practice of the Division to which the cause or matter in which the order was made is assigned."

- A It is true that the order of Jan. 22, 1943, was an order made by a judge in chambers, but this does not seem to me the appropriate method of proceeding when the action has come to an end and an order on further consideration is made. One is familiar with the practice which is referred to in s. 62 of the Act of 1925. Cases constantly occur where a party wishes to appeal to the Court of Appeal from an order of the judge in chambers, and he then has to move the judge formally in open court to discharge the order made in chambers, or a certificate is obtained that no further argument is required by the judge:
- B [see the note headed "Appeal from and application to discharge orders made in chambers", in the ANNUAL PRACTICE, 1953, p. 1188]. But it does not seem to me that s. 62 of the Act of 1925 is of any assistance in regard to the present problem, and, therefore, I come to the conclusion that, as stated in the ANNUAL PRACTICE, 1953, p. 699, in a case of an allegation of fraud of this kind,
- C the proper method of raising the matter is by a separate action in which proper pleadings will have to be delivered, the proper rules of evidence can be obeyed, and the matter can be regulated by oral evidence in a more satisfactory manner. As I pointed out, the order of Jan. 22, 1943, was not an order for the sale of the goodwill to the plaintiff, but merely an order approving the sale, and it seems to me that the action which the defendant
- D would bring to attack that sale would be an action asking that the sale be set aside. If, in such an action, the answer were made that the sale was authorised or approved by the court, the defendant would then say that the order approving the sale was obtained by fraud. If, therefore, the defendant wishes to raise an issue of that kind, he must do it by a separate action, and he cannot be allowed to do it merely on a notice of motion in the action which is now at
- E an end. Therefore, I come to the conclusion that I ought not to accede to the defendant's application for leave to enter an appearance now, and that his notice of motion must be dismissed. His other notice of motion, which asked that the order of Jan. 22, 1943, be discharged, went to the merits of the order. As I have already indicated, I do not think that that is the right procedure, and, in any case, if the defendant is not allowed to enter an appearance in the action, this notice of motion cannot be made effective, and must
- F also be dismissed. On the other hand, the plaintiff's notice of motion asking for the discharge of the appearance which was entered by the defendant on June 4, 1953, succeeds, and an order must be made accordingly.

Order accordingly.

Solicitors: *Field, Roscoe & Co.* (for the plaintiff); *Forsythe, Kerman & Phillips* (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

**SVENSKA TRAKTOR AKTIEBOLAGET v. MARITIME
AGENCIES (SOUTHAMPTON), LTD.**

[QUEEN'S BENCH DIVISION (Pilcher, J.), June 4, 5, 8, 9, 11, 1953.]

Shipping—Carriage by sea—Deck cargo—Cargo “stated” as being carried on deck—Clause in bill of lading giving liberty to carry goods as deck cargo—Carriage subject to obligation properly and carefully to carry—Carriage of Goods by Sea Act, 1924 (c. 22), schedule, art. I (c), art. III, r. 2.

The plaintiffs were the consignees of a number of tractors shipped from Southampton to Stockholm, and the defendants were the charterers (and for the purposes of the action treated as the owners) of the vessel in which the tractors were carried. Some of the tractors were carried as deck cargo and during the course of the voyage one was washed overboard. The contract of carriage was contained in the bill of lading which stated (inter alia) that all the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, were to apply to the contract, and that, if any term of the bill of lading was inconsistent with, or repugnant to, the Act, it should to that extent be void. The bill of lading also stated: “Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage, or claim arising therefrom.” In an action for the value of the tractor lost overboard,

HELD: (i) the clause in the bill of lading giving liberty to carry goods on deck did not amount to a “statement” that the tractor was being carried on deck so as to exclude it from the definition of “goods” in art. I (c) of the schedule to the Carriage of Goods by Sea Act, 1924, and, consequently, it was being carried by the defendants subject to the obligation imposed on them by art. III, r. 2, properly and carefully to load, stow, and carry it.

(ii) the second part of the clause in the bill of lading (excluding the liability of the shipowners for loss, etc.) was void as being contrary to art. III, r. 8, but the clause was severable and under the first part of it the defendants had liberty to ship cargo on deck but only subject to their obligation under art. III, r. 2, but, on the facts, they had not discharged that obligation.

(iii) in any event, the onus was on the defendants to prove that they had complied with art. III, r. 2, and they had failed to discharge that onus.

W. R. Varnish & Co., Ltd. v. Kheti (Owners) (1949) (82 Lloyd, L.R. 525), distinguished.

FOR THE CARRIAGE OF GOODS BY SEA ACT, 1924, schedule, art. I (c), art. III, rr. 2 and 8, see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 887 and 889.

Case referred to:

(1) *W. R. Varnish & Co., Ltd. v. Kheti (Owners)*, (1949), 82 Lloyd, L.R. 525.

ACTION for the value of a tractor lost overboard.

The plaintiffs, a Swedish company, were the consignees of a batch of fifty tractors which were shipped in the motor vessel *Glory*. The defendants were the charterers of the vessel, but for the purposes of the action they agreed to be treated as the owners. Under the charterparty the period of hire was expressed to be “about eight to fourteen days” and the limits were expressed to be “for a voyage from Amsterdam to Stockholm via Southampton and Copenhagen.” Of the fifty tractors shipped, thirty-four were stowed below decks and the remaining sixteen were stowed on Nos. 1 and 2 hatches as deck cargo. His LORDSHIP found that three tractors were stowed on the port side of No. 1 hatch, with wheels interlocking and brakes on and in gear, but with no chocks behind the wheels. Two tractors were stowed facing forward and the

third facing aft, and the three extended a little to starboard of the midship line. By about 6.30 p.m. on Oct. 16, the tractors were loaded and the Glory left her berth at Southampton, the tractors on No. 1 hatch being finally lashed and secured about an hour later while the vessel was proceeding down Southampton Water. During Oct. 17, the wind was from the south-west, varying between force three and force six of the Beaufort scale. Till 4 a.m. of Oct. 18, the Glory

- A course was altered to about north by east, and the wind, being from the westward, was on the vessel's port beam. During the 4 to 8 a.m. watch a tractor, one of the three tractors on No. 1 hatch which was to starboard of the others, was washed over the starboard side. The vessel then hove to and the remaining tractors were re-lashed. On arrival at Stockholm the master made a protest in which he said that on Oct. 17 the wind increased to force five to six and orders were given to inspect and secure all lashings, and that at 06.05 a.m. on Oct. 18, off the Haaksgonden, the vessel encountered several heavy seas which caused the lashings on No. 1 hatch partly to give way and washed one tractor overboard. His LORDSHIP found that the shippers knew that some of the tractors were stowed as deck cargo and made no protest, that the plaintiffs had no knowledge how the consignment was to be stowed, and that there was
- C no evidence that they had agreed expressly or impliedly to stowage on deck. His LORDSHIP also found that the contract of carriage was wholly evidenced by the bill of lading.

M. R. E. Kerr for the plaintiffs.

H. V. Brandon for the defendants.

Cur. adv. vult.

- D June 11. **PILCHER, J.**, read a judgment in which he stated the facts and continued: The bill of lading is, of course, subject to the Carriage of Goods by Sea Act, 1924, and is expressed so to be. The clause in the bill of lading which incorporates the Carriage of Goods by Sea Act is in these terms:

- E "All the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the schedule thereto, are to apply to the contract contained in this bill of lading and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act, and the schedule thereto, as if the same were herein specifically set out. If, or to the extent that, any term of this bill of lading is repugnant to or inconsistent with anything of such Act or schedule, it shall be void."

- F There the matter is expressed, and, even if it had not been expressed, it would have been implied by law. The next clause to which I ought to refer is the following:

"Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage, or claim arising therefrom."

- G The bill of lading contains on its face no statement that any particular goods were being shipped on deck, and that leads me to consider the section of the Act and the articles of the schedule which have been referred to in argument.

The Carriage of Goods by Sea Act, 1924, s. 1, is in the following terms:

- H "Subject to the provisions of this Act, the rules [in the schedule relating to bills of lading] shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland."

Turning to art. I (c) in the schedule to the Act one finds the definition of "goods" set out as follows:

"'Goods' includes goods, wares, merchandises, and articles of every

kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

It was submitted on behalf of the defendants that while there was admittedly no specific statement on the face of the bill of lading that any of these tractors were being carried on deck, the clause in the bill of lading which I have already read, giving liberty to the vessel to carry goods on deck, amounted to an agreement between the parties that the steamer was entitled to ship goods on deck, and, it being common ground that the tractor which was lost was shipped on deck, the clause giving liberty to ship on deck amounted in all the circumstances to a statement that the tractor was carried on deck sufficient to satisfy art. I (c) of the schedule, and thus to exclude the tractor in question from the definition of "goods" to which the Act applies.

I do not propose to spend much time on that submission because, in my view, it is quite untenable. The intention of the Act and the schedule in relation to deck cargo appears to me to be reasonably clear. At common law a shipowner is only authorised to stow goods on deck in certain circumstances, and here I propose to quote a passage from SCRUTTON ON CHARTERPARTIES, 15th ed., p. 157, because the principle is there set out tersely and concisely, and, of course, perfectly accurately:

"The shipowner or master will only be authorised to stow goods on deck: (1) by a custom binding in the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper of the particular goods so to stow them. The effect of deck stowage not so authorised will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods."

The policy of the Carriage of Goods by Sea Act was to regulate the relationship between the shipowner and the owner of goods along well-known lines. In excluding from the definition of "goods" the carriage of which was subject to the Act, cargo carried on deck and stated to be so carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo, on his own conditions and unaffected by the obligations imposed on him by the Act, in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided, of course, that the cargo in question was, in fact, carried on deck and that the bill of lading covering it contained on its face a statement that the particular cargo was being so carried. Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees of the bill of lading to whom the property in the goods passed under the terms of s. 1 of the Bills of Lading Act, 1855, that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage of the goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or indorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed on him by the Act. A mere general liberty to carry goods on deck is not, in my view, a statement in the contract of carriage that the goods are, in fact, being carried on deck. To hold otherwise would, in my view, do violence to the ordinary meaning of the words of art. I (c). I, accordingly, hold that the plaintiffs' tractors were being carried by the defendants subject to the obligations imposed on them by art. III, r. 2, of the Act.

The next question is: Was the shipowner in those circumstances entitled to carry the tractors or any of them on deck? I have already referred to the clause in the bill of lading which purports to grant to the shipowner a liberty

to ship goods on deck, but I may, perhaps, be pardoned for reading the clause again:

“Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage, or claim arising therefrom.”

A The clause or sentence is thus in two parts, and, in my view, it is reasonably clear that the second part of the clause offends and must offend against art. III, r. 8, of the schedule to the Act and cannot be relied on by the defendants. Counsel for the defendants argued that on the analogy of *W. R. Varnish & Co., Ltd. v. Kheti (Owners)* (1), it was possible to say that the second part of the clause did not offend against the Act. I do not propose to deal at length with that argument because, in my view, that case is not an authority for any such proposition. It was a case which depended very much on its own facts; it was a case in which the Carriage of Goods by Sea Act was only B incorporated by contract, and a case in which a rubber stamp clause was superimposed on the bill of lading. I think it is a case which must be confined to its own facts, and, in my view, it is no authority at all for the proposition advanced by counsel for the defendants that the second part of this particular clause does not offend against the Act. I am quite clear that it does.

C If the whole is to be regarded as one clause, it is argued on behalf of the plaintiffs that the whole clause must be taken to offend against the Act, and that with the second part of the clause goes the first part which purports to give the ship liberty to take deck cargo. On behalf of the defendants, it was argued that the clause should be read disjunctively, and that, inasmuch as the first portion did not offend against the Act, it should be allowed to remain, and that it could not consequently be said that in shipping some tractors on D deck the owners had committed such a fundamental breach of their obligation under the contract of carriage as to disentitle them from relying on any of the statutory exceptions, and, in particular, on the exception of perils of the seas. The two portions of the clause under consideration are connected by the conjunction “and” without any stop. The second part offends against the Act and the first part does not. While, in the view which I take of the E facts, the point in this case has not any practical importance, I am inclined to think that counsel for the defendants is right, and I proceed on the assumption that the defendants had liberty to ship cargo on deck subject always to their obligations under art. III, r. 2, properly and carefully to load, handle, stow, carry, keep and care for the goods in question.

F In this state of affairs, and on the facts proved or admitted, the defendants are in some difficulty. The wind and sea conditions were, and were admitted by the master to be, normal for the month of October in the North Sea. The vessel’s course necessarily involved her getting the wind and sea on her port beam, and there was nothing odd or abnormal about that. The vessel was light of her marks, and, no doubt, with her deck cargo she rolled considerably. All these were matters which must or ought to have been anticipated by the G master. The master’s view was that there was inevitably a risk that deck cargo of this sort, even if lashed, with every proper precaution might come adrift and be lost overboard in normal conditions of wind and sea. While I do not agree with those views expressed by the master, even if they were correct, they would not, in my view, avail the defendants, because, if there was a real risk that the tractors, if loaded on deck with every proper precaution, H might yet be damaged or lost in normal weather conditions, the master in so loading them would be in breach of his obligations under art. III, r. 2, properly and carefully to stow and carry the goods in question, and his owners would be responsible for any loss or damage to the deck cargo as a result of the master’s breach. As I have said, however, I do not accept the view expressed by the master, and I am satisfied that, if properly lashed, these tractors could have been carried safely to their destination in the normal weather conditions which

in fact prevailed. After the incident off the Haaksgronden, when the one tractor on No. 1 hatch was washed overboard and the other two tractors shifted, the two remaining tractors were re-lashed and carried to their destination without further trouble in spite of the fact that the force of the wind and strength of the sea remained the same for another twelve hours at least, and during a portion of that time the vessel was still on about the same course with the wind from about the same quarter. Another matter which, perhaps, is not unimportant is that this was the first occasion on which this master had ever carried tractors as deck cargo on this or any other vessel. The master gave evidence at some length; he was a Dutchman, but he spoke English very capably, and I think he was doing his best to assist the court. There were certain matters which I felt myself unable to accept in his recollection, and I have already referred to one of those matters, namely, the fact that, in my view, the tractors were stowed interlocked and not, as the master thought, wheel to wheel. There are other matters which I shall have to refer to on which I felt myself unable to accept the master's evidence. It is, perhaps, trite to say that the obligations of a shipowner when carrying deck cargo are not completed when the deck cargo is stowed and lashed at the port of loading. Through his master and crew, the owner has to ensure that the lashings are tended and tautened as necessary from time to time, because it is common knowledge that, as soon as deck cargo of any sort acquires any small movement owing to the fact that the lashings are no longer as taut as they were, if something is not done promptly and bad weather supervenes, the small movement will soon become a big one and it is more than probable that the lashings will go and the deck cargo or some of it will be lost overboard.

There is another matter on which I cannot accept the master's evidence. He said in the protest which I have already read that, apparently soon after passing the East Goodwin light vessel, which was twenty-two hours before the accident: "I ordered all lashings to be inspected and secured. They were found to be in order". When he was in the witness box the master said that he personally went down on to the hatch and inspected the lashings and found that they were taut and that nothing required to be done. I do not accept that. I prefer what he says in his protest which was made within a week or so of the accident. I think that, if he did anything, he merely told somebody to go and look at the lashings. The master did his best to explain how he came to say in his protest that he "ordered the lashings to be inspected", but I did not think that his explanation was a very satisfactory one, and I, accordingly, find that he did not himself go and look at the lashings. Moreover, neither in his evidence, nor in the protest, did he contend that anyone paid very much attention to the lashings once they were clear of the East Goodwin light vessel, and that was just the time when they started to run into bad weather. No doubt, the reason why they did not do that was that the fore deck was very largely flooded thereafter. Whether or not the lashings were originally sufficient—and I will deal with that point presently—I am not satisfied that any proper steps were taken during the last twenty-four hours before the casualty to tend and tauten the lashings which were there, and that is a matter which is just as important as providing lashings at the start which are sufficiently strong and properly disposed.

I do not propose to deal at great length—or at any length at all—with the master's account of how these three tractors were lashed, first of all to each other, and, secondly, to the vessel's hatches and bulwarks. The master drew a rough sketch of the way in which the lashing was done, and I am going to confine myself to saying that, having listened to the master's evidence, I was not satisfied that ropes of the size to which he spoke were used to secure the tractors to each other. In the course of his evidence he always spoke to the diameter of the rope, and I will refer to the diameter rather than to the more

usual way of describing a rope by its circumference. I was not satisfied that ropes of three-quarters of an inch to one inch in diameter were used to secure the tractors to each other. Mr. Etheridge [the shippers' representative], who was on board the vessel and who said he saw the rope being used to secure tractor to tractor, put the size of the rope as half an inch in diameter, and I am inclined to think that he was right about that. I am not satisfied that the wires which were used to lash the tractors to the ring bolts on the coamings and bulwarks were of the size spoken to by the master.

- A The securing of these tractors on No. 1 hatch was criticised in three ways by the plaintiffs who suggested (i) that the wheels of the tractors should have been properly chocked, which they were not; (ii) that wires or stronger ropes should have been used to secure the tractors to each other; and (iii) that the block of tractors should have been cross-lashed. I say at once that I was not impressed with the plaintiffs' first criticism, namely, that no chocks were used. These tractors were stowed on their rubber tyres on top of one or more tarpaulins on the hatch cover, and I doubt whether it would have been practical or feasible to chock the wheels of a tractor in that position, and I say no more about that matter. With regard to the second criticism, which, I think, is an important one, namely, that either stronger ropes or wires should have been used to secure the tractors to each other, I think that criticism is justified.
- B It may well be that if the ropes in fact used had been more carefully tended and kept taut they would have been sufficient, but, relying on the evidence of Mr. Joseph—an experienced stevedore called on behalf of the plaintiffs—and on the evidence of Mr. Etheridge as to the size of the ropes, I have come to the conclusion that the plaintiffs' second criticism is justified, and that the
- C ropes used were insufficient in strength and quite possibly not in their first youth. The third criticism made by the plaintiffs, namely, that the block of tractors should have been cross-lashed, is rather more difficult to explain in words than the other two matters. The principle, as I understand it, by which this block of three tractors was secured was this: First of all, the three tractors are secured to each other and then the block is secured from moving as a block
- D by wires made fast to rings fore and aft and on either side of the vessel. The master's reply to that third criticism was twofold. First of all, he said it was impossible to cross-lash a block of tractors of this kind—and by "cross-lashing" is really meant taking one wire from the starboard side of the block to the port side of the vessel and another wire from the port side of the block to the starboard side of the vessel, and similarly, I suppose, if necessary, fore and aft. The master said that that was not practicable because you could not lead the wires through appropriately. He also said that cross-lashing was forbidden by Dutch law because it rendered jettison of the cargo in an emergency extremely difficult. The master was not cross-examined about Dutch law and I feel a very grave doubt whether he was right about that, because I cannot believe that Dutch law can forbid a shipowner from cross-lashing
- E deck cargo; but I do appreciate that it may have been difficult to cross-lash these tractors. If, on the other hand, it was impossible to hold them securely in position without cross-lashing, then they ought not to have been stowed on deck at all. I am content to rest my conclusion with regard to the insufficiency of the lashing of this deck cargo on the fact that the ropes connecting the tractors to each other were insufficient in size or strength and were not
- F sufficiently tended. In addition to that, I feel that it is more than likely that the wires by which the block of tractors was secured—approximately, no doubt, as shown in the master's sketch, to ring bolts on the bulwarks—were not tended and tautened as they should have been.

I have indicated my view as to how this unfortunate accident occurred, but the case might almost have been decided on the principle of *res ipsa loquitur*. I appreciate that the mere fact that the force of the wind and the

strength of the sea were not abnormal does not necessarily disentitle a shipowner, when cargo is lost or damaged, to rely on the exception of perils of the sea, but in order to be entitled to rely on this exception the shipowner must establish that the loss was fortuitous, that it was due to some unforeseen incursion of seawater, either over the deck or into the ship, which could not have been avoided by proper care on his part. In this case there is no evidence at all of any fortuitous or unexpected peril. The master seems to have encountered exactly the kind of weather he expected to encounter and exactly the type of weather which, in his view, might easily result in the loss of deck cargo, even though properly stowed and secured. One does not need to know a great deal about the sea to appreciate that a little coaster like the *Glory*, in the conditions of wind and sea which she is likely to encounter in October in the North Sea, may easily have her foredeck covered by the seas as she rolls, according to the direction of the wind in relation to her course. It is quite clear that that is what happened to the *Glory*, and it is exactly what the master expected. She shipped, I suppose, the normal amount of water which was to be expected over her deck and fore hatch; that is what was, and it should have been clear to the master, going to occur, and if it did occur it was imperative that he should take great care with regard not only to the original lashing of the deck cargo, but to the tending and tautening of the lashings as the voyage proceeded. If tractors which have a fairly high side and weigh about one ton each are loaded on the fore hatch of a little craft like the *Glory*, reasonable care demands that they should be most firmly secured. This tractor was swept away in normal conditions of wind and sea, and that in itself raises a very strong presumption that it was not adequately secured.

That leads me to consider quite broadly the question of the burden of proof. The position under the Carriage of Goods by Sea Act in that respect is very conveniently set out in CARVER'S CARRIAGE OF GOODS BY SEA, 9th ed., p. 185, where, dealing with the question of onus of proof in the case of damage or loss, the learned editor says this:

"The effect of those words [the words of art. III, r. 2] is that if the goods-owner proves that the goods shipped have not been delivered, or have been damaged after shipment, the carrier is liable unless he can prove affirmatively (i) that he has taken reasonable care of the goods while they were in his custody and (ii) that the loss or damage falls within one of the immunities specified in art. IV, r. 2."

It would have been sufficient for me to say that I am left profoundly dissatisfied in this case with regard to the care which was taken by the shipowner in securing these tractors and tending and tautening the lashings. I have already indicated why I think this tractor came adrift; it was really quite unnecessary for me to have done so, but I thought it was desirable because I have heard a great deal of evidence about it. I could have left the matter simply on the burden of proof, observing that the tractor had not been delivered to its destination, and considered whether the shipowner had satisfied me that he had in the circumstances exercised reasonable care, and found that he had not so satisfied me. He certainly has not, and I think that this tractor was lost owing to the lack of care in its original lashing and in the subsequent tending of the lashings by which it and the other two tractors on No. 1 hatch were secured.

The result, therefore, is that the plaintiffs succeed and are entitled to recover judgment for the sum claimed, namely, £316 4s. 2d., with interest.

Judgment for plaintiffs.

Solicitors: *Ince & Co.* (for the plaintiffs); *Holman, Fenwick & Willan* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

*Re DARGIE (deceased). MILLER v. THORNTON-JONES
AND OTHERS.*

[CHANCERY DIVISION (Vaisey, J.), June 25, 1953.]

Trust and Trustee—Costs of trustee—Action by beneficiaries against trustee—Taxation as between solicitor and client—Disbursements from trust fund in excess of amount of taxed costs—Right of trustee to recoup himself out of trust fund.

The beneficiaries under a will commenced an action by writ against the the trustees, claiming an account of remuneration received by the trustees as directors of a limited company, on the footing that such remuneration was trust moneys. The court found in favour of the beneficiaries on some points and in favour of the trustees on others, and ordered that the costs of all parties should be taxed as between solicitor and client and retained and paid by the trustees out of the trust fund. On taxation, the taxing master disallowed on the trustees' bill of costs sums amounting to £437. The trustees nevertheless raised the full amount of their costs out of the trust fund, on the basis that they were entitled to an indemnity against costs.

HELD: while there was some truth in the view that trustees were entitled to their costs on an indemnity basis provided that the costs were incurred solely for the benefit of the trust estate, there was no such general rule in hostile litigation between the beneficiaries and the trustees, and in the present case the trustees were entitled to raise out of the trust fund only their costs taxed strictly in accordance with the order, and they must repay to the trust fund any sum raised in excess of that amount.

Re Robertson ([1949] 1 All E.R. 1042), applied.

Poole v. Pass (1839) (1 Beav. 600), distinguished.

AS TO TRUSTEES' COSTS IN ACTION BY BENEFICIARY, see HALSBURY, Halsham Edn., Vol. 33, pp. 275, 276, paras. 487-489; and FOR CASES, see DIGEST, Vol. 43, pp. 818-824, 828-830, Nos. 2613-2685, 2731-2748.

Cases referred to:

(1) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest, Practice, 936, 4756.

(2) *Poole v. Pass*, (1839), 1 Beav. 600; 8 L.J.Ch. 325; 48 E.R. 1074; 43 Digest 826, 2709.

(3) *Re Robertson*, [1949] 1 All E.R. 1042; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether, having regard to an order made by WYNN-PARRY, J., dated July 5, 1951, the defendants as trustees were entitled to retain and pay out of the trust fund £437 which represented disbursements made by them in connection with an action and disallowed on taxation.

On Mar. 31, 1950, beneficiaries under the will of Thomas Frederick Dargie, deceased, issued a writ against the trustees of the said will claiming, inter alia, an account of remuneration received by the trustees as directors of a limited company in the shares of which trust moneys were invested. The proceedings were hostile, and WYNN-PARRY, J., having decided in favour of the trustees on some aspects, but against them on others, ordered (as to costs) " . . . that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiffs and the defendants . . . and . . . that all the said costs when taxed be retained and paid by the defendants . . . as the trustees of the said will out of the estate of the said testator ". On taxation, the taxing master disallowed £437 from the trustees' bill of costs, and the trustees claimed to be entitled to recoup to themselves that amount from the trust fund, notwithstanding such disallowance.

Edwards, Q.C., and *Arthur Bagnall* for the plaintiff, one of the beneficiaries under the will of *Thomas Frederick Dargie*.

E. I. Goulding for the defendants, the trustees.

VAISEY, J.: This is an originating summons brought by the plaintiff, Mrs. Florence Miller, who is one of the beneficiaries under the will of her father, Thomas Frederick Dargie. The three defendants to the summons are the trustees of that will. The question which I am asked is whether, having regard to an order made by *WYNN-PARRY, J.*, dated July 5, 1951, in certain proceedings, the defendants, as trustees of the will, were entitled to retain and pay out of the testator's residuary estate £437 and whether they ought to account for and refund that sum to the residuary estate. That sum represented the excess of certain disbursements made by the defendants, or contracted to be made by the defendants, which was disallowed on taxation.

The action in question was brought by the present plaintiff, and other beneficiaries, as plaintiffs against the defendant trustees. The testator died on Apr. 8, 1942, and the action was commenced by writ issued on Mar. 31, 1950. In that action, which may properly be described as a hostile action, an action fought, I think, with a good deal of acrimony, the beneficiaries alleged that certain remuneration received by the trustees was remuneration from a limited company in which the testator had held large interests. The beneficiaries sought to have an account taken of the remuneration actually received by the trustees respectively and repayment of what might be found due on the account for the benefit of the testator's estate. Further relief was sought, the question being raised how the trustees ought to use the voting power which they had in this company by virtue of the shares of the testator, and an injunction and other ancillary relief being sought; and if and so far as necessary execution of the trusts of the will was asked for. The beneficiaries asked that the trustees should pay the costs of the action.

On July 5, 1951, *WYNN-PARRY, J.*, pronounced a judgment which dealt with the whole situation, and declared what the rights and liabilities were of each of the trustees in relation to these sums of remuneration which they had been respectively receiving, or were claiming to receive, and generally as to the somewhat difficult situation which had arisen owing to the trustees of the will being directors of this company. The judgment was a long one and went in great detail into the circumstances of the case and *WYNN-PARRY, J.*, referred to the disputes which had been debated in the action. Further, in his judgment he discussed the attack which was made against the trustees and the claims which were made against them personally in regard to the matters to which I have alluded. But it appears, and I need not go into the details, that to some extent the learned judge came to the conclusion that the trustees were right, and in other respects he came to the conclusion that their claims were not altogether well founded. At the end of the judgment, *WYNN-PARRY, J.*, dealt with the costs and it is obvious from what he said that there would in strictness have had to be an elaborate splitting up of the costs as between various issues so as to adjust the matter, not only between the beneficiaries and the trustees, but as between the trustees inter se. *WYNN-PARRY, J.*, said:

"If the parties cannot come to any arrangement, I shall have to make a long and complicated order . . . Unless the parties come to some arrangement I must make some order as to costs which will be most expensive and complicated."

Leading counsel for the trustees said:

"My Lord, here we have a case of an action brought against trustees, and all of those trustees have quite clearly behaved properly; nothing improper in their conduct has been alleged against any of them. They have behaved perfectly properly, and they were bound to defend this

action. On the general principles, trustees should not be put to expense by reason of the fact that they have defended proceedings in their capacity as trustees, so one starts with the principle that the trustees should get their costs as between solicitor and client."

Later, he said:

"My Lord, as to the costs I say that the trustees should get their costs as between solicitor and client out of the estate."

Then he says that there ought to be some splitting up of the costs between the various issues in the action. Near the end of the discussion with which the judgment concluded, the learned judge said:

"I have listened to counsel on the question of costs, and if I make what might be called a strict order it would be of the utmost complication and I think it would result in nothing but more expense. The view I take is that part of the trouble has been caused by this action being started by writ instead of being brought before the court on an originating summons. On the other hand, there are certain costs—I do not know how much or what percentage they represent—which have been incurred by the trustees which, in the course the case took, though it might be said it is being wise after the event, need not have been incurred. Taking it by and large, it appears to me that, so far as the trustees are concerned, they as trustees ought to have their costs as between solicitor and client out of the estate. So far as the beneficiaries are concerned, I think on the whole, as they are the persons interested in income and contingently interested in capital and it is extremely difficult to analyse their costs, the best thing to do is to make a similar order as regards their costs. So, in effect, I shall order the costs of all parties as between solicitor and client to be taxed and paid out of the estate."

Leading counsel for the trustees asked that there should be a minute signed and there the matter stopped. The order, presumably drawn up by junior counsel, provided for the making of certain declarations by the court, with liberty to apply, and then finally:

"And this court doth order that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff and the defendants both of this action and of the said application by originating summons."

I ought to add that the originating summons referred to in the order was a summons which in the course of the hearing the learned judge directed to be taken out pro forma and the order was made not only on the action initiated by writ, but also on the ancillary subsidiary proceedings which were within the ambit of that originating summons. The order concluded with these words:

"And it is ordered that all the said costs when taxed be retained and paid by the defendants in the said action as the trustees of the said will out of the estate of the said testator."

The costs were in due course referred to the taxing master for taxation and, as I suppose happens on every taxation, a certain amount was disallowed on the bills both of the beneficiaries and of the trustees. The disallowances on the bill of costs of the trustees were, I think, all reductions in the amounts paid to counsel. There is no doubt that the leading counsel who appeared for the trustees is an extremely able practitioner and I have no doubt that the trustees were very anxious to get, with his help, the fullest possible protection. The result of the taxation has been that some £437 was struck off the amount of the disbursements, and the bill was reduced by that amount to the sum of £1,145 ls. 11d. The beneficiaries' costs were taxed, after some deductions,

in the sum of £940 5s. 9d., and that sum was paid by the trustees to the solicitors for the beneficiaries in due course.

The point which arises in this case is whether the trustees were entitled to withdraw from the trust estate, and to retain as they have done, that sum of £437. It is said that the trustees are *prima facie* entitled to have their costs provided to such an extent and in such manner as to afford them a complete indemnity.

Several questions arise on that. First, did the learned judge who tried the action intend them to have a full indemnity for their costs? If this had been an action which was concerned solely with the benefits accruing, or intended to accrue, to the trust estate, in which the trustees had adopted a wholly disinterested and independent attitude, which is the normal attitude of trustees in such cases, I feel little doubt that WYNN-PARRY, J., if he had been asked, would, at any rate, have considered whether to give the trustees full indemnity, though I am bound to say that, reading the passages in his judgment which are relevant, I am inclined to think that the order for the taxation of the trustees' costs as between solicitor and client was something in the nature of a compromise or an adjustment, and, perhaps, rather a rule of thumb regulation of the position. I think that although this action was, perhaps, to some extent for the benefit of the estate, it was still more an action which was concerned with the rights of the trustees personally to obtain moneys for their own personal use. That the learned judge would have allowed them costs on a higher scale than that as between solicitor and client is very doubtful, and I find no sufficient indication in his words that he ever meant them to have more than that which the order stated, which was drawn up in conformity with the words used and in conformity with the interpretation of his intentions by the junior counsel who settled the minute. I find no sufficient indication that he intended the trustees to have more than that which he gave them by the precise terms of the order, i.e., costs as between solicitor and client.

The order of WYNN-PARRY, J., of July 5, 1951, was plain in its terms. The costs of all the parties to that action were to be taxed as between solicitor and client, and it must always be remembered that a taxation as between solicitor and client is not a taxation on an indemnity basis, but is, as was described by BUCKLEY, L.J., in *Giles v. Randall* (1) ([1915] 1 K.B. 295), "substantially a party and party taxation on a more generous scale." I think what the trustees were entitled to under the order of July 5, 1951, was an order for the taxation of their costs on a generous scale falling short of a taxation which was intended to secure for them a complete indemnity.

I know that there is a general idea that trustees are always entitled to their costs on an indemnity basis, and there is a certain amount of truth in that, provided always that the costs in question have been incurred solely for the purpose of benefiting the trust estate. There is no such rule—certainly I can find no trace of there being any such rule—where the litigation, for it is litigation that we are speaking of in this case, was designed to define and secure the personal rights of the trustees as individuals, and I cannot see on what ground it should be said that it would follow as a natural consequence that, if the judge had been asked, he would have said: "Oh, of course, as trustees they are entitled to be fully indemnified."

In an old case, *Poole v. Pass* (2), counsel was very careful to ask for some additional words to be put in to entitle his clients to more than the solicitor and client costs of an action, something for the extra costs and expenses incident to and arising out of the action. In the present case, the order was drawn up by junior counsel and no suggestion was ever made that the trustees ought to have more than their costs as between solicitor and client. It is said that where the trustees' expenses in connection with the action exceed the costs as so taxed, they can help themselves by putting their hands into the

trust capital and taking out the difference. I do not think that is a matter to which I ought to give the slightest approval. The trustees would be saying to the taxing master: "Tax our costs as between solicitor and client. Disallow anything you like. It does not matter to us in the very least how you tax these costs because we shall, as a matter of right, take out of the trust estate and put into our own pockets the whole of our bill of costs whether you allow it or disallow it." It was extremely improper to allow the taxing master to tax their costs with the intention, possibly then not wholly formed, of disregarding the taxation altogether and treating themselves as being entitled, not only to the taxed costs, but also to the costs which had been taxed off.

A If they considered that there was a slip in the order of WYNN-PARRY, J., the trustees could have applied to the judge for an amendment to be made. Alternatively, the trustees might have applied for the taxation to be reviewed, asking for the restoration of some of the disallowed items on the ground that the taxing master, if he had borne in mind that he was taxing the costs of trustees, would have dealt with the bill in a more generous spirit. The taxing master might not have acceded to that application because he would have been met with the difficulty facing me, the terms of the order itself. But I think that there would have been some ground for saying that, as it was a solicitor and client taxation, while the beneficiaries' costs would be taxed on one footing, the trustees' costs would be dealt with on a wider footing, having regard to the well-founded and well-grounded principle that within reason trustees ought not to be put to any expense.

A good many cases have been brought to my notice, but I do not know that any of them is particularly helpful. The general proposition is that a trustee is entitled to be reimbursed out of trust property all expenses which he has properly incurred having regard to the circumstances of each particular case. In *Poole v. Pass* (2) an order was made for the payment of the costs of the suit by a mortgagor who was calling on the mortgagee, whose mortgage had been satisfied, to transfer the legal estate to him. At the end of the judgment of LORD LANGDALE, M.R., counsel asked (1 Beav. 604): "As trustee he will have trustee's costs, as between solicitor and client, and the costs of opinion taken?" The answer was: "Yes; I think no trustee would be safe unless such costs were allowed." Then the note is (*ibid.*, 605):

"The defendant was decreed to execute to the plaintiff, or as he should direct, a surrender or assignment of the term, and the master was ordered to tax the defendant his costs of this suit, as between solicitor and client, and to tax him his charges and expenses, properly incurred, to be paid by the plaintiff."

It is the absence of those words from the order of WYNN-PARRY, J., which seem to me to be fatal to the trustees' claim to this £437.

I hesitate to mention, except very briefly, a case of my own, *Re Robertson* (3), which dealt with the small disallowance of a sum of £2 1s. which had been taxed off the shorthand writers' account in respect of the note which had been taken of the judgment. The taxing master had reduced the charge for that work from £7 13s. to £5 12s., a difference of £2 1s. The taxation had been directed as between solicitor and client. If the course taken by the trustees in the present case were the right one, then similarly in *Re Robertson* (3) the trustee could have said: "You have allowed me for my shorthand note £5 12s., reducing the charge of £7 13s. to that amount, and the £2 1s. I am entitled to appropriate out of the trust fund notwithstanding the taxation." I think that that case shows conclusively that, if any sum is disallowed from a solicitor and client taxation on a trustee's bill of costs, the trustee must not put the disputed amount in his pocket, but, if he is dissatisfied, must seek the directions of the court.

This action instituted by originating summons must succeed. I think that

the proper course for me to adopt is to declare that, having regard to the order of July 5, 1951, the defendants, as trustees of the will, were not entitled to retained the disallowed items amounting to £437. They ought to account for and refund to the residuary estate the whole of the amount so paid and retained over and above the taxed costs. The costs of this application must be paid by the trustees personally as between party and party.

Order accordingly.

Solicitors: *Ballantynes* (for the plaintiff); *Jaques & Co.* (for the defendants). A
[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

LONDON COUNTY COUNCIL *v.* CATTERMOLES (GARAGES), LTD. B

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
April 17, 20, 1953.]

Master and Servant—Liability of master—Liability to third person for act of servant—Act within scope of authority and course of employment—Authorised act done in improper manner—Servant employed as garage hand to move customers' cars in garage—Car driven on to highway in course of being moved from one place to another in garage—Servant having no licence and expressly prohibited from driving. C

The defendants, who were the owners of a garage, employed P. in a general capacity as a garage hand, part of his duty being to move cars in the garage so as to make way for other cars. He had no driving licence and he was forbidden to drive vehicles. In front of the garage were petrol pumps, and on Feb. 7, 1950, the attendant asked P. to remove a motor van, which was stationary in front of the pumps, so as to allow some motor lorries to obtain petrol. Instead of pushing the van out of the way, P. drove it. Finding that there was not sufficient space to drive straight into the garage out of the way of the lorries, he drove on to the highway, intending to turn there so as to come back to the garage behind the lorries. On the highway a collision occurred between the van which P. was driving and a van belonging to the plaintiffs, which was damaged. In an action by the plaintiffs for damages against the defendants, D

HELD: P.'s duty being to move cars in the garage, it was impossible to define the scope of his employment as that of pushing cars by hand in contradistinction to moving them by other means, including that of driving them, and, notwithstanding the fact that he was expressly forbidden to drive cars, his action in moving the van by means of its own engine, instead of by pushing it, was within the scope of his employment, being a wrongful and unauthorised way of performing an act which he was employed to perform; the excursion on to the highway was merely incidental to moving the van out of the way of other motor vehicles on the defendants' premises, the work for which P. was employed, and, therefore, although it was illegal for P. to drive on the highway as he had no licence, the fact that the accident occurred when he took the van off the garage premises on to the highway did not affect the result, and the defendants were liable in damages to the plaintiffs E

Canadian Pacific Ry. Co. v. Lockhart ([1942] 2 All E.R. 464) and *Goh Choon Seng v. Lee Kim Soo* ([1925] A.C. 550), applied. F

AS TO SCOPE OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 221-230, paras. 397-409; and FOR CASES, see DIGEST, Vol. 34, pp. 127-130, Nos. 981-996. G H

Cases referred to:

- (1) *Canadian Pacific Ry. Co. v. Lockhart*, [1942] 2 All E.R. 464; [1942] A.C. 591; 111 L.J.P.C. 113; 167 L.T. 231; 2nd Digest Supp.
- (2) *Goh Choon Seng v. Lee Kim Soo*, [1925] A.C. 550; 94 L.J.P.C. 129; 133 L.T. 65; 34 Digest 138, 1079.
- (3) *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530; 69 L.J.Q.B. 895; 83 L.T. 362; 34 Digest 142, 1113.
- A (4) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of His Honour JUDGE DONE, made at Clerkenwell County Court, and dated Feb. 5, 1953.

- B The defendants were the owners of a garage situated on premises adjoining Pentonville Road, London. In the front of the premises, between the garage and the road, were petrol pumps. On Feb. 7, 1950, two motor lorries approached the premises to obtain petrol and the employee in charge of the pumps asked one Preston, who was employed by the defendants as a garage hand, to move a motor van which was stationary in front of the pumps. Preston got into the van, started the engine, and drove the van past the pumps into Pentonville
- C Road, intending to turn round there and come back behind the lorries so as to place the van in the garage out of their way. In Pentonville Road the van came into collision with, and damaged, a motor van belonging to the plaintiffs. The plaintiffs claimed damages, amounting to £23, against the defendants on the ground that the accident was caused by the negligent driving of a servant of the defendants in the course of his employment. The defendants contended
- D that Preston's employment was quite different from that of driving cars, that he had been expressly forbidden to drive cars, and that, therefore, he was not acting in the course of his employment at the time when the accident occurred. The learned judge held that Preston's act in driving the van was wholly unauthorised and he dismissed the action.

- E *Eveleigh* for the plaintiffs.
Coningsby for the defendants.

SIR RAYMOND EVERSLED, M.R.: This appeal involves an illustration of the principle (not difficult to state, but by no means always easy to apply), which is found in SALMOND ON TORTS, 11th ed., p. 105. I refer to that passage because it was expressly approved by the Privy Council ([1942] 2 All E.R. 467) in *Canadian Pacific Ry. Co. v. Lockhart* (1) (it being then in the ninth edition, at p. 95). It reads:

- G "It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of servant at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it . . . On the other hand, if the
- H unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

In *Lockhart's* case (1) the facts before the Board were, briefly, these. To enable its employees to get conveniently from one place of work to another, the defendant railway company provided certain cars, known as "track

motors", which proceeded on the company's rails. Some of the employees, however, found it more convenient, in getting from one job to another, to use their own motor cars on the road rather than the track motors of the railway company. Having experienced difficulties because the employees' cars were not always properly licensed, the company put up notices expressly prohibiting employees from using their own cars in connection with the company's business unless they were properly insured against, among other things, third-party risks. In disregard of the notice, one of the employees, a carpenter named Stinson, used his own motor car for the purpose of getting from one job to another, although the car was not properly insured. An accident occurred and the question was whether the railway company was liable. The Privy Council, applying the passage from *SALMOND ON TORTS*, 9th ed., p. 95, held that the company was liable. Their Lordships took the view that Stinson was doing an authorised act, namely, proceeding in the company's service from one job to another in his motor car, but doing it in an unauthorised way, namely, using his car when it was not properly licensed, in disregard of the prohibition. The judgment of the Board was delivered by LORD THANKERTON. At the close of the judgment, LORD THANKERTON used this language ([1942] 2 All E.R. 468), which was relied on by counsel for the defendants in the present case:

"If the prohibition had absolutely forbidden the servant to drive his motor car in course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor car, and that, therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do."

As I read the judgment, LORD THANKERTON was not there expressing a final conclusion, but was suggesting the possibility of the argument. I have read the passage because it leads, I think, conveniently to the substance of the contention of counsel for the defendants that the job which Preston, the employee in this case, was employed to do was something quite different in its nature and character from the driving of motor cars, and that the accident which occurred arose from the fact that he was then engaged in driving a car and, therefore, was not acting in the course of his employment. In the note of his judgment the learned county court judge said:

"I found that Preston was employed as a general garage hand. It was part of his duties to assist in the movement of cars on the defendants' premises by pushing them or by giving guidance to the driver, e.g., when reversing. But he was not authorised to drive, i.e., to control the movement of vehicles under their own power. He was not competent to drive and had, in fact, been expressly forbidden to do so. I held that this was not a case where the defendants' servant was doing an authorised act in a manner which was unauthorised, but that the act in question, viz., the driving of a car, was outside the scope of what he was employed to do and was wholly unauthorised."

In my judgment, it necessarily follows from that passage that the view of the learned judge was in accordance with the argument which counsel for the defendants addressed to him, namely, that the driving of the motor car was an activity in character and kind distinct from the activity which Preston was employed to perform. With all respect to the learned judge, I have come to a different conclusion.

[HIS LORDSHIP stated the facts in regard to the accident and continued:] The question, then, is: Was Preston, when he executed this manoeuvre, doing an authorised act, that is, something within the scope of his employment, in

an unauthorised manner? Or was he doing something quite independent of his employment and altogether outside its ambit or scope? What, then, was the nature and what were the terms of the employment? The learned judge found that

"Preston was employed as a general garage hand. It was part of his duty to assist in the movement of cars on the defendants' premises by pushing them or by giving guidance to the driver, e.g., when reversing."

- A The judge went on to find that Preston was forbidden to drive and there is no question in this court that that was so. But is it true to say that the nature of his employment was of the somewhat limited and curious nature of what I will call man-handling motor cars, and, if so, was that something wholly distinct from moving them by any other means? We have been supplied with notes taken of the learned judge's oral judgment by both the learned counsel
- B who have assisted this court, and on this matter there is a close identity between them. The note of counsel for the plaintiffs contains this statement: "His job was to get cars out of the way of other cars and a great deal of that had to be done by hand". The note of counsel for the defendants is: "Part of his job being to assist in getting cars out of the way of other cars . . ."
- C We also have the judge's note of the witnesses' evidence, and I will turn at once to what the defendants' manager, Mortimer, said of the nature of Preston's employment. He said that he himself did not engage Preston, but that Preston's job was general garage hand and

"assisting to shunt vehicles, that is, to assist drivers when reversing by standing behind the vehicles. It was not his job to drive vehicles.

- D At first he was not employed to grease. Then he was asked to fit in on the servicing side."

Then later, but this is not stated as part of the terms of the employment, Mortimer said:

"Preston was not employed to drive himself. I once saw him in a vehicle driving. I warned him if I saw it again I would dismiss him."

- E It appears to me tolerably clear that the terms of Preston's engagement were not very precise. He was employed in a general capacity as a garage hand and part of the functions of a garage hand were to move, or to help to move, cars in the garage so as to make way for other cars which wanted to get in or out. I think, from the evidence, that the prohibition about driving was not a limitation of the scope of his employment so much as a prohibition subsequently
- F insisted on (for obvious reasons) when it was discovered that he was not qualified to drive as he had not got a licence for driving in England. I think it, therefore, impossible to say that Preston was engaged for the defined job of pushing cars by hand, or, indeed, that such a job is one which can be sensibly supposed in contradistinction to moving cars by other means including that
- G of driving them. I am leaving out of account, for the moment, the circumstance, which has caused me a little difficulty, that the accident occurred when Preston was driving the van, not in the garage, but in Pentonville Road. ✓ To that matter I will return, but, for the moment, I confine myself to the general matter of moving cars by driving them under their own motive power as distinct from pushing them or using any other means for moving them. It
- H seems to me that, once the nature of the employment is regarded as I have stated it, then, as a matter of common sense, the result inevitably follows that the use of a motor car's own engine to do the shunting was not something independent of the job of shunting, but was an unauthorised or prohibited mode of doing an authorised job.

We have been referred to a number of cases and of all of them it may be said that, the facts being very different, they cannot be decisive in the present case. But I think that *Lockhart's case* (1) and *Goh Choon Seng v. Lee Kim*

Soo (2), also a decision of the Privy Council, tend to support the view that the court does not attempt narrowly to define the precise limit and scope of a man's employment by treating the particular prohibition, express or implied, as limiting the scope of the employment, as distinct from being confined in its application to modes of performance. In *Goh Choon Seng v. Lee Kim Soo* (2) persons who had been employed, among other things, to collect and set fire to rubbish, had thought fit to carry the rubbish on to someone else's land and set fire to it there. It does not appear that they were expressly prohibited in terms from going on to someone else's land, but, obviously, such a prohibition would be implicit. At least, it could not have been authorised. It was, nevertheless, held by the Board that the damage which flowed from the burning of rubbish on the land of a third party flowed from an act done by the servants in an unauthorised manner but in pursuance of their authorised task. I also cite a few words from the judgment of ROMER, L.J., in *Beard v. London General Omnibus Co.* (3) (a case in which the decision went the other way), as indicating what I have ventured to call the common sense of the matter. He said ([1900] 2 Q.B. 534):

"If one sees in the streets of London an omnibus admittedly belonging to the defendant company driven in the ordinary way by a person who appears to be a driver, the presumption is that he is authorised by the company."

So here, as it seems to me, if one sees a van on the premises of a garage company being driven by a garage hand, the presumption is that the garage hand is doing something which he is authorised to do. Apart, therefore, from the matter of the highway, to which I will come in a moment, it seems to me, with all respect to the county court judge, that the prohibition against moving cars by driving them did not amount to such a limitation of the scope of Preston's authority that it can be said that he was doing something outside the scope of his employment.

There remains the point that Preston moved the van, not within the precincts of the garage itself, but out on to the highway, on to the Pentonville Road, where, incidentally, he was doing something unlawful, having no licence to drive. The question, then, does arise whether the scope of the employment, defined in general terms as it was by Mortimer, did not extend to the movement of this van out into the street with a view to bringing it back behind the lorries into the yard. I think it is clear that nothing of significance was made of that particular matter in the court below. During the argument the question was asked: Supposing that Preston, obeying the command or request of the petrol pump attendant, had pushed the van on to the highway and then it had caused some accident, whose would the liability have been? All that was said that was material on this point was this by Mortimer, in cross-examination, in regard to whether Preston was permitted to push a car on to the road:

"Not on to the road; there would be nothing wrong for him to push it on to the ramp."

By the ramp, I understand, is meant not the inside of the garage but that part of the defendants' premises on which the pumps were. Again, it is important to bear in mind the circumstances of the accident. Preston himself said (and there seems to be no reason to doubt it, nor was he cross-examined on it) that originally he intended to move the car (albeit by the prohibited method of driving) out of the lorries' way, by going forward and then back again into a doorway, but the possibility of so doing was prevented by the fact that the lorries were too close behind him to enable him to get back, and, therefore, to get out of the way, he had to get out into the Pentonville Road. In the circumstances, it seems to me that the excursion on to the Pentonville Road is purely incidental to what Preston was doing. And what he was doing was something

which he was engaged to do. In general terms, he was getting this van out of the way of two other motor vehicles. I do not, therefore, think that the result is altered by the circumstance that Preston took this van off the garage premises on to the Queen's highway.

A I said at the beginning of my judgment that the principle is not difficult to state. The difficulty has been in its application. Giving the matter the best attention that I can and applying (as I hope that I am entitled to do) some degree of common sense to the matter, I conclude (contrary to the view of the learned judge) that Preston was here doing no more than performing in an unauthorised way an act he was employed to perform. In my judgment, the plaintiffs are entitled to recover, and, accordingly, this appeal should be allowed.

B BIRKETT, L.J.: I agree. My view of this case is that Preston's act, which has given rise to the dispute, was merely a wrongful and unauthorised mode of doing an act authorised by the employer. I think that the learned county court judge, in coming to the conclusion that he did, fell into a very pardonable error in regarding the act of driving, in itself, as being a conclusive thing. In *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (4) the driver of a petrol lorry threw down a lighted match while petrol was being delivered to a garage, and a fire broke out. LORD WRIGHT said C ([1942] 1 All E.R. 497):

D "The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think that what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act."

E With great respect to the learned county court judge, I think that is what he did in the present case, because, in the note of his judgment, the clear line of demarcation that he made was that Preston was not authorised to drive and, therefore, what he did was outside the scope of his employment, whereas, I think, the view which ought to be taken on the facts, and on the authorities which have dealt with similar facts, is that this was a wrongful and unauthorised mode of doing the act authorised by the master. In *Canadian Pacific Ry. Co. v. Lockhart* (1) LORD THANKERTON, delivering the judgment of the Privy Council, said ([1942] 2 All E.R. 468): F

"In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment."

G The first consideration, therefore, is to gather the scope of the employment. The conclusion to which I come on the evidence is that the scope of Preston's employment was as a general garage hand, part of his job being to get cars out of the way so as to allow other cars to move freely in the garage. In SALMOND ON TORTS, 11th ed., p. 109, it is stated:

H "Even expressed prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do."

Therefore, having arrived at a conclusion as to what was the scope of Preston's employment, my own view is that, notwithstanding the "expressed prohibition", the driving of the car in the circumstances of this case was not something outside the scope of his employment, but was merely a wrongful, improper, and unauthorised mode of doing an act which was authorised by the master, so as to make the master liable.

I confess that I was disturbed by the point, which was raised by ROMER, L.J., in the course of the argument, that, as the accident occurred, not in the defendants' garage, but on the highway, different considerations might apply. To drive on the highway without a licence, as Preston did, was to do an illegal act. That was something completely and entirely outside the scope of the employment, so the argument runs, and it could not be said to be an unauthorised way of doing an authorised act. On reflection, however, I agree with the view which has been expressed by SIR RAYMOND EVERSHED, M.R. A
On the facts of the case, driving the van on to the highway seems to be quite an incidental matter. It was not as if Preston was driving a customer's car some forty or fifty miles. It was part of the movement of the van to enable the business of the garage to go on. He was merely moving the van out of the way of the lorries, and, in the circumstances, it was impossible to fulfil that duty without taking the course that he did, which involved his going on the highway where the accident took place. Had he not done that, the accident would not have occurred, but I cannot think that the mere fact that he went on to the highway and that, as he had no licence, his act was illegal, makes any difference. I think the true view to take of the matter is that driving the van on to the highway was merely an incidental part of performing the act which he was employed to do, though it was an unauthorised way of doing it. For these reasons I agree with the judgment delivered by my Lord and that this appeal should be allowed. B C

ROMER, L.J.: I also agree. I was troubled a little, at one time during the discussion, about the point which BIRKETT, L.J., referred to towards the end of his judgment, namely, the question whether the fact that the accident took place, not within the curtilage of the garage premises, but on the public highway outside, made any difference. The learned judge, in his short note of judgment, said: D

"It was part of [Preston's] duties to assist in the movement of cars on the defendants' premises by pushing them."

According to a note made by one of learned counsel, the judge also said: E
"Preston was authorised to push vehicles in the garage". It was not quite clear to me whether a point could not be made to the effect that a necessary inference from those statements of the judge was that anything that was done by Preston outside the defendants' premises was something done outside the scope of his employment. But the point does not appear to have been a great deal relied on in the court below. It was used for a somewhat different purpose, F
and, certainly, I think, formed no foundation for the learned judge's decision. I think, on reflection, that counsel for the plaintiff was justified in submitting that the act of taking the van on to the road was not an independent act in itself, but was part of the act of getting the van out of the way. I do not think that the learned judge was intending to define the premises within which alone the defendants authorised Preston to do the work, and, accordingly, it follows G
from the submission of counsel for the plaintiffs that the accident took place within the area of Preston's authorised activities. If that be so, I have practically nothing to add to what my brethren have said, because it seems to me that the facts bring this case clearly within the third proposition which was laid down by the Privy Council in *Goh Choon Seng v. Lee Kim Soo* (2), where judgment was delivered by LORD PHILLIMORE. I need not refer to the first of the two H
heads which LORD PHILLIMORE laid down. The third one is ([1925] A.C. 554):

"... where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it."

That statement was afterwards elaborated and affirmed in the later decision of the Privy Council in *Lockhart's* case (1), and, applying it, it seems to me

that, when Preston was told to keep the garage clear from other cars, it involved the movement of cars and the mode in which he chose to perform that duty was a subsidiary part of the function itself, and the fact that he chose what, after all, is a usual and not an abnormal method of doing it brings the matter within the operation of the law as stated in those cases. It was an unauthorised method of doing an authorised act, and, according to the law, as decided in those cases, the employer is liable for the consequences. I, accordingly, agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. G. Barr* (for the plaintiffs); *Robbins, Olivey & Lake* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

B

MCDONALD v. JOHN TWINAME, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), June 22, 23, 1953.]

C *Master and Servant—Apprenticeship—Agreement in writing executed by apprentice—Name of master inserted by rubber stamp—Later acknowledgment and adoption by master of agreement—Apprentices Act, 1814 (c. 96), s. 2.*

D On May 12, 1947, the plaintiff, then fifteen and a half years of age, entered the employment of the defendant company. Later, the defendants gave to the plaintiff a form of apprenticeship agreement headed: "Deed of Apprenticeship" which purported to bind the plaintiff for a term of five years. The plaintiff and his father executed the document. The defendants did not execute it, but an officer of the company inserted their name in the document by means of a rubber stamp. In December, 1949, the plaintiff applied to the Ministry of Labour and National Service for deferment of his national service on the ground that he was an apprentice under a five years' written agreement terminating on Oct. 9, 1952. The defendants certified that the plaintiff was such an apprentice, and on Jan. 16, 1950, sent to the Ministry a copy of the agreement which purported to show that the original had been properly executed by the defendants. On Nov. 16, 1951, the plaintiff was summarily dismissed on the ground of misconduct, but the court held that, although his conduct was in breach of one of the express terms of that deed, it was not such as to entitle the defendants summarily to dismiss him. On a claim by the plaintiff for damages for the wrongful determination of his apprenticeship agreement,

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G HELD: from the date of its execution by the plaintiff the defendants took the benefit of the agreement and of such services as the plaintiff rendered; they must be taken to have adopted the agreement and to have affirmed its existence when they sent a copy to the Ministry; and, therefore, although they did not execute the agreement, they must be treated as bound by it as if they had executed it, and the plaintiff was entitled to recover.

H *R. v. St. Peter's-on-the-Hill* (1741) (2 Bott. 6th ed., 394) and *R. v. Fleet* (1777) (Cald. Mag. Cas. 31), applied.

Per SIR RAYMOND EVERSLED, M.R.: since, under s. 32 (1) (a) and (b) of the Companies Act, 1948, an apprenticeship agreement need not be made under the seal of a company, but might be made on behalf of a company in writing signed by a person acting under its authority, by the insertion by one of their officers in the agreement of their name by means of a stamp the defendants had entered into the agreement within the meaning of s. 2 of the Apprentices Act, 1814, and so were bound by it.

AS TO EXECUTION BY MASTER OF CONTRACT OF APPRENTICESHIP, see HALSBURY, Hailsham Edn., Vol. 22, p. 128, para. 213; and FOR CASES, see DIGEST, Vol. 34, pp. 508, 509, Nos. 4214-4226.

FOR THE APPRENTICES ACT, 1814, s. 2, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 9.

Cases referred to:

- (1) *Waterman v. Fryer*, [1922] 1 K.B. 499; 91 L.J.K.B. 315; 126 L.T. 316; 34 Digest 510, 4255. A
- (2) *Learoyd v. Brook*, [1891] 1 Q.B. 431; 60 L.J.Q.B. 373; 64 L.T. 458; 55 J.P. 265; 34 Digest 514, 4296.
- (3) *R. v. St. Peter's-on-the-Hill*, (1741), 2 Bott. 6th ed. 394; 34 Digest 508, 4218.
- (4) *R. v. Fleet*, (1777), Cald. Mag. Cas. 31; 2 Bott. 6th ed. 396; 34 Digest 508, 4219. B
- (5) *Kirkby v. Taylor*, [1910] 1 K.B. 529; 79 L.J.K.B. 267; 102 L.T. 184; 74 J.P. 143; 34 Digest 507, 4213. C

APPEAL by the plaintiff from an order of His Honour JUDGE FENWICK at Workington and Cocker-mouth County Court, dated Apr. 2, 1953, dismissing the plaintiff's claim for £71 10s. damages for the breach by the defendants of an apprenticeship agreement. C

The plaintiff was born on Oct. 10, 1931, and on May 12, 1947, he entered the employ of the defendants with the object of learning the craft of plasterer. At some later date the defendants sent him a form issued by the National Joint Council for the Building Industry and entitled: "Deed of Apprenticeship. No. 1". In that form the defendants as masters had inserted their name and address by means of a rubber stamp in the recital of parties to the deed, had deleted the words at the end, namely, "In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written", and had inserted their name, again by means of a rubber stamp, in the space provided in the words "The Common Seal of . . . Limited, was hereunto affixed in the presence of". The plaintiff, as apprentice, inserted his name and address as party to the deed, and in the relevant spaces he inserted the word "plasterer" to denote his apprentice trade and completed the clause relating to the term of apprenticeship so as to read: ". . . for the term of five years to be computed from Oct. 10, 1947." The plaintiff signed the deed as apprentice in the presence of John J. Brown. The plaintiff's father, as guardian, inserted his name as a party to the deed, but in the space allotted to the representative selected by the local joint apprenticeship committee, and he signed at the end as parent in the presence of John J. Brown. The plaintiff returned the document to the defendants who made no additions or alteration to it. On Dec. 18, 1949, the plaintiff applied for deferment of his national service, and completed a form in which he described himself as an apprentice plasterer under a five years' written agreement. The back of the form was completed by the defendants, as employers, who certified that the plaintiff was serving as an apprentice. On Jan. 16, 1950, the defendants sent this form to the office of the Ministry of Labour and National Service and enclosed a copy of the "deed of apprenticeship" in which they made certain variations in the filling up of the blank spaces, viz., the name of the guardian was inserted in the correct space, the West Cumberland Building Trades Association was entered as the fourth party to the deed, the name "W. Sandwith" was inserted in the space at the end for the signature of their representative, and, finally, the words: "In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written", were not deleted, the name R. J. S. Atkinson was inserted in the space "The Common Seal of John Twiname, Ltd. was affixed in the presence of . . .", and the name John Twiname was inserted in the space for the signature of the master. D
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On Feb. 14, 1950, the plaintiff was granted deferment until Dec. 17, 1950. On Nov. 28, 1950, and again on Oct. 25, 1951, the defendants certified that the plaintiff "who commenced his apprenticeship with this firm on May 12, 1947, is making satisfactory progress" and, as a result, further deferment was on each occasion granted to the plaintiff. On Nov. 16, 1951, the plaintiff was summarily dismissed.

- A By his particulars of claim dated Oct. 20, 1952, as amended on Apr. 2, 1953, the plaintiff claimed £71 10s. damages for the wrongful determination of his apprenticeship agreement. The defendants, by their defence, denied that the plaintiff was an apprentice, and, further, that they had wrongfully dismissed him. Further, or in the alternative, they said that, if the plaintiff was employed by them, such employment was properly determined by reason of his misconduct. The county court judge found that there was no enforceable contract for five B years, that the plaintiff had no greater rights than those under a normal contract of service, that the dismissal was justified, and that, therefore, the action failed. Accordingly, he gave judgment for the defendants, and the plaintiff appealed.

John Thompson for the plaintiff.

Sellers for the defendants.

- C SIR RAYMOND EVERSHERD, M.R.: I will, first, deal with a submission made by counsel for the defendants, that, whether or not there was a valid and enforceable apprenticeship agreement, the conduct of the plaintiff (who appears after a time to have developed conceit and insolence and to have indulged in insubordination) amounted to subversive conduct of such a kind that his continued presence on the defendants' premises was an embarrassment, D not only to the management, but also to the workmen employed there, and was such that it entitled the defendants in any event to dismiss him summarily. I cannot help feeling sympathy with the defendants having regard to the findings of fact as to this young man's foolish conduct, but, in my opinion, assuming that the plaintiff was, in truth, an apprentice, his conduct was not such as entitled the master to exercise the remedy of summary dismissal. E Beyond doubt, on the assumption again that there was here an apprenticeship agreement, the plaintiff's conduct involved a breach of one of its express terms, namely:

- F "That during the continuance of the apprenticeship the apprentice will faithfully and honestly serve the master as his apprentice and be diligent to learn the craft aforesaid and will at all times willingly obey and perform the lawful and reasonable commands and requirements of the master."

- G But the document itself provides a remedy for the master in the event of his being dissatisfied with the behaviour of the apprentice. In other words, I think the case falls short of the extreme examples, to which reference was made in *Waterman v. Fryer* (1), cited by counsel for the defendants—for instance, *Learoyd v. Brook* (2) where the apprentice had the habit of stealing and so made the continued relationship of master and apprentice wholly impossible.

- H The only question, therefore, which remains is: Was there here at the relevant date an effective apprenticeship agreement? The plaintiff relies on the existence of an apprenticeship agreement or deed and alleges that it has been wrongfully broken. To discover what constitutes an effective apprenticeship agreement it will be necessary for me to refer briefly to the statute 5 Eliz. 1, c. 4 and the Apprentices Act, 1814. Until the Act of 1814 an apprentice had to be bound by deed, but that Act considerably modified that requirement. It is intitled

"An Act to amend an Act passed in the fifth year of Queen Elizabeth, intituled 'An Act containing divers orders for artificers, labourers, servants of husbandry, and apprentices'."

Section 2 reads:

"And whereas by the said statute, divers rules and regulations were enacted respecting the qualifications of persons entitled to take and become apprentices, and the term of years for which such apprentices should be bound, and as to the mode of binding such apprentices; and it was also enacted by the said statute that all indentures, covenants, promises, and bargains of and for the having, taking, or keeping of any apprentice otherwise thereafter to be made or taken than is by the said statute limited, ordained, and appointed, should be clearly void in the law to all intents and purposes; and that every person that should from thenceforth take or newly retain any apprentice contrary to the tenor and true meaning of the said Act, should forfeit and lose for every apprentice so by him taken the sum of £10: And whereas it is expedient that so much of the said recited Act should be repealed: Be it therefore enacted, that so much of the said recited Act shall be and the same is hereby repealed; and that it shall and may be lawful for any person to take or retain or become an apprentice, though not according to the provisions of the said Act; and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise valid and effectual, shall be valid and effectual in law, the repeal of so much of the said Act as is herein last above recited notwithstanding."

The question of the exact extent of the repeal and of the subsequent enactment is not entirely free from obscurity, but this much is plain, that, whereas before the passing of this Act an apprenticeship deed was necessary, it now suffices if an apprenticeship agreement in writing is entered into by the parties to be bound by it. No other question as to validity arises in the present case, e.g., as to the length of service or otherwise.

With that premise I turn to the facts of this case. It appears that the plaintiff, then under sixteen years of age, offered himself to the defendants as an apprentice; he was taken on, but no agreement of any sort, recorded or evidenced in any writing, was then made and it was only after he had been in the service of the defendants for a time that the writing to which I shall refer came into being. I understand from counsel for the defendants that the reason for that procedure was that the defendants wanted to see more of the boy before they finally bound themselves and him by a written document which would last for several years. Subsequent events would, no doubt, have made it clear that the defendants misinterpreted the virtues of the boy, but it seems no less plain that during the period of probation he was acting as an apprentice though the statutory requirements had not been satisfied. There is no question, to my mind, of his having been employed as an ordinary servant or workman. [HIS LORDSHIP referred to the "deed of apprenticeship" and continued:] It appears that this document, with the name John Twiname, Ltd., impressed thereon, was sent to the plaintiff, executed by him, and by his father and returned. According to the evidence, it was then sent to the local area apprenticeship committee, but they returned it and nothing more was done in regard to it. It is, however, in my opinion, plain that from that time onwards the relationship between the defendants and the plaintiff was regarded by both as regulated, and that it was, in fact, regulated, by the terms of this written document. The execution by the plaintiff and his father, we must assume, was execution by them as their deed. It had not been executed at all by the defendants in the sense of having the common seal of the company affixed or otherwise (if at all) than by the placing of the stamped name of the company on it at the beginning and at the end.

If the matter had rested there, it would be a question of doubt, to put it no higher, whether the terms of the Act of 1814 had been satisfied. But the matter does not rest there. The relationship continued and eventually a question

arose of the plaintiff being called up for military service. [His Lordship referred to the application for deferment and the copy deed of apprenticeship sent to the Ministry of Labour and National Service and continued:] The learned judge, I think, fell into an error in regard to the copy deed for he seems to have thought that the question was whether that document was admissible as evidence of the original document. That, however, is not so. The judge said:

- A "In 1950 Twinames wrote a letter to the Ministry of Labour. I have come to the conclusion that that document is admissible in evidence for the purpose of the Statute of Frauds. I so admit it and no further."

In my judgment, no question arises in regard to the Statute of Frauds. We are not concerned with the question whether there was an oral agreement of which there is a memorandum in writing. We are concerned to see whether s. 2 of the Act of 1814 has been satisfied, namely, whether there is a written agreement entered into by the defendants. The purpose of putting in evidence this document attached to the Ministry of Labour form is not to prove the contents of the original deed, which are not in doubt, but to prove an independent fact, namely, that in 1950 the defendants were showing by their certificate that the affixing to the original deed of the stamped name "John Twiname, Ltd." (which is a printed signature of a limited company) was done with their authority and either as equivalent to a signature or so as to indicate that the defendants were in truth entering into the apprenticeship document. That is the purpose for which the plaintiff seeks to use this document and for such purpose, in my judgment, the document is plainly admissible in evidence.

- D But there is, I think, a further ground on which the plaintiff here must be entitled to succeed. The facts which I have recited show that the original so-called deed was executed as a deed by the plaintiff and his father, but was not executed as a deed by the defendants. From the date of its execution, however, it seems to me plain that the defendants regarded themselves as governed in their relations with the plaintiff by the terms of the deed and took the benefit of it and of such services as he rendered. That is further shown by the circumstance that the defendants supported the plaintiff's application for deferment. In face of those facts I think that the two cases which counsel for the plaintiff cited in opening, *R. v. St. Peter's-on-the-Hill* (3), and *R. v. Fleet* (4), are authority for the view that the defendants, although they did not execute this deed, must be treated as bound by it, as if they had so executed it, so as to satisfy the requirements of the statute of 5 Eliz. 1, c. 4. I do not propose to take time to refer in detail to those cases. In each case a young person had been taken on by a master as an apprentice, the apprentice had executed a deed, but the master had not, and the master was held to be bound as though he or she had so executed. Counsel for the defendants made the point that there was an essential distinction between those two cases and the present. He said that in those cases there was never any relationship between the master and the apprentice until the deed executed by the latter came into existence, whereas in the present case there was the earlier relationship from the time when the plaintiff offered himself as an apprentice to the defendants. But although there is that difference in fact it does not, I think, provide a difference of significance. For the plaintiff was never taken on in any capacity other than as an apprentice, though until this document came into existence the statutory requirements in regard to apprenticeships had not been satisfied. I think, therefore, on the authority which those two cases provide, that the plaintiff is entitled to succeed and to make good his submission that the defendants must be treated in this action as though they had executed as a deed the document referred to.

I think, as I have already indicated, that the plaintiff might also be entitled to claim that the Act of 1814 was satisfied in that the insertion of the stamped

name "John Twiname, Ltd." must be treated as having constituted an "entering into" a written agreement by the defendants—a fact which the later certificate of the defendants and the copy agreement attached to it seems to me clearly to have indicated. A limited company can sign a document by means of some duly authorised person putting its printed signature to it or impressing the printed name of the company on it. That will suffice as a proper execution except in cases where the common seal must be affixed, and the execution of an apprenticeship agreement, as I read s. 32 (1) of the Companies Act, 1948, is not such a case. On that ground I think the plaintiff might well succeed in showing that the defendants did enter into an agreement in writing in this case, but it is sufficient for the plaintiff to rest on his first point, namely, that there was here a deed or its equivalent, and, accordingly, that the defendants must be treated as bound by the terms of this so-called deed of apprenticeship.

The result of that conclusion is that the plaintiff is entitled to succeed in the action, that the judgment of the learned county court judge must be set aside, and that there should be judgment for the plaintiff for the sum claimed by him, £71 10s.

BIRKETT, L.J.: I agree. There are two main questions to be determined. The first is whether the court is satisfied that there was, on all the facts and documents, a valid subsisting and enforceable apprenticeship agreement between the plaintiff and the defendants. The second is whether the conduct which is detailed in the evidence was of a character which justified the defendants in summarily dismissing the plaintiff. It is enough for me to say that I am of the same opinion as my Lord on both those questions.

It is plain from the evidence which has been recited here and that which was given in the court below that the plaintiff and his father executed the document to which we have been referred and that on that document appears a stamp giving the name and address of the defendants. It is plain, in my opinion, that, although they never executed the document in the full sense of that term, they most certainly must be taken on the evidence not only to have adopted it, but to have acted on it and to have affirmed its existence when they sent a copy to the Ministry of Labour. It was suggested in argument by counsel for the defendants that they had accepted no benefits under the document. It is clear that they did, and I do not think it can be reasonably contended that in the circumstances there was not a valid subsisting and enforceable apprenticeship agreement. Being of the opinion that, if that be so, the conduct of the apprentice in this case, however reprehensible it might have been, did not reach that scale which would permit the defendants summarily to determine the agreement, I think this appeal ought to be allowed.

ROMER, L.J.: I agree. The principle on which counsel for the plaintiff relied as supporting his first point when he opened his appeal before us is stated in *NORTON ON DEEDS*, 2nd ed., p. 26, as follows:

"Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it."

The rule plainly has a very ancient origin, as can be seen by the references there to *LITTLETON*, s. 374, and to the Year Book of 8 Edw. 4 (1468), 8 b. The author proceeds:

"and such non-executing party can sue on covenants with him contained in the deed."

It is true that here no premium was paid and no money passed to the defendants, but it is equally true that they were entitled, from the moment that the plaintiff and his father signed the document, to the benefit of the covenants by them which the document contained, and that must be regarded in the eye of the

law as consideration for the corresponding obligations which the defendants themselves undertook. I can see no answer to that point, on which counsel for the plaintiff relies, with the result that the document, whether or not, in fact, executed by the defendants, is binding on them by reason of the fact that they took the benefit of its provisions. That being so, it is not necessary to express any concluded view whether or not the defendants must be regarded as having entered into this written agreement. The Act of 1814 dispenses with the necessity of a deed, but there is authority: see, for example, *Kirkby v. Taylor* (5), that, notwithstanding the general terms in which the Act is framed, an agreement in writing is necessary. All I would say with regard to the question whether the defendants should be treated as having entered into an agreement of apprenticeship in writing is that I agree with SIR RAYMOND EVERSHERD, M.R., that there is much to be said on behalf of the plaintiff to the effect that they should be so treated having regard to the presence of the rubber stamp and the subsequent confirmation and assurance which they gave on the occasion of the application by the apprentice for deferment. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *O. H. Parsons* (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Hayton, Simpson & Fisher*, Cockermouth (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

KING v. KING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), July 6, 1953.]

Husband and Wife—Maintenance—Application to High Court—Decree of judicial separation already pronounced—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

On Jan. 28, 1953, the wife obtained a decree of judicial separation on the ground of the husband's adultery, and on May 7, 1953, she took out a summons under the Matrimonial Causes Act, 1950, s. 23 (1), for a maintenance order, alleging that the husband had wilfully neglected to provide reasonable maintenance for her. The husband entered a general appearance, but on June 5, 1953, he issued a summons for leave to amend his appearance to one "under protest, the [husband] disputing that the court has jurisdiction to entertain the [wife's] application" on the ground that, as the wife had already obtained a decree of judicial separation, the court no longer had jurisdiction to make an order under s. 23 (1).

HELD: the court had jurisdiction to entertain proceedings by the wife for judicial separation, although, in view of the fact that she had already been granted a decree, no further decree could be granted her, and, therefore, the court had jurisdiction under s. 23 (1) of the Act to entertain the wife's application.

Woodward v. Woodward ([1952] 2 All E.R. 226), applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410.

Cases referred to:

- (1) *Cooper v. Cooper*, [1952] 2 All E.R. 857; [1953] P. 26; 116 J.P. 593.
- (2) *Rusby v. Rusby*, [1950] W.N. 349; 94 Sol. Jo. 489; 27 Digest, Replacement, 84, 631.
- (3) *Woodward v. Woodward*, [1952] 2 All E.R. 226; [1952] P. 299.

SUMMONS adjourned into court.

Colin Duncan for the husband.

Fairweather for the wife.

DAVIES, J.: On July 31, 1952, the House of Lords ([1952] 2 All E.R. 584) dismissed the husband's appeal from the decision of the Court of Appeal, dated Oct. 25, 1951, reversing a decision of BARNARD, J., who had pronounced a decree nisi in favour of the husband on the ground of cruelty, exercising his discretion in respect of the husband's admitted adultery. On Sept. 3, 1952, the wife petitioned for a judicial separation on the ground of the husband's adultery. This petition was undefended, and a decree of judicial separation was pronounced on Jan. 28, 1953. The wife thereafter made no application for permanent alimony, but on May 7, 1953, she took out an originating summons under the Matrimonial Causes Act, 1950, s. 23 (1), alleging that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. It is admitted by counsel for the wife that the reason why she has chosen to apply under s. 23 (1), rather than to apply for alimony under s. 20 (2) is the fact that under s. 23 (2) the court has power to order that periodical payments shall be secured, but under s. 20 (2) there is no such power to order security for alimony. To the wife's originating summons the husband at first entered a general appearance, but, on June 5, 1953, by the present summons he applied for leave to amend his appearance by adding thereto the words "under protest, the [husband] disputing that the court had jurisdiction to entertain the application", and for directions as to the determination of the question arising by reason of such an appearance. This summons was adjourned by the registrar to the judge and came on for hearing before me in chambers on June 24 last.

The argument of counsel for the husband is essentially a short and simple one and is based entirely on the words of s. 23 (1) of the Act. That sub-section, so far as is material, provides:

"Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife . . . the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . ."

The important words for the purpose of the point which has to be decided are: "if it would have jurisdiction to entertain proceedings by the wife for judicial separation". The contention for the husband is that it is a condition precedent to the exercise of the jurisdiction given by this section that the court should at the date of the wife's application have jurisdiction to entertain proceedings by the wife for a judicial separation, and that in the present case, as the wife has already obtained such a decree, which remains in full force and effect, the court would have and has no such jurisdiction. It is impossible, it is said, for a court to pronounce a decree of judicial separation between parties who are already judicially separated, and this is an objection which would go not merely to the merits of any such petition by the wife, but to jurisdiction. To construe the section in any other way would, it is said, be in effect to read into the section the word "had" between the words "have" and "jurisdiction".

Counsel for the wife, on the other hand, contends that the words on which the husband's argument is based do no more than define the ambit of the application of the section. If it were not for their presence, there might well be a doubt whether the jurisdiction depended on domicile, on residence, or on mere presence in this country. The effect of these words, it is said, is merely to provide that a wife may apply to the court under the section if the residence or domicile of the parties is such that the wife could petition for a decree of judicial separation. The mere fact that there is already in existence a decree of judicial separation would not prevent the court from entertaining another suit for the same relief, though it would, no doubt, prevent the court from granting a decree. It is also suggested that the legislature, when enacting the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, which was, of

course, the precursor of s. 23 of the Act of 1950, must have intended to give an adequate remedy and to include the right to ask for a secured provision to wives who are unwilling either to divorce their husbands or to adopt the often insincere device of a petition for restitution of conjugal rights, and that it could not have been intended that a wife who has obtained a decree of judicial separation should be able to apply to a court of summary jurisdiction, whose powers are limited in amount, for an order on the ground of wilful neglect to maintain—as she, undoubtedly, can: *Cooper v. Cooper* (1)—but should in precisely similar circumstances be prevented from applying to this court where there is no financial limit.

I confess that I do not find that last argument particularly convincing. The intention of the legislature is a matter on which it is frequently dangerous to speculate, and, as counsel for the husband pointed out, it is equally possible that the legislature, when enacting s. 20 (2), may have deliberately intended not to empower the court to order security and to give merely a power similar to that of courts of summary jurisdiction to order payments to be made. Moreover, it is plain that the present problem could not arise in connection with the exercise of the powers of a court of summary jurisdiction, for the relevant words of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, are:

“Any married woman . . . whose husband shall have been guilty of . . . wilful neglect to provide reasonable maintenance for her . . . may apply . . .”

In the course of the argument three authorities were cited: *Rusby v. Rusby* (2) where LORD MERRIMAN, P., said ([1950] W.N. 349):

“Before the court entertains an application of this sort [under s. 23 (1)] it is first of all necessary for it to satisfy itself that it would have jurisdiction to entertain proceedings by the wife for judicial separation. [Counsel for the husband] has rightly refrained, in my opinion, from suggesting that that means that one has to enquire whether the circumstances are such that a decree of judicial separation should be pronounced. What is meant is that the status of the parties as regards domicile, residence or the like is such that the court would have jurisdiction as between those parties to pronounce a decree of judicial separation. If that condition is satisfied, then it has jurisdiction to entertain an application of this kind.”

That decision was followed by WILLMER, J., in *Woodward v. Woodward* (3). In that case a respondent to a summons under s. 23 (1) took the preliminary point that, as the wife alleged that the respondent had deserted her for a period of less than three years, the court would not have jurisdiction to entertain proceedings for judicial separation based on such desertion, and, therefore, the court had no jurisdiction to entertain the application under s. 23. WILLMER, J., decided against the husband's contention and said ([1952] 2 All E.R. 226):

“In my judgment, the argument, attractive as it is, is entirely fallacious, because it confuses the question whether there is jurisdiction to entertain proceedings with the question whether there are in fact good grounds for proceedings. Merely because, in a particular case, the wife would necessarily have failed had she instituted proceedings for judicial separation, it does not in the least follow that the court would have no jurisdiction to entertain the proceedings. The jurisdiction to entertain proceedings depends on domicile and residence of the parties. That is quite a separate matter from the merits of the claim that is put forward. It seems to me that any other view would involve that this new enactment added nothing to the remedies already open to the wife. Yet, quite clearly, I should have thought, s. 23 (1) was intended to confer a new remedy.”

Finally, I was referred to an observation made by LORD MERRIMAN, P., in the course of his judgment in the Divisional Court in *Cooper v. Cooper* (1). The actual point decided in that case was, as I have already indicated, that a wife who has obtained a decree of judicial separation is entitled to apply to a court of summary jurisdiction for an order on the ground of wilful neglect to maintain, but in the course of his judgment the learned President said ([1952] 2 All E.R. 861):

“ . . . apart altogether from any proceedings which she could take for alimony in the suit for judicial separation, under the Matrimonial Causes Act, 1950, s. 23 (1), she has the right to sue in the High Court for wilful neglect to maintain.”

It is true that that observation of the learned President was obiter and that this particular point was not argued, but I am sure that the observation was not made without due consideration, and it is obvious that any dictum of the President on a matter of this sort is one to which great weight must be given. If the President's view is right, it is conclusive in the present case.

After having had the benefit of a full argument, I confess that I do not find the point easy, and I cannot help feeling that the wording of the statute might with advantage have been clearer, but, on the whole, I have come to the conclusion that the present case is covered by the decision of WILLMER, J., in *Woodward v. Woodward* (3), and that the contention of the wife is correct. As it seems to me, there is no essential difference on this issue between the position of a wife who petitions for judicial separation on a ground which in law does not entitle her to such a decree, as was notionally the case in *Woodward v. Woodward* (3), and that of a wife who petitions for judicial separation when by reason of the existence of a previous decree she cannot hope in the event to be successful. If the objection in the former case is one which goes only to the merits and not to jurisdiction, as WILLMER, J., held, so, in my judgment, must be the objection in the latter case. In both cases, as it seems to me, the court can entertain the petition, though in neither case would a decree be pronounced. In my opinion, therefore, the husband's preliminary objection fails, and the wife is entitled to proceed with her application under s. 23 (1). Needless to say, I am fortified in the conclusion at which I have arrived by the observation made by the President in *Cooper v. Cooper* (1), to which I have already referred.

There is, in my opinion, one other consideration which supports this conclusion. It is, as I understand it, conceded on behalf of the husband that where the parties are, for example, resident within the jurisdiction, the wife would have a right to apply for, and might succeed in obtaining, an order under s. 23 (1), even though on the facts and the merits she would have no hope of obtaining a decree of judicial separation. If that is so, it would indeed be remarkable if a wife who has on the merits established her right to such a decree, is to be shut out from the remedy given by the section. In the result the husband's summons will be dismissed with costs.

Summons dismissed.

Solicitors: *Bird & Bird* (for the husband); *Scadding & Bodkin* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

R. v. SIMONS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Parker and Donovan, JJ.),
July 6, 1953.]

Criminal Law—Sentence—Taking into consideration offence not within jurisdiction of court passing sentence—Offence only triable on indictment by election of defendant—No election by defendant.

A *Street Traffic—Offence under Road Traffic Acts—Outstanding offence—Taking into consideration on conviction of some other offence.*

The applicant was convicted at quarter sessions of various offences and was sentenced to three years' corrective training. In sentencing him an offence of driving a motor vehicle while disqualified was taken into consideration. The magistrates had committed him for trial for that offence, but he was not indicted for it at quarter sessions as there was some doubt whether he had exercised his right to be tried by a jury under the Summary Jurisdiction Act, 1879, s. 17 (1).

B
C HELD: in the absence of a claim by the applicant to be tried by a jury quarter sessions had no jurisdiction to try him on the charge of driving while disqualified, and, therefore, ought not to have taken that offence into consideration when passing sentence for the offences which that court had power to try, but, in the circumstances of the case, the court would not interfere with the sentence passed on the applicant.

D Per curiam (i): offences against the Road Traffic Act, 1930, in relation to the driving, insurance, or otherwise, of motor vehicles ought not to be taken into consideration when passing sentence on a conviction of some other offence. They should be prosecuted separately, because there are special provisions in the Act relating to indorsement or disqualification for holding a licence which can only follow on a conviction.

E (ii) if there has been a committal for trial at quarter sessions for an offence and there is doubt whether the prisoner has elected to be tried on indictment, the committal cannot be quashed. The indictment should contain a count for the offence and the court should quash that count.

AS TO TAKING OTHER OFFENCES INTO CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 9, p. 258, para. 365; and FOR CASES, see DIGEST, Vol. 14, pp. 472, 473, Nos. 5070-5103.

Case referred to:

F (1) *R. v. Collins*, [1947] 1 All E.R. 147; [1947] K.B. 560; [1948] L.J.R. 6; 111 J.P. 154; 2nd Digest Supp.

APPLICATION for leave to appeal against sentence.

G On Apr. 16, 1953, the applicant, Kenneth Alfred Simons, was charged at Leicester City Quarter Sessions with taking and driving away a motor vehicle without the owner's consent (contrary to the Road Traffic Act, 1930, s. 28 (1)), dangerous driving, storebreaking, and larceny. He pleaded Guilty to taking the vehicle, to receiving, and to dangerous driving, and was sentenced to three years' corrective training. One other offence of driving while disqualified was taken into consideration.

No counsel appeared.

H LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: It is with regard to the offence that was taken into consideration that this court desires to make a comment, because we are not giving leave to appeal. The applicant had also been charged when before the magistrates with driving a motor vehicle while disqualified, which is a summary offence punishable with six months' imprisonment under the Road Traffic Act, 1930, s. 7 (4). The applicant was committed for trial by the magistrates for driving while disqualified, but he could only be tried on indictment for

that offence if he claimed the right to be tried by a jury under the Summary Jurisdiction Act, 1879, s. 17 (1) (now the Magistrates' Courts Act, 1952, s. 25 (1)), which provided that, if a person is liable to be sentenced to more than three months' imprisonment, he can elect to be tried by a jury. When the case came before quarter sessions, the applicant was not indicted for that offence because there seemed to be some difference of opinion whether or not he wished to be tried by a jury, and the learned recorder was asked to quash the committal. I do not know how you quash a committal, and I do not think you can. The only thing the court can do is to quash the relevant count in the indictment. As he had been committed for trial, and as there was a doubt whether he had elected to go for trial, it would have been better in the circumstances to have included a count for that offence in the indictment. If he had been indicted, as he ought to have been, evidence could have been given whether or not he had elected to go for trial by calling the magistrates' clerk, and, if the recorder had come to the conclusion that he had not elected to go for trial, he could have quashed the count. After the conviction of the other offences, the recorder took into consideration this offence of driving while disqualified. There are two objections against doing that. The first is that, if quarter sessions have no power to try the offence, they cannot take it into consideration when passing sentence for another offence. Secondly, this court has laid down in unmistakable terms in *R. v. Collins* (1) that offences in relation to the driving of motor cars ought not to be taken into account in any court where there is a conviction of some other offence, for the reason that there are special provisions in the Road Traffic Act, 1930, s. 7 and s. 8, with regard to indorsement of or disqualification for holding a licence, and the disqualification or the indorsement can only follow on a conviction. When the court says it takes a matter into consideration, that does not amount in law to a conviction. The court would like to repeat (i) that, if a court has no jurisdiction to try a particular offence, it ought not to take that offence into account when passing sentence for an offence which it has power to try, and (ii) that offences against the Road Traffic Acts in relation to the driving, insurance, or otherwise, of motor vehicles, ought not to be taken into account when sentence is being passed for other offences, but should be prosecuted separately because the law requires magistrates to take certain steps with regard to indorsement or disqualification for holding a licence which can only be taken if there is a conviction. But there is no ground for interfering with the sentences passed in this case and, therefore, this application for leave to appeal is refused.

Application dismissed.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

BULL v. BULL.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), June 23, 24, 1953.]

Divorce—Desertion—House occupied by both parties—Desertion by wife—Return to matrimonial home—No resumption of cohabitation.

A A wife deserted her husband for two periods, in 1946 for approximately six months and in 1947-48 for approximately twelve months. In 1948 she returned at her husband's request to the matrimonial home and subsequently cooked his meals and did occasional mending for him, but otherwise had as little communication with him as possible. There had been no sexual intercourse between the parties since 1936. On Sept. 9, 1952, the husband petitioned for a decree nisi on the ground of his wife's desertion, and he contended that where there had been an initial period of desertion it was no longer necessary to establish that the spouses, while living under the same roof, had done so as two separate households.

B HELD: in the circumstances the wife was not in desertion, notwithstanding the periods of desertion by her in 1946 and 1947-48.

Hopes v. Hopes ([1948] 2 All E.R. 920), applied.

C *Bartram v. Bartram* ([1949] 2 All E.R. 270), distinguished.

AS TO LIMITED COHABITATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 656, para. 965, and 1953 Supp., Vol. 10, para. 965; and FOR CASES, see DIGEST, Replacement Vol. 27, p. 339, 340, No. 2813-2819.

Cases referred to:

D (1) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 27 Digest, Replacement, 340, 2818.

(2) *Bartram v. Bartram*, [1949] 2 All E.R. 270; [1950] P. 1; [1949] L.J.R. 1679; 113 J.P. 422; 27 Digest, Replacement, 340, 2819.

(3) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 27 Digest, Replacement, 401, 3301.

(4) *Perry v. Perry*, [1952] 1 All E.R. 1076; [1952] P. 203; 116 J.P. 258.

E APPEAL by the husband from an order of His Honour JUDGE HOWARD, sitting as a divorce commissioner, dated Jan. 20, 1953.

F The parties were married in August, 1930, and there were two children of the marriage, born in 1931 and 1933. From 1936 onwards there was no sexual intercourse between the parties, who occupied separate bedrooms. In June, 1946, the wife left the matrimonial home and stayed away until Christmas of that year. After she had returned she bought her husband's rations and cooked his meals which usually he had with one of his children, but she had no conversation with him other than to ask him what he would like to eat, and she always refused to go out or have her meals with him. Early in 1947 the wife left the matrimonial home again and remained away for about twelve months. In 1948 she returned at her husband's request and they resumed a relationship similar to that which they had had after the wife's return in 1946. By his petition, which was undefended, the husband sought a decree nisi for divorce on the ground of his wife's desertion, but the learned commissioner dismissed the petition.

Loudoun for the husband.

H The wife was not represented.

SOMERVELL, L.J., stated the facts and continued: The petition is dated Sept. 9, 1952, and the relevant three years from that date take us back to Sept. 9, 1949. During the whole of that period the husband and the wife have been living under the same roof in the circumstances which have been described. The learned commissioner was not satisfied that the husband had made out a case of desertion. Counsel for the husband did not suggest that the circumstances in which the parties were living under the same roof would

justify us in coming to the conclusion that there was no longer one household but two households, to use a phrase taken from the judgment of DENNING, L.J., in *Hopes v. Hopes* (1). Prima facie if a husband and wife are living under one roof, neither can say that the other has deserted, although, of course, there may be limitations and restrictions on the normal and ideal marriage relationship which make it very far from a full or satisfactory marriage. *Hopes v. Hopes* (1) shows that where the parties are living under the same roof it must be established that they are living as two households in order for one to succeed on a petition for desertion. It is not suggested that the circumstances which prevailed throughout the whole of the three years prior to the petition in the present case would justify any such finding.

It was, however, submitted by counsel that the test is entirely different if there has been an initial desertion, that is to say, an initial period where one party has been away from the matrimonial home in circumstances in which the court would hold that there had been desertion during that period. He relies for that principle on *Bartram v. Bartram* (2) where a wife had deserted her husband for some years. She then had to leave the house where she was, and there was nowhere else where she could go except to the house where her husband was living. Although one gathers that when she went there there were not two separate households as in *Hopes v. Hopes* (1), it was held that her presence under that roof did not stop the desertion running. The question is whether that decision was based on the principle for which counsel contends or whether it was based on some narrower ground. Undoubtedly, there are words in the judgment of DENNING, L.J., which at any rate tend to support the wider principle for which counsel contends. He said ([1949] 2 All E.R. 273):

“Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time”,

and he refers to *Mummery v. Mummery* (3). Speaking for myself, I think *Mummery v. Mummery* (3) and *Perry v. Perry* (4), where it was held that occasional acts of sexual intercourse may not, having regard to the circumstances in which they take place, prevent the period of desertion running, do not assist in the present case. BUCKNILL, L.J., in his judgment, refers (and, if I may say so, with respect, rightly refers) to the fact that actual desertion by the wife had been established for many months. He said (*ibid.*, 272):

“The wife does not suggest for one moment that she brought it [her desertion] to an end. The question is: Do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run.”

ASQUITH, L.J., regarded the case as a border-line case of very great difficulty. I think it is clear from his judgment that he found it possible to hold that the desertion had not been interrupted simply because the wife was not a free agent, but was acting under the spur of necessity in returning to live under the same roof.

If I am right in thinking that that was the ratio of those two decisions, the cases differ completely from the present case where the wife was under no spur of necessity, but came back, indeed, at the request of the husband. All this happened before the material three years, and there is force in the consideration which the learned commissioner had in mind that the husband asked her to return knowing what had been the previous relationship but with the hope

that that relationship would improve. Therefore, I do not think that *Bartram v. Bartram* (2) supports the wide proposition for which counsel contended, nor do I think in principle that any such proposition could be accepted or laid down. We are dealing simply with the present case and in the present case during the relevant three years the parties were living under the same roof as part of one household. Periods of physical desertion prior to the three years may in certain circumstances be relevant in considering the issue, but in the present case I do not regard them as establishing that during those three years there had been desertion when plainly, applying the normal "one roof" principle, it is not open to the husband to say that his wife had deserted him. For these reasons I think the learned commissioner came to a right conclusion and I would dismiss the appeal.

- B** JENKINS, L.J.: I agree. Where one spouse presents a petition for divorce on the ground of desertion by the other and it appears that during the period of alleged desertion the parties have been living under the same roof, the question at once arises whether during that period the allegedly deserting spouse was still in desertion. I think one may say that *prima facie* the fact that they have been living under the same roof is a circumstance against the view that there has been continuous desertion. Nevertheless, that circumstance is not necessarily fatal, as appears from *Bartram v. Bartram* (2), where, in the circumstances of that case, this court came to the conclusion that the period of desertion had not been interrupted by the time during which the wife was living under the same roof as the husband. My Lord has referred to the facts in *Bartram v. Bartram* (2), which show that there were many years of desertion during which the wife lived in a different house from the husband. Her residence in that house, which belonged to the husband, was put an end to by the husband's selling it with a view to forcing her to come and live with him. There was no house other than the one occupied by the husband in which she could live consistently with her continuance in the employment in which she was engaged. She, therefore, against her will went and lived in the same house as the husband. The terms on which she lived in the house were that she refused to sleep with the husband and slept with the adopted daughter of her husband's mother. She never went into his rooms, and she paid no attention at all to him as a husband, never mended his clothes, cooked for him, or went out with him. She never treated him in any way differently from the way she would treat a lodger whom she disliked. At times, however, she sat at the same table with her husband and ate the common food provided for them.

- Those were the facts to which the decision in *Bartram v. Bartram* (2) was addressed, and we are now asked to apply the principle said to be deducible from that case to the very different facts of the present case. In the present case there were two periods of what may be described as actual desertion by the wife, one from June, 1946, for a matter of six months, and the other from the spring of 1947 for a matter of twelve months. Ever since the end of the latter period the parties had, in fact, been living under the same roof. The petition was presented on Sept. 9, 1952, so that the last period of actual desertion was some four and a half years before the presentation of the petition. As to the circumstances in which the husband and wife had been occupying the same house since the end of the second period of actual desertion, it appears that there had been no sexual intercourse since about 1936 (which was, of course, before the first period of actual desertion), and that the wife cooked meals for the husband and occasionally did mending for him, though not often, but, so far as she could while living in the same house, she arranged to see as little as possible of him. The two children of the marriage came and stayed for their holidays from time to time in the house, but the family, apparently, never had meals together. The conditions in which the parties have been living for many years now are certainly unsatisfactory and uncomfortable from the

husband's point of view and I share the sympathy expressed for him by the learned commissioner. Nevertheless, it would, in my view, be difficult on the evidence to hold that there were here two separate households. The circumstances relied on in support of that view are weaker than those in *Bartram v. Bartram* (2), and the element of compulsion on the wife to live under the same roof as the husband, which was a decisive factor in that case, is wholly absent here. I think the parties must be taken to have been living in one and the same household on the facts of this case, albeit it was not the kind of household normally kept by a happily married couple. Having lived with his wife on the same terms for some four and a half years preceding the presentation of the petition, the husband now says that on the strength of the initial actual desertion in 1946 the wife has ever since been in desertion from him. In my view, so to hold in the circumstances of this case would be an unwarrantable extension of the decision in *Bartram v. Bartram* (2). I agree with my Lord that on the facts of this case the learned commissioner came to a right conclusion in holding as he did that the requisite period of desertion had not been made out. Accordingly, I would dismiss the appeal.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Gedge, Fiske & Co.*, agents for *A. E. Floyd & Co.*, Dunmow, Essex (for the husband).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

Re HOWELL (*deceased*). HOWELL AND ANOTHER *v.* LLOYDS BANK, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), June 30, July 1, 1953.]

Family Provision—Infant children—Change of circumstances after death of testator—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (1).

In 1947 the testator's marriage with G. was dissolved. In 1949 an order was made which withdrew from G. all right of access to the two children of the marriage, both of whom were then under ten years of age. In the same year the testator married M. In 1950 the testator made a will in which he appointed M. the guardian of his infant children and left the whole of his property to her, or, if she predeceased him, then to his children. In August, 1950, the testator died, leaving an estate of the total value of about £2,500. M. was seriously ill after the testator's death and the children went to live with G. (who had no private means of support). Application was now made under the Inheritance (Family Provision) Act, 1938, s. 1 (1), on behalf of the children for provision to be made for them out of the testator's estate.

Held: although in deciding whether the testator had made reasonable provision for the children the circumstances to be considered ought to include those which could reasonably have been foreseen by the testator at the moment of his death, his dispositions of his property ought not to be judged exclusively in the light of circumstances occurring after his death, which might have altered the situation; it could not be said that the testator's dispositions were unwarranted in the circumstances which presented themselves to him; and, therefore, the provision for the children was not unreasonable, and no provision would be made for them under s. 1 (1).

FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 795.

Cases referred to:

- (1) *Re Styler*, [1942] 2 All E.R. 201; [1942] Ch. 387; 111 L.J.Ch. 263; 167 L.T. 295; 2nd Digest Supp.
(2) *Re Brownbridge*, (1942), 193 L.T.Jo. 185.

APPEAL by the plaintiffs, the infant children of Frederick George Howell, deceased, from an order of ROXBURGH, J., dated Mar. 4, 1953, dismissing their application for reasonable provision to be made for their maintenance under the Inheritance (Family Provision) Act, 1938, s. 1 (1), on the ground that the testator had not acted unreasonably in giving by his will all his property to his second wife.

J. W. Mills for the plaintiffs, the infants.

A. C. M. Kerr for the defendants, the executors.

SIR RAYMOND EVERSLED, M.R.: On the whole I do not think we should interfere with the order which ROXBURGH, J., made, though the case has, to my mind, that difficulty which is characteristic of all cases which relate to the fortunes and affairs of young children.

The application is made under the Inheritance (Family Provision) Act, 1938, on the footing that here the testator was unreasonable in having made no direct provision whatever for his two small children. The children in question, the applicants by their guardian, were aged eight and ten respectively, and they are the children of the marriage between the testator and their mother, whom I will call Mrs. Gladys Howell. That marriage was dissolved on the petition of the husband in April, 1947, on the ground of the wife's cruelty to the husband. In 1949 BARNARD, J., made an order which withdrew from the children's mother all right of access on her part to the children, then living with the testator and his second wife, Mrs. Marjorie Howell, whom he married in March, 1949. Those conditions remained until the testator's death in August, 1950.

The testator had, by his will made in 1950, left the whole of his property to his second wife who is now his widow, and he also appointed Mrs. Marjorie Howell to be guardian of the infant children, the effect of that appointment being, by virtue of the Guardianship of Infants Act, 1925, s. 4 and s. 5, that she, the widow, was joint guardian with the mother, subject to any directions that the court might give on application to the court by either the natural or the testamentary guardian. It is not insignificant to point out that the testator had his children in mind, for his will contained the further provision that in the event of his wife predeceasing him all his property should go to his children.

The testator was not a man of property. He carried on business as an optician, and substantially his estate consisted of that business and the assets connected with it, including the premises where it was carried on. The total value of the estate is stated to be £2,500, and, broadly speaking, the estate stands in this way. That part of the premises on which the business was carried on has been let to the man who bought, for £1,000 payable in ten yearly instalments of £100 each, the goodwill of the business. He also pays a rent of £104 per annum for the use of that part of the premises. The widow herself lives in the residential part of the same premises, 43, Milton Street, Portsmouth, and it seems tolerably clear that that is the best arrangement for her, because she has thereby a home, and, through the arrangement made about the business, some means of support. There is nothing else available. Mrs. Marjorie Howell, the widow, has been seriously ill since the testator's death, and the evidence shows that her state of health is such as to make her now, in the technical sense, unemployable. But the financial hardships are equally shared at the moment by Mrs. Gladys Howell, who, again, is without property, though she appears not to be in so poor a condition of health; she is slightly the older of the two ladies, and is said to be a woman of some education who normally would be

able to earn an income. An effect, as I gather, of the widow's illness immediately following the testator's death was that the children returned to their mother, who now has them with her, and DANCKWERTS, J., on an application to make the children wards of court took the view that there was no good ground for disturbing that state of affairs, and so they remain with their mother.

The facts as to the estate show, I think, quite plainly the unhappy limitation on anything which the court could in any circumstances achieve. The statutory limit imposed of two-thirds of the income, even if the power were exercised to its maximum extent, would provide a very small weekly sum for each child. There is in addition the difficulty to which ROXBURGH, J., alluded and about which I do not feel competent to express any very decided opinion, that if something is provided for the children, it may well be that the effect of that provision will, on the one hand, be to reduce what the children's mother is getting under the National Assistance Act, 1948, and, on the other, to impose on the State an increased liability, or a liability, to make similar provision for the widow. It was expressed picturesquely—and though I think it was clear what the judge had in mind, it was, perhaps, not entirely accurately expressed—when the judge referred to the matter as being out of which pocket the State was to pay. I do not myself think that it is right or necessary to deal with this case on the footing that, assuming the jurisdiction was exercisable, there is nothing very much that the court can do. If on that ground I were disposed to follow the judge in saying what he did, I am aware of the argument that I should be in one and the same breath saying that I thought the testator had acted unreasonably in making no provision for the children, and thereupon acting unreasonably myself by doing exactly the same thing.

I, therefore, go back to the first point, viz., the premise on which any exercise of jurisdiction must depend—whether the court can rightly say that the testator here, in the circumstances as they were when he died as well as when he made his will, acted unreasonably in giving the whole of his property to his wife if she survived him. The learned judge took the view that the testator had not acted unreasonably, and, as I have indicated, on the whole I have come to the same conclusion.

The words of s. 1 (1) of the Act of 1938, so far as relevant, are:

“Where, after the commencement of this Act, a person dies domiciled in England leaving . . . a wife [and infant children] and leaving a will, then, if the court on application . . . on behalf of [the dependants] is of opinion that the will does not make reasonable provision for the maintenance of”

the dependants, then the court may make orders under the Act. At first sight that sub-section might appear to indicate that the function of the court went so far as this, that, if a judge sitting (as has been said) in the armchair of the testator would have thought it better to make some provision different from that which the testator made, the court might say that the testator in making his dispositions acted unreasonably, but it is, I think, clear that the function of the court is of a more limited character.

In *Re Styler* (1) MORTON, J., in his judgment said ([1942] 2 All E.R. 204):

“There are one or two observations in the cases decided on this Act to which I desire to refer, although I fully appreciate that every case must rest upon its own facts. In *Re Brownbridge* (2) BENNETT, J., said that the Act did not throw upon the testator a duty to make provision for his dependants. It only gave the court the right to interfere if it came to the conclusion that the dispositions which were made were unwarranted. In that particular case BENNETT, J., did not think it right to interfere with the testator's disposition. In respectfully agree with those observations. I do not think the court should interfere with a testatrix's or testator's

dispositions merely because the judge may think that he would have been inclined, if he were in the position of the testator or testatrix, to make some provision for a particular person. I think the court has to find that it was unreasonable on the part of the testatrix or the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision."

- A That view of the intention of the Act has, so far as I know, been consistently acted on since and should, in my judgment, be followed now. The question then is posed: In making this will containing the provision which I have indicated, did the testator make unreasonable provision for these children? The matter could equally well be put: Was the series of dispositions unwarranted in the circumstances as they presented, or should have presented, themselves to the testator at the moment of his death? For I think, *prima facie* at any rate, it must be right to judge this matter, whether the testator was unreasonable, in the light of the circumstances which did present, or should have presented themselves, to him up to the moment of his death. No doubt the circumstances must include eventualities reasonably to be foreseen, but the testator ought not to be judged exclusively in the light of circumstances happening after his death, which might very much have altered the situation.

- B I have referred to the state of affairs at his death, and I think, within the very limited range in which the testator could make dispositions, it is not possible to say that this direction of the testator that if his widow survived him she should have everything was unreasonable or unwarranted. I was myself attracted by the way counsel for the executors put it when he said that
- D on the facts as they were the only adequate provision which the testator could make was by securing that there was a home available where his widow would live, it being the fact, and known to him to be the fact, that she would make provision for the children and would look after them as she had been doing for some little time before he made his will.

- E One does not, I think, improve on a case of this kind by attempting elaboration. I have indicated the considerations that have influenced my own mind, and, for these reasons, I would dismiss the appeal. I confess I do so, perhaps, with a greater readiness (if I may use that phrase) because I think, generally speaking, applications under this Act are of such a kind that this court should not readily entertain appeals interfering with decisions of judges below—though that is not to say that, if this court was convinced that the judge had erred, it would
- F not be its duty to interfere with the order made below.

BIRKETT, L.J.: I am of the same opinion. Applying the principles of law which have been laid down with regard to the interpretation of the Act of 1938, and considering the whole of the facts in this case, I think there is no other conclusion to which this court could come, and that this appeal ought to be dismissed.

- G **ROMER, L.J.:** I agree, and I would only add, as, indeed, my Lord has already indicated, that questions under the Act of 1938 are very much matters for the exercise of the judge's discretion, and appeals to this court, at all events in the case of small estates, should not be encouraged.

Appeal dismissed.

Solicitors: *Pengelly & Co.* (for the plaintiffs); *Joynson-Hicks & Co.*, agents for *Lyndhurst G. Groves*, Portsmouth (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re SHEPHARD (*deceased*). SHEPHARD AND ANOTHER *v.*
CARTWRIGHT AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),
May 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, July 1, 1953.]

Gift—Inter vivos—Advancement—Father and children—Evidence to rebut presumption of advancement—Subsequent acts or events—Allotments of shares in names of children—Shares subsequently sold and proceeds treated by father as his own moneys—Other provision made for children.

The testator had three children—P., born in 1901, W., born in 1906, and D., born in 1913. In 1929 the testator decided to go into the business of speculative building, and he and one M. promoted five private companies and divided the share capital between their respective families. Allotments of shares were made in the names of D. and W. without their knowledge. In 1934 the testator and M. promoted a public company to acquire all the shares of the five private companies for £700,000, partly in cash and partly in shares of the new company. Half the consideration went to each of the two families. The consideration for the shares standing in D.'s name was some £45,900, and for W.'s shares some £26,700 in cash, and, in addition, forty thousand shares of £1 each were allotted to each of them. D. and W. signed the sale agreement, but denied any knowledge of the transaction, as they were in the habit of signing many documents on the testator's instructions without inquiry. The recital to the sale agreement contained a statement that the members of M.'s family held their shares as nominees for him, but there was no similar recital in regard to the testator's family. The testator, having procured authorities from D. and W. to the public company to pay direct to him their shares of the cash proportion of the purchase consideration, placed the sum received by him in a banking account in his own name, and later transferred part to deposit accounts in the names of D. and W. He then sold the share consideration passing to D. and W., and credited the amounts received to their deposit accounts. Having procured from D. and W. authorities requesting the bank to honour withdrawals by him from their deposit accounts, by the end of 1935 he had withdrawn the whole of the sums to the credit of their accounts. In 1935 he promoted another private company, of which he had the sole control. He distributed the shares of the company which were paid for out of money drawn from W.'s deposit account, equally among the members of his family, viz., his wife (the children's stepmother), his eldest child P., and D. and W. Further sums drawn from D.'s and W.'s deposit accounts were used to buy real and leasehold property in the company's name. Between 1935 and 1939 he caused entries to be made in the books of the company showing D. and W. as creditors to the extent of some £47,000 and £50,000, respectively, on loan accounts. D. and W. knew of the loan accounts, but throughout the testator's lifetime they remained ignorant of the allotments of the shares to them in 1929, of the transactions in 1934, and of the deposit accounts. From time to time, the testator purchased houses in the names of his children and informed them, as soon as each was of age, that these purchases were gifts to them. In 1949 the testator died, and D. and W. now claimed as creditors certain sums against the testator's estate on the ground that the allotments of the shares of the private companies in their names in 1929 must be regarded as advancement to them by the testator, that the testator was a trustee of the price of those shares received by him in 1934, and that his estate was accountable to them for the proceeds of the testator's dealings with the trust money, and they contended that evidence of the events in and after 1934 was inadmissible to rebut the presumption of advancement.

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HELD: (i) on the facts the plaintiffs had failed to establish that the moneys withdrawn from their respective deposit accounts which represented the proceeds of sale of shares were trust moneys in the testator's hands or that the testator's estate was otherwise accountable to them for such moneys, and, therefore, they were not entitled to succeed.

A (ii) evidence of acts and statements of the testator in and after 1934 was admissible per DENNING, L.J.: because, as regards acts, whenever the court had to ascertain the intention of a person when doing an act it was always permissible to look at his subsequent conduct to throw light on his intention, and, as regards statements or declarations, evidence of such was admissible at common law if they were against the interest of the testator's estate, while, in the case of a written statement, in any event the statement would be admissible under the proviso to s. 1 (1) of the Evidence Act, 1938; per ROMER, L.J.: the relevant acts were so associated with the original transaction as, in effect, to form part of it.

B Per SIR RAYMOND EVERSHED, M.R.: It was not suggested that evidence is inadmissible of conduct of an alleged donor subsequent to the alleged gift which tends to show recognition or affirmation of the gift. It is, in my view, clear that, if regard is to be had to that evidence, there cannot be excluded such parts of the story as tend in the other direction. If the testator's dealings in 1934 and 1935 are to be considered at all, they must be considered in their entirety. It cannot be legitimate to pick out such parts of the whole narrative as support the plaintiffs' claim in isolation from their context.

D Decision of HARMAN, J. ([1953] 1 All E.R. 569), affirmed.

AS TO PRESUMPTION OF ADVANCEMENT, see HALSBURY, Hailsham Edn., Vol. 17, p. 677, paras. 1402, 1403; and FOR CASES, see DIGEST, Vol. 25, pp. 510-513, Nos. 67, 68.

Cases referred to:

- E (1) *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465; [1949] 1 K.B. 550; 2nd Digest Supp.
- (2) *Devoy v. Devoy*, (1857), 3 Sm. & G. 403; 26 L.J.Ch. 290; 28 L.T.O.S. 336; 65 E.R. 713; 25 Digest 515, 111.
- (3) *Grey (Lord) v. Grey (Lady)*, (1677), 2 Swan. 594 (36 E.R. 742); 1 Cas. in Ch. 296 (22 E.R. 809); 25 Digest 511, 71.
- F (4) *Sidmouth v. Sidmouth*, (1840), 2 Beav. 447; 9 L.J.Ch. 282; 48 E.R. 1254; 25 Digest 512, 82.
- (5) *Christy v. Courtenay*, (1849), 13 Beav. 96; 51 E.R. 38; Digest Supp.
- (6) *Crabb v. Crabb*, (1834), 1 My. & K. 511; 3 L.J.Ch. 181; 39 E.R. 774; 25 Digest 512, 81.
- (7) *Warren v. Gurney*, [1944] 2 All E.R. 472; 2nd Digest Supp.
- (8) *Jackson v. Rodger*, [1952] 1 All E.R. 16; [1952] Ch. 110.
- G (9) *Zouch d. Abbot & Hallet v. Parsons*, (1765), 3 Burr. 1794; 97 E.R. 1103; 28 Digest 142, 28.
- (10) *Doe d. Thomas v. Roberts*, (1847), 16 M. & W. 778; 153 E.R. 1404; 28 Digest 143, 39.
- (11) *Lyell v. Kennedy. Kennedy v. Lyell*, (1889), 14 App. Cas. 437; 59 L.J.Q.B. 268; 62 L.T. 77; 1 Digest 401, 1017.
- H (12) *Soar v. Ashwell*, [1893] 2 Q.B. 390; 69 L.T. 585; 32 Digest 508, 1677.
- (13) *Pole v. Pole*, (1748), 1 Ves. Sen. 76; 27 E.R. 901; 43 Digest 652, 863.
- (14) *Dyer v. Dyer*, (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest 511, 78.
- (15) *Finch v. Finch*, (1808), 15 Ves. 43; 33 E.R. 671; 25 Digest 511, 79.
- (16) *Marshal v. Crutwell*, (1875), L.R. 20 Eq. 328; 44 L.J.Ch. 504; 39 J.P. 775; 27 Digest, Replacement, 152, 1108.
- (17) *Jens v. Cooke*, (1857), 24 Beav. 513; 27 L.J.Ch. 202; 30 L.T.O.S. 253; 53 E.R. 456; 25 Digest 515, 104.

(18) *Murless v. Franklin*, (1818), 1 Swan. 13; 36 E.R. 278; 25 Digest 511, 80.

APPEAL by the plaintiffs from an order of HARMAN, J., dated Feb. 19, 1953, and reported [1953] 1 All E.R. 569.

By their action the plaintiffs, Richard David Shephard and Winifred Cartwright, the younger son and daughter of the testator, Philip Edward Shephard, who died in 1949, claimed against his executors a decree for general administration together with a number of special accounts and inquiries designed to investigate their claims made or pending. The plaintiffs claimed as creditors certain moneys and property said to arise out of gifts (viz., allotments of shares in limited companies) made to the plaintiffs in or about 1929. The allotments of the shares were in the plaintiffs' names and raised the presumption of advancement existing between a father and his children, and it was contended by the plaintiffs that evidence of subsequent events was inadmissible to rebut the presumption of advancement. The plaintiffs' claim was opposed by the eldest son. HARMAN, J., admitted evidence of subsequent events, and came to the conclusion that the testator did not in the allotments of shares intend to commit himself irrevocably by way of out and out gifts.

Bathurst, Q.C., and *Victor Coen* for the plaintiffs.

Mulligan for the executors.

Sir Lynn Ungood-Thomas, Q.C., and *F. B. Alcock* for the party attending, Philip Edward Shephard junior, the eldest son of the testator, who opposed the plaintiffs' claim.

Cur. adv. vult.

July 1. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The questions which the court is called on to determine on this appeal are those asked by the three inquiries numbered 5, 7 and 10 in the order for general administration made in this action on Jan. 12, 1953. They are questions of great complexity and difficulty, and I find it, therefore, useful to set out at the beginning of my judgment the three inquiries. They are:

"5. An inquiry whether any and which of the children of the testator derived or received from the testator in his lifetime any and what sums of money or other estates or property in the nature of advancements.

7. An inquiry whether the plaintiff Richard David Shephard is entitled to a first charge or any charge on 580 shares of £1 each in Woodside Park Garden Suburb, Ltd., standing in the testator's name at the date of his death to secure the sum of £23,960 8s. 9d. or some other and what sum. 10. An inquiry whether, subject to what may be found on the inquiry numbered 14, the plaintiff Winifred Maud Cartwright is entitled to all or any and if so which of the 450 shares of £1 each in Philip Edward Shephard Estates, Ltd., registered in the name of the testator at his death."

As will later appear, the inquiries numbered 7 and 10 are relatively of a subsidiary character. The main debate has been on the first inquiry numbered 5 in relation to the two plaintiffs in the action, for their elder brother, the party attending these proceedings, has made no claim in this action, though there are in fact circumstances available to him comparable with those on which the plaintiffs relied. But, in my judgment, the real question involved in the appeal is in truth distinct from inquiry No. 5 and is not necessarily solved by an answer to it.

I have already said that the order of Jan. 12, 1953, was an order for general administration. The history of the litigation has not been uneventful—it was the subject of comment in the opening paragraphs of the judgment of HARMAN, J.,—but it is essential to bear in mind that the writ in the present proceedings was issued on June 19, 1951, and that the two plaintiffs thereby claimed to be entitled as creditors of the estate of the testator, Philip Edward Shephard, who was their father, for very large sums of money, together far more than sufficient to exhaust entirely the assets in the hands of the executors. HARMAN, J.,

therefore, having ordered amendment of the proceedings so as to entitle them in the matter of the testator's estate, made the order I have mentioned in the form appropriate to a creditor's administration suit and thereafter proceeded to deal (*inter alia*) with the three inquiries as though they had been adjourned direct to him in open court before certificate.

- A I have mentioned these matters before referring to any detail because it is, in my judgment, necessary to state and to emphasise that the plaintiffs in the action claim as creditors (between them for the sum of over £100,000, the claim of the first plaintiff being approximately double that of the second) of their father's estate. They say that their father's estate owes to them this large sum of money, and so asserting it is plain that the onus lies heavily on them to prove their case. How, then, do they claim that the debt arises? They answer: Out of certain dealings or transactions in 1934 and 1935. The testator died in 1949, and there is no question but that the claims were made for the first time after his death. *Prima facie*, therefore, the Limitation Act, 1939, must in any event provide a complete answer to any common law claim in debt or for money had and received, but it is the case of the plaintiffs that the dealings in 1934 and 1935 were dealings by the testator with moneys which, because they were the proceeds of absolute and unconditional gifts previously made to the plaintiffs by the testator himself, were, to the testator's knowledge, the plaintiffs' moneys, and for the use of, or dealings with, which the plaintiffs had given to the testator no, or no valid, authority. If this allegation is well founded, then the Limitation Act, 1939, is not available to the executors. The testator must be regarded on this basis as a trustee to whose hands trust moneys will have come. The plaintiffs were even prepared to contend, if necessary, that the testator must be held to have acted in concealed fraud of the plaintiffs and so to have deprived himself and his estate of any defence under the Limitation Act, 1939. For this purpose they relied on *Beaman v. A.R.T.S., Ltd.* (1). As the plaintiffs in their evidence stated that their father was a man of scrupulous honour, I propose to say no more on this last contention than to hold that on the facts of the case it is, in my opinion, insupportable.
- E It is clear from what I have said that it is an essential foundation to their claim for the plaintiffs to prove the gifts to which I have referred. For, unless such gifts are established, then the subject-matter of the testator's dealings in 1934 and 1935 was not the plaintiffs' property at all, and their claim fails in limine. The significance of the fifth inquiry directed by the learned judge thus appears. It is also made apparent in what respect the present case differs
- F so greatly (as the judge observed) from the more usual case where the question, *aye or no*, of an advancement by a parent to a child falls to be determined. In the more usual case, the question arises whether some item of property found to be legally vested in a child is beneficially the child's own property. In this case, the subject of the alleged gifts, *viz.*, shares in certain private companies, was, undoubtedly, so vested originally—in, or shortly after, 1929—
- G but it was so vested in circumstances and on conditions such that the testator was always able to exercise (as he did) unlimited control over the disposition of the shares and also over the whole of their proceeds of sale in 1934 (which proceeds in May, 1934, were placed to the credit of deposit accounts with Barclays Bank, Ltd., in the plaintiffs' respective names). This control was exercised in various ways by the testator for the benefit of his family, including
- H himself, and in so far as certain of the proceeds of sale were ultimately utilised by the testator in creating benefits of a different character for the two plaintiffs, they have been prepared to give credit accordingly, on the footing that to that extent the testator has been able to discharge himself from the obligation which (they say) rested on him to account to them strictly for the whole of the original proceeds. It is part of the plaintiffs' case that they never knew anything whatever about the existence of the property, *i.e.*, the shares in the private companies, or about the vesting of it in their names, or the placing in

their names on deposit account of the proceeds of the realisation of the shares, until one or other of the defendants told them about these matters after their father's death. This ignorance is, indeed, remarkable, for each of the plaintiffs signed powers of attorney and other documents in relation to the shares alleged to have been given to them and in relation to their proceeds of realisation, including directions to Barclays Bank to honour cheques drawn by their father on their respective deposit accounts to the credit of which there was at one time, as they say quite unknown to them, over £200,000. The directions or authorities to the bank are short and simple documents. It is plainly understandable that their execution might have been forgotten after a period of nearly twenty years, but it is not easy to comprehend how any reasonably intelligent or educated human being could have executed such documents without becoming aware of their nature, and neither plaintiff has denied execution or raised a plea of non est factum in regard to any of the documents which he or she executed. I assume, however, that the learned judge accepted the testimony of the plaintiffs that they were in fact at all times wholly ignorant of the character of the documents which they were content to sign without observation or inquiry, though I observe that he described their respective affidavits as "very uncandid documents."

It may, therefore, be that the judge was right in his view that once the gifts were proved everything else followed in the plaintiffs' favour—if the judge meant thereby gifts absolute and unqualified. It is the fact that when the first plaintiff executed the various documents put before him by his father he was but twenty years old, though he was of full age when the bank acted on the authority which the first plaintiff had executed (on the evidence, without any further reference to him) and permitted his father to withdraw large sums, on one occasion over £70,000, from the first plaintiff's account. If those sums withdrawn were, in the eye of the law, trust moneys in the testator's hands, it is not easy to see how, in the circumstances and on the facts which, I think, HARMAN, J., found, the testator ever discharged himself in respect of them. The second plaintiff is, however, to my mind, in much greater difficulty. She was of full age when she signed the authority to the bank, and the bank in fact acted on that authority from time to time by using the moneys to the credit of her account in or towards the discharge of the testator's overdrawings on his own account, the sums so used being relatively small in amount, i.e., round figures of £1,000 and £2,000 at a time. Substantially the whole amount originally standing to the credit of the second plaintiff's account was so used over a period of about twelve months from January, 1935. In her case, therefore, I am not for myself satisfied that the second plaintiff could, whatever may be the proper answer to inquiry No. 5, successfully establish that any of the moneys withdrawn from her account became trust moneys in the testator's hands, or that she could otherwise deprive the testator's estate of the benefit of the Limitation Act, 1939, as a defence to her claim on his executors to account.

But these questions only arise if, in the first instance, absolute and unqualified gifts are established. The learned judge on this issue, the issue directly raised by inquiry No. 5, found against the plaintiffs. My brethren, whose judgments I have had the advantage of reading in advance, are also both of opinion that the plaintiffs fail on this essential issue. I agree with them that the plaintiffs have failed to establish such absolute and unqualified gifts as are essential to their case, but since I have, perhaps, reached the same conclusion by a slightly different route, I have thought it proper to attempt an explanation of my own reasons. In particular, I have thought it of great importance to a proper apprehension of the plaintiffs' claim to state the matters which I have set out above. In the first place, and having regard to those facts, the onus of proof, in my judgment, rests, as I have already indicated, heavily on the plaintiffs to establish the making of absolute and unqualified gifts by their father to them and so to establish the further and essential proposition that the several sums drawn

out from their deposit accounts and used by or for the benefit of the testator and his family were trust moneys in his hands. There is a second reason, in my judgment, for the significance of the matters I have stated, which is consequential on the first, and may be an expansion of it or a different way of stating it. Where the question of advancement arises in respect of an item of property found in the name of a child, and in the more usual case after the parent's death, then the question is relatively straightforward, viz., whether, on all the facts of the case, the property is held subject to a resulting trust in the parent's favour, or whether the child is, at the time when the proceeding is brought, beneficially entitled to the property, and, in the latter event, it is irrelevant if, during the parent's life, he or she may have received and made use of the income of the property, to determine the exact circumstances and the precise qualifications which must be treated as having attached to the original vesting of the property and as having justified such use on the parent's part, for in none of the many cases which have been cited to us has any claim been made by the child to recover as a creditor from the parent's estate the equivalent of any such interest which the parent may have received, and, as DENNING, L.J., observes in his judgment, there is strong authority for the view that such a claim would not be lightly entertained. It seems, then, to follow that the vesting by way of advancement of property in the name of a child may not be inconsistent, at any rate, with the retention by the parent of a right to receive and enjoy the interest on the property during his own life. In the present case it is not sufficient for the plaintiffs to prove an intention on the testator's part to make to them advancements to operate in some way at some time and subject to some powers of control or revocation. They must show that, notwithstanding the steps that were taken at the time when the various acts were done which are relied on as constituting or recognising advancements, but which effectively preserved (as they were obviously intended to do) complete liberty of action to the testator to deal with the subject-matter "advanced" during his lifetime, the testator must be treated as having made to each of the plaintiffs absolute and unqualified gifts operating immediately. It is to be noted that if the plaintiffs are right in so claiming (as they must be to succeed at all), then equally they should be entitled to claim against their father's estate an account of all income or interest received by him attributable to the property in question or its proceeds. In my judgment, it is this full but essential claim that the plaintiffs have failed to establish.

The conclusion of the learned judge after he had carefully considered all the material before him was as follows ([1953] 1 All E.R. 579):

"Considering the evidence as a whole, and doing my best to weigh the circumstances on both sides, I feel obliged to come to the conclusion that the testator did not in the earlier allotments of shares, any more than in the transactions with the businesses, intend to commit himself irrevocably by way of out and out gifts."

If, by that observation, the learned judge meant no more than to hold that the plaintiffs had not established any absolute and unconditional gifts, I respectfully agree entirely with him, but he proceeded to answer the fifth inquiry in the negative, and I am unable to accept (as I do not think the judge accepted) the inference from that answer that there was never any advancement (in the sense of any intention to benefit the two plaintiffs) at all. The learned judge, in the earlier part of his judgment, so fully recited all the facts and all the evidence before him, that I find it unnecessary to repeat in detail those matters. The story, and the figures involved, are highly complex, and save in two relatively minor matters, the plaintiffs have not quarrelled with the learned judge's recitals. It is, however, important to notice that the gifts alleged were made in, or shortly after, 1929, and consisted of the placing (as I have already stated) in the names of the two plaintiffs (and also in the names of the testator's

wife and his elder son, the party attending these proceedings) certain shares in six private companies which he formed about that time. The names of the companies and the numbers of the shares so placed in the names of his wife and children and also in his own name are conveniently set out in para. 10 of the joint affidavit of the two defendants to this action filed on June 16, 1950, in certain earlier proceedings, and I refer to, but do not repeat, that table in this judgment. The formation of those companies appears to have been the testator's first excursion into the business of building and property owning, and counsel for the plaintiffs in this court naturally and forcibly relied on what he called the pattern which the distribution of the shares presents. The case is not one where a father has put a few shares into the names of his wife or children to qualify them as directors or to increase the numbers of his supporters at a general meeting. Thus, whereas the number of shares which he himself held in all the companies amounted together to 725, those put in the name of the first plaintiff amounted to 875, and those put in the name of the second plaintiff to 425—the larger number put in the name of the former being attributable to his large holding (450 out of 750 together held by the testator's family) in one particular company which carried on a road-making business, the type of business in which the first plaintiff was himself actually employed. On the other hand, as the judge found, neither of the plaintiffs knew anything about the formation of these companies or, at least, of their alleged interest in them, and no certificates or documents of title to the shares ever appear to have been issued to the plaintiffs or, indeed, issued at all. It seems clear that the testator, together with his associate, Mr. Meyer, who, and whose family, held equivalent amounts of shares in these companies, completely controlled their operations. By what means, if at all, any voting rights attaching to any of the shares held by members of the testator's family other than himself were ever exercised does not appear. There is no evidence that any single piece of paper relating to their holdings ever reached the hands of the plaintiffs or either of them, and against the conclusion which counsel for the plaintiffs sought to draw from the so-called "pattern" of the shareholding must be set the circumstance that, as regards the Meyer holdings which were similarly distributed, the evidence showed that the shares placed in the names of members of Mr. Meyer's family other than himself were placed in their names as nominees for Mr. Meyer. But whatever might have been the proper inference to be drawn from the very limited circumstances known about the formation of these six companies and the placing of their shares in the plaintiffs' names, the matter is, in my judgment, carried appreciably further in the plaintiffs' favour by the events of 1934. I venture, however, to emphasise again that the only gifts alleged were those of the shares themselves by the placing of them in the plaintiffs' names. It has never been suggested that any further or independent gift was made in 1934. The events of 1934 are relied on by the plaintiffs solely as evidence of a recognition or affirmation by the testator of the gifts previously made.

What I have called "the 1934 events" consist broadly of two separate matters: first, the fact that in the case of one of the six companies a dividend was declared in respect of the shares, being the only dividend ever declared by any of the companies prior to the sale of the shares presently mentioned. The full amount of the dividend attributable to the shares held by the testator and his three children (for there were no shares in his wife's name in this company) was received by the testator and used by him to discharge a debt due by him to that company, and neither of the plaintiffs ever knew anything about such dividend till after the testator's death. At a later date, however, in 1936, the testator instructed the defendant Dunk, who acted as his accountant, to state in answer to an inquiry made by the Inland Revenue, that the two plaintiffs (and their brother, the party attending) were beneficially interested in so much of the dividend as related to the shares in their respective names.

But more significant was the second matter which occurred in 1934, viz., the sale which the testator and Mr. Meyer negotiated of all the shares in all six companies to a public company for a very large consideration payable partly in cash and partly in shares. Again, the plaintiffs say that they had no knowledge of this transaction whatever in spite of the agreement presently mentioned. They executed powers of attorney and authorities to each of the six companies which enabled the testator (with Mr. Meyer) to carry out the sale, and by these or other means the whole of the consideration attributable to the shares held by the testator or members of his family was received by the testator himself. But for the purposes of the sale an agreement was entered into (which the plaintiffs, among others, duly, if submissively, executed) and that agreement contained the significant recital that the shares held by members of Mr. Meyer's family other than himself were held by them as nominees for Mr. Meyer, there being no corresponding recital in regard to the shares held by members of the testator's family other than the testator. Further (and, perhaps, most significant of all), the testator appears, following a conversation with Mr. Dunk, to have placed to the credit of the plaintiffs respectively with Barclays Bank, Ltd., the exact amounts expressed in shillings and pence, after allowing for certain other payments which can be identified and regarded as paid on behalf of the respective plaintiffs, of the total cash consideration attributable to the two plaintiffs' shares and also the approximate equivalent of the proceeds of the share consideration similarly so attributable. The testator similarly dealt with the cash and share consideration attributable to the shares held by the party attending, the plaintiffs' brother, Philip, and also the consideration attributable to the shares held by the testator's wife. As regards the testator's wife, it is one of the two matters in which the learned judge appears to have been in error that he said that the testator's wife never received the consideration due to her, viz., £5,000 in cash, and I mention it in case it should have influenced the judge in reaching a conclusion that the various actions of the testator in 1934 were not sufficient to constitute a recognition or affirmation of previous gifts.

The learned judge took account of all these matters, but did not, as I understand him, regard them singly or in combination as of substantial significance. In my judgment, their combined effect, at least, is formidable, and I have, for my part, found it impossible to deny that they constitute a recognition or affirmation of some gift or advancement in 1929. But it does not follow, in my view, that they are consistent only, as counsel for the plaintiffs would have it, with an absolute and unqualified gift of the corpus (at any rate) of the original shares. For the acts relied on as constituting recognition of the previous gifts were accompanied by other acts which left (and must have been intended to have left) with the testator a control over the disposition of the proceeds of sale of the shares as complete and unlimited as he appears to have had over the shares themselves.

I have already observed that the cases provide illustrations of gifts to children of such character as do not appear to impose any liability on the parent to account for the income or interest received by him during his life. In the present case, the qualified character of the advancement is more far reaching, for it left with the testator a power of control, if necessary a power of revocation, a "dominion" over the subject-matter "advanced": see *Devoy v. Devoy* (2); which enabled him during his life to make such use thereof as he thought fit for the general benefit of his family, including himself. But I can see nothing repugnant or illogical in this result which is not only consistent with his general conduct over a long period of time, but also seems natural enough to a father who might well not, and I think, as his will showed, did not, desire to produce substantial inequality between his children. Owing to what must be regarded as accidents, including the varying fortunes of the six companies and the times

at which the testator sold the share considerations, the proceeds attributable to the first plaintiff's shares greatly exceeded those attributable to the second plaintiff's. As HARMAN, J., noted, the withdrawals from his children's deposit accounts were (apart from their application directly by the bank in reduction of his own over-drawings) substantially used or wanted by the testator for acquiring new properties for the property company which he formed known as Philip Edward Shephard Estates, Ltd., and the final result was that each of the plaintiffs was credited on loan account with that company with sums of more nearly equal amount.

I have more than once referred to the fact that shares were originally placed also in the name of the eldest of the testator's three children, the party attending, and that a deposit account was likewise opened in his name which was also withdrawn by or used for the benefit of the testator and his family in the same way as the two deposit accounts of the plaintiffs. The party attending makes no claim in this action, but it is clear (and there was no argument before us to the contrary) that no inference favourable or unfavourable to the plaintiffs can be drawn from that fact or from any distinction that might on investigation be found between the treatment of the party attending, on the one hand, and the plaintiffs, on the other. Nor have I been able to derive assistance from the circumstance that other properties, in some cases businesses, in others real properties, were from time to time put into each of the plaintiff's names, though counsel for the party attending contended that there was an essential distinction between the vesting of real properties in the children's names, on the one hand (which he conceded were gifts), and, on the other, the vesting of business properties, including shares (which he contended were not). It is true that, for some business purposes, the testator may have used the names of his children because his own employment by the Royal Exchange Assurance disabled him from personally engaging in those businesses, but in other cases it is far from clear to me to what extent he may not have intended his children to be beneficially interested in the many business enterprises for which he was responsible. And as regards the real properties which he acquired in the names of his children, though he did inform them of such purchases, he does not appear to have done so until some time after the actual dates, and then he told them (according, at any rate, to the second plaintiff) that such properties would "eventually become" theirs. In practice, he kept the entire management in his own hands and neither of the plaintiffs enjoyed during their father's life the income produced by the properties.

The result, in my judgment, is that though the plaintiffs establish "advancements" in the sense that the testator, when he put the shares in the six companies in their names, intended to confer benefits on them, they fail to establish that the moneys withdrawn from their respective deposit accounts which represented the proceeds of sale of the shares were trust moneys in their father's hands or that the testator's estate is otherwise accountable to them for such moneys, and since, as I have said, the onus lies, and lies heavily, on the plaintiffs, it is unnecessary for the executors to show, or for the court to find, what precisely were the terms or qualifications of the original "advancements". It is enough that any "advancements" which the plaintiffs can establish were not of such an absolute character that the testator's estate is now accountable for all sums withdrawn from the relevant deposit accounts.

This conclusion is sufficient to dispose of the appeal and makes it unnecessary to deal with the seventh and tenth inquiries, for the claim which underlies each of those inquiries is based on the ability to trace trust moneys into that which now represents them, and, if I am right so far, there never were any such trust moneys. In the case of the first plaintiff, Richard (inquiry No. 7), the claim rests on the circumstance that over £37,000 which was withdrawn from the first plaintiff's deposit account was in fact so withdrawn for the purpose of

acquiring 880 shares in Woodside Park Garden Suburb, Ltd., of which only three hundred were afterwards put in the first plaintiff's name. But the case of the second plaintiff (inquiry No. 10) again is fraught with much greater difficulty, for I am by no means satisfied that even if she were able to establish that the moneys standing to the credit of her deposit account were absolutely hers, she could further trace any of the sums withdrawn from that account (which were, as I have said, withdrawn by being from time to time transferred by the bank to the credit of the testator's own account) into shares in Philip Edward Shephard Estates, Ltd. Though I do not desire to attach much importance to the point, the peculiar difficulties with which the second plaintiff is faced on any view may reflect legitimately, in my opinion, on the claims generally of the two plaintiffs.

The question was discussed during the argument whether it is legitimate to take account of conduct on an alleged donor's part, subsequent to the date of the alleged gift, which tends to show that no gift was intended. It was not suggested that evidence is inadmissible of conduct of an alleged donor subsequent to the alleged gift which tends to show recognition or affirmation of the gift, and in the present case the testator's dealings with the one dividend received and in connection with the sale and the proceeds of sale of the shares were strongly relied on by the plaintiffs to support their claim. It is, in my view, clear that, if regard is to be had to that evidence, then, whatever be the answer to the general question, there cannot be excluded such parts of the story as tend in the other direction. If the testator's dealings in 1934 and 1935 are to be considered at all, then they must be considered in their entirety. It cannot be legitimate to pick out such parts of the whole narrative as support the plaintiffs' claim in isolation from their context.

It is, therefore, in my judgment, in the present case unnecessary to answer the general question, and I prefer not to do so, particularly having regard to the authorities, including the authority of the text-books, to which I later refer. In any given case, the question will arise in regard to some particular matters of fact, and whether such matters of fact are, or are not, admissible in evidence will in practice be likely to depend on many circumstances, for example, whether they may also constitute admissions on the part of the donee, whether they are evidence of a continuing habit or practice of the alleged donor, or whether (as in this case) they are intimately connected with other conduct of the donor which is clearly admissible in evidence. I do not, therefore, desire to go further in this case than to decide what the circumstances of this case require to be decided.

HARMAN, J., was of opinion that a distinction could properly be drawn between subsequent declarations and subsequent conduct or subsequent "events" tending in each case in the alleged donor's interest. I agree with him, that, according to the general rules of evidence, the former, whether oral or written, could not, after the declarant's death, be given in evidence (apart from the Evidence Act, 1938), but that there is nothing in those general rules to exclude the latter, whatever might be their weight. Counsel for the party attending was also, as I understood him, disposed to agree that, however slight might, and frequently would be, its weight, evidence of relevant events, i.e., of the alleged donor's conduct as distinct from declarations made by him orally or in writing, would always be admissible in proof of his intention at the earlier date of his alleged gift, and in many of the cases such evidence seems in fact to have been received, for example, by LORD NOTTINGHAM, L.C., in *Lord Grey v. Lady Grey* (3).

There is, however, authority the other way. In *Sidmouth v. Sidmouth* (4) and in *Christy v. Courtenay* (5), LORD LANGDALE, M.R., expressed, more strongly in the first of them, the contrary view, and those cases have been treated as authority for the exclusion of evidence of subsequent conduct in the text-books:

see, for example, UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 10th ed., p. 187, LEWIN ON TRUSTS, 14th ed., pp. 156, 157. The exclusion of a subsequent will of the "donor" tending against the gift may in any case be justified in so far as it constitutes an express or implied declaration: see *Crabb v. Crabb* (6). But nice distinctions might arise between the terms of the will or deed as constituting a declaration, on the one hand, and the fact and character of the disposition, on the other, on which we have in the nature of the present case heard no argument. Finally, our attention was drawn to the observation of MORTON, L.J. ([1944] 2 all E.R. 473), in regard to subsequent declarations in *Warren v. Gurney* (7) that: "If the rule were otherwise it would be extremely easy for persons to manufacture evidence" which it was said was no less applicable to subsequent conduct. No doubt, a donor can, in a sense, "fabricate" conduct subsequent to a gift by him for the purpose of showing that no gift was intended. But the further argument based on the circumstance that he cannot be cross-examined after his death is at least less significant in regard to conduct.

If the matter were free of authority I should be disposed, as at present advised, to agree with HARMAN, J., but having regard to the authorities I have mentioned, and since the general question does not require our decision in the present case, I prefer, as I have said, to express no opinion one way or the other on it. I only add that in the somewhat analogous case, where the question was whether a testatrix had intended in her lifetime to make to another an out and out gift of a chattel or merely to promise to give it at some future time, the Court of Appeal recently in *Jackson v. Rodger* (8) received and considered evidence of subsequent conduct of the alleged donor which tended to disprove the intention to give, but the authorities in regard to advancements were not cited to the court.

The conclusion of the whole matter is, in my judgment, that this appeal ought not to succeed. For reasons, however, which I have already sufficiently indicated, I am not satisfied that the matter can be properly dealt with merely by answering the three inquiries numbered 5, 7 and 10, and I should, therefore, desire to hear counsel on the form of order proper to be made.

DENNING, L.J.: Before us counsel for the party attending took a preliminary point. He contended that, whether there was an advancement to the children or not, they had no claim to be creditors because their claims were statute-barred. In order to test this point, I propose to assume that there was an advancement by the father to the children, not only of the original shares, but also of the money which he put into deposit accounts in their names. On that footing, the money was just as much theirs as if it had come to them, not from their father, but from another source, for instance, by deed of gift from an uncle, and put into their names at the bank. Suppose, then, that in such a case the father had got the children to sign documents authorising him to draw on their banking account, what would be the legal result?

In considering this question, a distinction must be drawn between the two children, because the son was under age at the time when he signed the authority, whereas the daughter was not, but in regard to both of them, the judge has found that they had no inkling of the transactions. They signed whatever documents were put before them without any inquiry whatever. They remained throughout the father's life ignorant of the original allotments, and of the sale agreement, and of the deposit accounts. So far as the son is concerned, I think that the authority signed by him was absolutely void. It was, on the face of it, an authority to the bank authorising them to honour the father's signature to withdrawals from the son's deposit account. In other words, the son authorised the father to draw out the son's money. That is a transaction so manifestly prejudicial to the son that the law regards it, not merely as voidable, but as void. It is very like the appointment by an infant of an agent, which has always been held void. It has been the law of this country for many centuries that

an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everything done by the agent on behalf of the infant is also void and incapable of ratification. The reason for this rule is because an infant has not sufficient discretion to choose an agent to act for him. He is all too likely to choose the wrong man, and so the law, rather than have any argument on the point, declares him to be incapable of choosing an agent at all. If he is to enter into any legal transaction, he must enter into it by himself and not by an agent, and then the law will look into the transaction and see whether it is binding on him or not. This distinction—between a transaction entered into by the infant himself and one entered into by an agent on his behalf—is taken in all the books. It is taken by LORD MANSFIELD himself in the leading case of *Zouch d. Abbot & Hallet v. Parsons* (9) where he says that the powers of attorney given by infants are void, and also all deeds by an infant which “delegate a mere power and convey no interest.” The same distinction is taken by PARKE, B., in *Doe d. Thomas v. Roberts* (10) where he said (16 M. & W. 780): “. . . an infant cannot appoint an agent . . . an agreement by an agent cannot bind an infant.”

Applying these principles, it seems that the power of attorney given by Richard David Shephard to his father on May 2, 1934, was void, so also the authority dated May 14, 1934, by which he authorised the purchasing company to hand over the money and shares to his father on his behalf, and in addition the undated authority by which he authorised his father to withdraw money from his deposit account, because he was at all those times under age. None of those documents conveyed any legal interest. They duly authorised other people to affect the legal interest of the infant. As such they were absolutely void. On the assumption that there was initially an advancement, the money subsequently received by the father by virtue of the void authority was money had and received to the use of the son.

The authority signed by the daughter Winifred stands in a different position, because she was of full age. She cannot say it was not her document. The plea of non est factum is not open to her, but she can assert that she was her father's daughter and that she was under her father's influence when she signed it and in receipt of no independent advice. That is sufficient to negative any idea that there was a gift by her to the father. And if the authority did not operate as a gift to the father, what was its effect? I cannot myself regard it as a loan, for the simple reason that a loan is a contract, and there is no evidence of any such contract. It seems to me that, on the assumption that there was initially an advancement, any money which the father withdrew from the daughter's account by virtue of the authority was money had and received by him to her use.

If there was initially an advancement, the son and daughter would have had a good cause of action against the father for money had and received. But what about the Statute of Limitations? It seems to me that the father would here be in a dilemma. When he drew the money from the bank, either he intended to use the children's money as his own, or he did not. If he did intend to use it as his own and told them nothing about it, then the very nature of his dealing amounted to a fraudulent concealment from them of their right of action, and the period of limitation did not start to run until the children discovered it: see the Limitation Act, 1939, s. 26, and *Beaman v. A.R.T.S., Ltd.* (1). If the father did not intend to use the money as his own, but on behalf of the children as he ought to have done, then he was a trustee of it and he has since converted it to his own use, and the children are not bound by any period of limitation: see *Lyell v. Kennedy*, *Kennedy v. Lyell* (11) (14 App. Cas. 457) and *Soar v. Ashwell* (12) ([1893] 2 Q.B. 394); see also the Limitation Act, 1939, s. 19 (1) (b).

In my opinion, therefore, the point raised by counsel for the party attending fails. I find myself in agreement with HARMAN, J., when he said that if the original allotments in the names of the children are to be treated as advancements "the rest of the claims follow logically", and also with his view that "having regard to the claimant's ignorance" the Statute of Limitations would not have afforded a defence.

This brings me, therefore, to the real question in the case, which is this: When the father put these shares into the names of the children, did he intend them as advancements to the children or not? And on this question we have heard much argument about the admissibility of evidence. It is said in some of the text-books that the contemporaneous acts and declarations of the father are admissible, but not subsequent acts or declarations unless they are against his interest. I do not think that is correct. A distinction must be drawn between subsequent acts and subsequent declarations. Whenever the courts have to ascertain the intention of a person in doing an act, it is always permissible to look to subsequent acts and conduct on his part which throw light on his intention. Take the familiar case where a man takes and drives away a motor car without the consent of the owner. The offence depends on his intention at the time of taking it. If he intended to deprive the owner permanently of it, he is guilty of theft; if he merely intended to use it for a temporary purpose, he is not guilty of theft but only of a statutory offence. On the question of his intent, his subsequent conduct is most relevant, whether for him or against him. If, at some later time, he returns the car to its owner, that is admissible evidence to negative an intent to steal. Thus, if he returns it after a few hours, it is strong evidence, but if he waits for several months it is weak evidence. If he only returns it after he knows the police are on his track, then a jury might well think that, at the time of taking, he intended to deprive the owner of it permanently and was guilty of theft, and that the return of it was a belated attempt to manufacture evidence in his favour. But there is no doubt that the return of it can be given in evidence in his favour. The weight to be attached to it is entirely for the jury: see HALE'S PLEAS OF THE CROWN, vol. 1, p. 509. Declarations by a man about his intention in doing an act stand on a different footing. Contemporaneous declarations are admissible, but not subsequent declarations, at any rate not in his own favour. Statements made voluntarily by a man as to his past intention can always be given in evidence by the other side, but they cannot be given in evidence on his own side. If the man who took the motor car afterwards tells an acquaintance: "I took the car with the idea of selling it", that is admissible in evidence against him as an admission, but if he tells a friend: "I only took the car for a drive round", he cannot call the friend to give the statement in evidence, because it is hearsay. If the accused man desires to say that, he must say it on oath in the witness-box.

I have taken the trouble to state those elementary propositions because, save for the Evidence Act, 1938, the rules of evidence are the same in civil actions as in criminal matters, and I see no reason why they should be any different in the cases about advancement. If a question arises between father and son, or between the father's representatives and the son, as to the intention of the father when he put property into his son's name, then the subsequent acts and conduct of the father are, in my opinion, admissible, whether for him or against him. The weight to be attached to them is entirely for the tribunal of fact. There are many cases where such evidence has been received, and none that I can find where it has been rejected, though, to be sure, the weight attached to it has varied. Thus, in the common case where the father buys property in his son's name and afterwards takes the rents and profits for himself, no one had doubted that this receipt of the rents and profits is a relevant circumstance and admissible in evidence. In 1677 LORD NOTTINGHAM, L.C., himself admitted it, together with evidence of other subsequent

acts of ownership by the father, in the original case in which this subject was discussed, *Lord Grey v. Lady Grey* (3), and the only question which troubled him was the weight to be attached to it. Seventy years later, in 1748, when LORD HARDWICKE, L.C., had occasion to consider the matter in *Pole v. Pole* (13), he stated (1 Ves. Sen. 76) quite generally that

A “ . . . where a father takes an estate in the name of his son, it is to be considered as an advancement, but that is liable to be rebutted by subsequent acts.”

To go on forty more years, in the leading case of *Dyer v. Dyer* (14), where a father took property in the name of himself and his eldest son in succession, and afterwards made a will leaving it to his younger son, the Court of Exchequer (sitting on its equity side) admitted evidence of the father's conduct in leaving B it by will, though it was held not sufficient to rebut the presumption. In *Finch v. Finch* (15) in 1808, LORD ELDON, L.C., admitted evidence of an uncle's will, though he declined to attach any importance to it. Likewise in 1834 in *Crabb v. Crabb* (6), LORD BROUGHAM, L.C., admitted a codicil in evidence, though he gave no weight to it. In 1875, in *Marshall v. Crutwell* (16), C SIR GEORGE JESSEL, M.R., admitted evidence of subsequent acts by a husband and held that in the circumstances the presumption was rebutted.

It is sometimes said that it is not so much the father's subsequent conduct which is admissible, but rather the acquiescence of the son in it. That was the view expressed by LORD LANGDALE, M.R., in the case of Lord Stowell's advancements: see *Sidmouth v. Sidmouth* (4). I confess I do not follow this line of reasoning. It is not the son's intention which is in question, it is the D father's intention, and his intention at the time when the property was put in the son's name. The son may not have known anything of the transaction when the property was put into his name. He may not have heard anything of it until years later. Yet when the son discovers that it is in his name and finds that his father is receiving dividends from it, it is agreed on all hands that his acquiescence is admissible in evidence. On what ground is this acquiescence E admissible? It can only be on the ground that it is an admission by the son to this extent: “I know that my father never intended me to have this property.” In drawing that inference, the son in most cases has nothing to go on except the conduct of his father subsequent to the transaction. If the son's inferences from subsequent conduct are admissible, surely the inferences of the court are also admissible.

F It is instructive to observe that in all the many cases where a father has received the dividends, no son has ever sought to recover them back from the father or his estate, and in *Dyer v. Dyer* (14) EYRE, C.B., gave a broad hint that no son would be allowed to do so. The Chief Baron said (2 Cox, Eq. Cas. 95):

G “ . . . now would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill.”

It should be noticed that the Chief Baron made that observation in regard to a case where the son was under age and was, therefore, incapable of acquiescence to his detriment. If the son in such a case is disentitled to recover the rents, the reason must be because the subsequent conduct of the father is strong H evidence that he intended to retain a life interest in the property, taking the income of it during his life, but intending that the property itself should belong to the son after his death. In short, the subsequent conduct is admissible as evidence of the father's intention.

Turning now to subsequent statements or declarations made by a father, in which he states what his intention was at the time of the transaction, it is quite clear that their admissibility follows the common law rules. If, and in so far as, they amount to admissions by the father that he intended to give

the property to his son, they are admissible against him or his estate on the ground of admissions. If he is dead and they are declarations against his interest, they are admissible on that ground. If they are statements in his favour to the effect that he intended that the property should belong beneficially to him, they are inadmissible on the ground of hearsay, but, be it noted, on that ground only. It is not because they are subsequent to the transaction, but because they are hearsay, that they are not admitted. Once the objection of hearsay is overcome, as it can be if the father is alive and comes to give evidence, then his statement on oath is admissible, even though it is made many years after the transaction: see *Devoy v. Devoy* (2). Nowadays the objection of hearsay can also be overcome under the Evidence Act, 1938. If the father is dead and before his death made a written statement at a time when litigation was not pending or anticipated, his statement is admissible in evidence, though its weight is entirely for the judge.

It has been suggested that there is good reason why subsequent declarations should not be admissible, because: "If the rule were otherwise it would be extremely easy for persons to manufacture evidence . . .": see *Warren v. Gurney* (7), per MORTON, L.J. ([1944] 2 All E.R. 473). But, with great respect, that is a consideration going to the weight of the evidence, not to its admissibility. It is extremely easy for a father to invent his subsequent evidence on oath, but, nevertheless, it is admissible, although the judge may attach little weight to it. So also it is extremely easy for a father to take the son's income, and for the son out of filial piety to acquiesce, but, nevertheless, it is admissible, although the judge may attach little weight to it, at any rate, so far as the corpus is concerned.

These considerations lead me to the conclusion that the admissibility of evidence in these cases is to be governed by the same rules as in other civil actions, and according to those rules, in order to ascertain a man's intention, evidence is admissible, not only of the nature of the act and his contemporaneous statements which are part of the transaction, but also of any subsequent acts and conduct on his part which throw a light on his intention. That was the view of HARMAN, J., and I entirely agree with it. It is much better to have a simple rule like this, which can be easily applied without resort to precedents, rather than a rule of exclusion which is subject to numerous exceptions and can only be applied after much research into the books, and then only with hesitation and uncertainty.

This brings me at long last to the facts. There is, to start with, the presumption of advancement. That is not, as I understand it, a presumption of conclusive or compelling force. It is, as was said in *Dyer v. Dyer* (14), a "circumstance of evidence", which means, I take it, that it is like other well-known presumptions—the presumption that a man intends the natural consequences of his acts, for instance, or the presumption of *res ipsa loquitur*—a provisional presumption only. It gives rise to an inference which may—not must—be drawn. If there is no other evidence on either side, an advancement will unhesitatingly be inferred, but if there is other evidence pointing one way or the other, then the tribunal of fact must, at the end of the case, come to its own conclusion whether an advancement was intended or not, giving proper weight to the natural inclination of a father to provide for his son, but also taking into account all other circumstances.

Approaching the facts in that way, what do we find? This father put shares into the names of his children, but he never told them anything of what he had done, although they were of an age well to understand it, indeed two of them were of full age. Not only did he tell them nothing about it, but thenceforward he dealt with the shares as if they were solely his property and no concern of the children at all. When a large dividend was declared on their shares, he took it for himself and used it to pay off his own debts. When an opportunity arose to sell the shares at a great profit, he sold them without a

word to them and took the proceeds for himself. It is true that a few days later he did, on his accountant's advice, put the proceeds into deposit accounts in the names of his children, but he promptly neutralised that action by getting them to sign authorities enabling him to draw on the accounts as he pleased, and thenceforward he used the money as his own. All this would have been most reprehensible if it had been the children's money that he was using. He ought at least to have told them what he was doing and to have got their consent to it, but he said not a word to them. He got them to sign all the necessary documents by telling them where to sign, and they signed, and that is all they knew about it. Such absolute dominion goes far to show that he never intended to make a gift to them, but always intended that the shares and their proceeds should belong to him.

Now contrast his action over the shares with his actions over house property and over loan capital to the estates company. He put those in the children's names, but he told them what he had done, and he never used them as his own. At his death, the children took the houses and the loan capital absolutely, and a very ample provision it was for them, £50,000 apiece. There is no doubt that those were advancements and that the children have the benefit of them, but not content with that, they seek in this action to go back eighteen years and say that their father, all those years ago, took away shares and money which belonged to them and converted them to his own use. It is a monstrous claim to make against a father who treated them so well. The truth is that the shares and money never belonged to them, and I think that they must at the time have known it and since forgotten it, otherwise they would not have signed the documents so blindly as they did.

I find myself in full agreement with the judge who tried the case, and I would dismiss the appeal.

ROMER, L.J.: The question whether the result of a voluntary transfer of property by a parent into the name of his child is to vest, not only the legal title to the property, but the beneficial interest therein as well in the child depends on the intention of the parent at the time of the transfer. It, accordingly, resolves itself into a question of fact to be determined in the light of all admissible evidence. The fact that the transferee is the child of the transferor is a circumstance of evidence which suffices, in the absence of any other evidence, to displace the presumption of resulting trust which normally arises in cases where the transferee is a stranger in blood to the transferor. The relationship of parent and child is, however, by no means conclusive of the parent's intention, but is only an indication, and it may be either confirmed or overridden by any such other evidence as may be available and admissible as to the state of the parent's mind in relation to the transaction at the time when it was effected. The principles as stated above are well established in our law and are applicable equally to purchases by a father in the name of his child as to transfers to the child either by the father or by some third party at the father's direction.

A question which was much discussed on the hearing of the present appeal was as to the limits of admissibility of matters which might, if they were accepted for consideration, illuminate the intention of a parent at the time that he passed property into the legal ownership of his child, and, in particular, whether the acts or conduct (as distinct from the declarations) of the father subsequent to the transaction may properly be admitted in evidence as being relevant to his state of mind at the time of the transaction itself. It has been suggested that all such acts and conduct are admissible in evidence, it being a matter for the judge to decide whether any, and, if so, what, weight or value should be attributed to them. For myself I find a difficulty in accepting this view, which appears to me to be in conflict with long-standing authority and with the opinion of the text writers on the subject, who treat subsequent acts

by the parent as being just as inadmissible in general to support a resulting trust as is evidence of the parent's subsequent declarations: see, for example, UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 10th ed., p. 187; ASHBURNER'S PRINCIPLES OF EQUITY, 2nd ed., p. 110; WHITE AND TUDOR'S LEADING CASES IN EQUITY, 9th ed., vol. 2, p. 775; and LEWIN ON TRUSTS, 14th ed., p. 157. Certain acts at least of a parent performed subsequent to the transaction, and referable to the property transferred, seem to me to be manifestly irrelevant to an inquiry as to his intention at the time of the transaction itself. For example, a man transfers property to his son in 1930. In 1940 he makes a will bequeathing the property to someone else. This testamentary disposition is, in my opinion, not only entitled to no weight in ascertaining what the transferor's intention was in 1930, but it should not be received in evidence at all. This view is in conformity with *Finch v. Finch* (15), and *Crabb v. Crabb* (6), in which cases the precise point was considered by LORD ELDON, L.C., and LORD BROUGHAM, L.C., respectively, and with cases such as *Sidmouth v. Sidmouth* (4), *Jeans v. Cooke* (17) and *Christy v. Courtenay* (5). The reason for rejecting such a testamentary act as evidence is the same as that which was explained by this court in *Warren v. Gurney* (7) as the ground for rejecting a parent's subsequent declarations, viz., that they could be manufactured by the parent for his own ends. The further objection that the testator might well have forgotten about the earlier gift when he made his will is possibly more germane to the weight to be attributed to the testamentary act than to its actual admissibility. What I have said with regard to subsequent testamentary dispositions of a parent would apply equally in principle to other subsequent conduct, e.g., acts of ownership by him over property which he had transferred to his son when such acts were initiated some years after the date of the transfer and were never made known to the son. Such acts would, as I think, be wholly inadmissible as evidence to support an intention by the father of resulting trust: see *Murless v. Franklin* (18). I would add, with regard to the observation of LORD HARDWICKE, L.C., in *Pole v. Pole* (13), that the presumption of an advancement "is liable to be rebutted by subsequent acts", that it is pointed out (rightly, as I think) in UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 10th ed., p. 187, that LORD HARDWICKE's dictum must surely be given a narrower interpretation than that which his words seem to imply.

What subsequent acts or events, then, are properly admissible in evidence for the purpose of ascertaining the father's intention in transferring property to his child? Without attempting any exhaustive definition the following categories of conduct seem to me to qualify: first, evidence of acts both by father and son is receivable, if against interest, for such acts operate as admissions; secondly, acts are admissible, if they are so associated with the original transaction as, in effect, to form part of it, for example, the continued retention by a father, on the uncommunicated purchase of property in his son's name, of the title deeds, and of accrued and accruing rents subsequently paid by the tenants; thirdly, I think that subsequent acts are admissible, if they tend to show a course of dealing as between parent and child. For example, a father buys shares for a child in circumstances which, if taken alone, would tend to establish an advancement. Evidence would, I think, be admissible to show that both before and after this particular transaction the father made purchases of shares in the same company in the name of the same child avowedly as nominee for himself, for this evidence would be relevant to the question whether the particular transfer should be taken in isolation or should be regarded as one of a series of transactions, and thus be stamped with the same characteristic as attached to the others.

I now turn to the question of what was the intention of the testator in the present case, Philip Edward Shephard, when, in 1929, he secured the allotment to the plaintiffs of shares in the private companies which he and Mr. Meyer

promoted. This is obviously the prime issue in the case, for I respectfully agree (for the reasons stated by DENNING, L.J., in his judgment) with the view of HARMAN, J. ([1953] 1 All E.R. 575), that if

A "the original allotments of shares in their names with the private companies are to be treated as advancements to them so that they became once and for all the beneficial owners of those shares, the rest of the claims follow logically."

B The argument for the plaintiffs before us was that the allotments ought to be so treated, with the result that from the moment when the allotments were made the plaintiffs became the absolute and sole beneficial owners of the shares allotted to them respectively. The contrary argument for the party attending was that the plaintiffs were not intended by the testator to have any beneficial interest in the shares at all, but were mere pegs on which the testator found it proper to hang the legal title for his own personal convenience. After the most careful consideration of what is, I think, a difficult case, I have come to the conclusion that the intention of the testator was something betwixt and between that which is attributed to him by the plaintiffs and that for which their brother contends.

C In my judgment, the testator, in having the shares allotted to the plaintiffs, did intend to confer a benefit on them, but one that was future, nebulous, and subject to an overriding control which was to remain vested for an indefinite period in himself. If he thought right to let them have a dividend, then they were to have it, but not otherwise. If he sold the shares, they were to take such part of the proceeds as he decided to give them, but no more. He might, indeed, dispose of such proceeds wholly in some other direction and, if he did, so much the worse for them, but underlying all this was an intention that, in addition to receiving such gifts as he might confer on them from time to time, they should ultimately inherit whatever remained undisposed of at his death. There is nothing surprising in a father forming an intention such as this, and especially when he is a man who is engaged in activities of a somewhat speculative character demanding a ready supply of capital, to whom it would be inconvenient to part irrevocably with large sums which he might require at short notice for the furtherance of his enterprises. A comparable intention was in fact established to the satisfaction of the court in the case of the father in *Devoy v. Devoy* (2). The relevant and admissible considerations in the present case point strongly, in my judgment, to the view that such was the intention of the testator, Philip Shephard. In the first place, the course of dealing as between him and his children (which, as I have already indicated, is, in my opinion, relevant) supports the view. From the earliest times as to which evidence is available, the testator put property into the names of his children for his own purposes without intending to vest any immediate beneficial ownership in them and, indeed, in most cases, without telling them anything about it. Examples of this are to be found in the registration under the Registration of Business Names Act, 1916, of a business in the names of "R. D. & P. E. Shephard", the hairdressing business at Dartford which he established in the name of his daughter Winifred, and the furnishing business which was carried on at premises at Torquay, ostensibly belonging to Richard, and which was registered as the property of Richard & Grimes. Then with regard to the houses which he apparently bought in the names of the plaintiffs from time to time. Richard said in evidence that the testator first told him of the purchases which had been made in his name from 1929 onwards some time after he attained twenty-one in November, 1935. As to one of such properties, a house at Hastings, Richard's evidence was that this was bought in his name by the testator in 1932 or 1933, but the testator did not tell him so until 1936 or 1937. The testator had converted the house into flats, which were not a success, so he put in a manageress

to run the place as a hotel. This also was a failure because the manageress took to drink, and it was not until then that the testator told Richard of the original purchase and asked him to take over the property, which he did. The service contract of the manageress was, apparently, with Richard, though he did not realise that this was so until he took over the property from her. Richard did not receive the rents of any of the properties standing in his name until about 1936 when, he said, they were given to him.

As to the properties in Winifred's name, she made her home in the house at Streatham which her father bought for her in 1934, but she never received any of the rents of the other properties at all, receiving only an allowance from her father of £84 a month. Her evidence was not that the testator gave these properties to her so that they should belong to her at once. He told her, apparently, that they would be something for her when she was older and when he had gone. She understood from him that he was making her a present of them to come to her, as she said, eventually. It would appear, therefore, that with regard to the house properties bought in these children's names from 1929 onwards, no immediate or absolute gift was intended or made, but they remained subject to the father's dominion and control.

This characteristic attached also, in my opinion, to the allotment of the shares. Neither of the plaintiffs was at any time in a position to sell the shares or otherwise deal with them, for neither of them ever had a share certificate. Whether or not any share certificates were actually issued by the company is not definitely known, but none was ever in the possession of the plaintiffs. Nor, indeed, did either of the plaintiffs know anything about the allotments at all. Although, therefore, they were the legal owners of the allotted shares the position was that neither of them had either the means or the knowledge to turn them to any personal advantage. Neither did they fare any better with regard to income benefits deriving from the shares. Only one dividend was declared by any of the five private companies, and that was a dividend of £25 10s. tax free per share declared by New Ideal Homesteads, Ltd. There were a thousand shares of this company, of which half were held by the Meyer family. The testator received fifty per cent. of the total dividend declared and applied it to his own purposes notwithstanding that each of his three children held one hundred shares in the company. In the course, however, of correspondence with the income tax commissioners concerning this dividend which subsequently ensued, the testator told his accountant, Mr. Dunk, that each child had a beneficial interest in the dividend proportionate to his or her holding, and Mr. Dunk informed the commissioners accordingly. As a final example of the testator's complete disregard of the position of the plaintiffs as shareholders, he obtained the vesting of their shares in the public company without their knowing anything about it, either, presumably, by purporting to transfer them himself or by procuring their signatures to share transfers in the same way that he, from time to time, procured their signatures to innumerable other documents. I regard all these matters regarding the testator's control over the shares from the moment they were allotted as admissible evidence under the second head to which I have earlier referred, viz., events which are so associated with the original transaction as, in effect, to form part of the terms of that transaction.

Further proof of the testator's determination to retain control of the realisable value of the shares is to be found in the way in which he dealt with the matter when the shares were acquired by the public company. At or about the time of this acquisition the testator procured from the plaintiffs their signature to documents which made him complete master of the situation. The first were powers of attorney authorising the testator to act on the plaintiffs' behalf in relation to every conceivable matter that might arise in connection with their shares in the private companies. The second documents were

authorities to the directors of the public company requesting them to pay to the testator the cash portion of the purchase consideration payable to them on the sale and to hand to him the allotment letters in respect of the shares to be allotted to them as further part of the consideration. It does not appear whether the testator acted under the powers of attorney (though he may have done so in order to pass to the public company the plaintiffs' shares in the private companies) but he acted on the authorities so as to possess himself of the cash consideration and of the plaintiffs' shares in the public company, which he forthwith proceeded to sell. He then applied the cash and the proceeds of the shares in a manner inconsistent with any possible view that he regarded them as belonging to his children in any absolute sense, though he indicated a recognition of some sort of beneficial interest being vested in them by establishing the deposit accounts in their names, albeit at the suggestion of Mr. Dunk. The plaintiffs themselves knew nothing of these things at the time. This vague acknowledgment of the children's interests, however, was sufficiently fleeting for within a few months he had drawn the whole of the moneys out of the deposit accounts, in pursuance of further authorities which he had obtained from the plaintiffs, and applied them to purposes of his own. Later, however, he did take the definite step, which he communicated to the plaintiffs, of opening the loan accounts with Philip Edward Shephard Estates, Ltd., and thus of conferring on each of them a substantial provision by way of advancement. The rest of the moneys derived from the original allotments he substantially disposed of in other directions, and, indeed, it is for that reason that these proceedings have belatedly been brought. It seems to me that his conduct in relation to the plaintiffs' shares in the private companies and the consideration received from the public company on their acquisition is of the same pattern as had characterised all the dealings with his children of which we have knowledge. He himself retained control in the same way as he had done of the earlier businesses and the houses. He had not found it convenient or proper to accompany the legal title to the businesses with any immediate beneficial interest. As to the house and real properties, he had given certain limited benefits (e.g., he eventually gave to Richard the hotel at Hastings and the rents of the other properties from 1936), but any further benefits (and there might possibly be none) were to be reserved for the future. So also, in exactly the same way, he retained control of the shares in the private companies and of the purchase consideration when they were sold, but did in fact confer benefits, quantified by himself, through the medium of the loan accounts. From first to last he maintained a dominating control by means of documents which he prepared himself and which the children signed without question or demur. In these circumstances, it seems impossible to me to regard the original share allotments as constituting one single transaction, isolated and divorced from the other dealings which the testator had with the plaintiffs both earlier and subsequently. It has to be remembered that when the private company shares were allotted they were of no considerable value, and I regard their allotment to the plaintiffs as constituting merely one link in a chain of transactions between parent and children and as possessing the same characteristic as the others, viz., the retention by the parent of control and dispositive power. The principal, if not the only, point of substance, in my opinion, which the plaintiffs can urge against this view is the fact that the agreement of May 16, 1934, expressly recites that the members of the Meyer family held their shares in the private companies as trustees for the elder Leo Meyer, whereas there is no such recital in favour of their father with regard to the plaintiffs' shares. It may well be, however, that the scintilla of beneficial interest in the plaintiffs which the testator did, undoubtedly, recognise displaced in the testator's mind the applicability of such a recital. Be that as it may, I cannot think that this feature of the case is of any great consequence when one surveys the position

as a whole, and, in so surveying it, I find myself in entire agreement with HARMAN, J., when he said in his judgment ([1953] 1 All E.R. 579):

"Considering the evidence as a whole, and doing my best to weigh the circumstances on both sides, I feel obliged to come to the conclusion that the testator did not in the earlier allotments of shares, any more than in the transactions with the businesses, intend to commit himself irrevocably by way of out and out gifts. I take the view . . . that these were only provisional arrangements not intended to remove his freedom of action, and I find no principle of law which prevents me from giving effect to that view."

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Douglas & Co.* (for the plaintiffs); *MacDonnell* (for the executors); *Sidney Pearlman* (for the party attending).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HOWELL v. HOWELL.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), July 6, 1953.]

Legal Aid—Costs—Order against successful party—Relief of legal aid fund—Relevance—Order in favour of unsuccessful petitioner against successful party cited.

A wife petitioned for a decree of dissolution of her marriage on the ground of her husband's cruelty. The husband denied the cruelty and alleged adultery by his wife with the party cited. The husband and the party cited were both legally aided, but the latter was liable to contribute substantially towards his costs. The allegation of adultery was dismissed by the commissioner, who nevertheless made an order for £75 costs in the husband's favour against the party cited.

HELD: on the assumption that the court had jurisdiction to make an order for costs against a successful defendant, a party cited being in the same position as a defendant, such an order should only be made in most exceptional circumstances and not merely by reason of the fact that, as in the present case, its effect would be to relieve the taxpayer quoad the party in whose favour the order was made.

AS TO AN ORDER FOR COSTS AGAINST A SUCCESSFUL LITIGANT, see HALSBURY, Hailsham Edn., Vol. 26, p. 97, para. 183; and FOR CASES, see DIGEST, Practice, p. 893, No. 4348.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (7) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 534.

Cases referred to:

- (1) *Gray v. Ashburton* (Lord), [1917] A.C. 26, 33; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; Digest, Practice, 893, 4348.
- (2) *Re Foster v. Great Western Ry. Co.*, (1882), 8 Q.B.D. 515, 521; 46 L.T. 74; *sub nom. Re Foster v. Great Western Ry. Co. Ex p. Great Western Ry. Co.*, 51 L.J.Q.B. 233; Digest, Practice, 851, 3970.

APPEAL by the party cited from an order of Mr. Commissioner BUSH JAMES, Q.C., dated Feb. 23, 1953.

The wife petitioned for a decree nisi of divorce on the ground of her husband's cruelty. The husband in his answer denied cruelty and alleged adultery by his wife with the party cited. The learned commissioner found that there was no cruelty by the husband and dismissed the petition; he further rejected the husband's allegation of adultery against the wife and the party cited. The party cited was legally aided, but was liable to make a substantial contri-

bution towards his own costs, and the learned commissioner made an order against him for £75 costs.

R. T. Barnard for the party cited.

SOMERVELL, L.J.: This is an appeal by leave from a decision as to costs by Mr. Commissioner BUSH JAMES, Q.C., and arises in the following circumstances. The wife petitioned for a decree nisi of divorce on the ground of cruelty. The husband denied cruelty and alleged adultery by his wife with the party cited, against whom an order for costs was made.

In his judgment, the learned commissioner sets out the history of the marriage, which is immaterial for present purposes except in so far as the party cited is concerned. He came to live at the matrimonial home as a lodger, and, as found by the commissioner, he became friendly with the wife and they went about together. The learned commissioner says:

"I think the conduct of the party cited is to be much deprecated. I think that it is entirely through him that the wife left her husband in August, 1951, and I think he comes out of this case very badly, but that is very different from making a finding of adultery against him, and I have to bear in mind that apart from this photograph there is no evidence of any affection, in the sense of familiarity, having existed between these two people at all. I think he has been most foolish. I think he has asked for trouble, and I think that the respondent has reasons for a very great grudge against him, but adultery is a serious matter, and has to be established by concrete evidence. I am not satisfied that that evidence has been produced. I accordingly make no finding with regard to the adultery alleged in this case."

The learned commissioner also found against the wife on the issue of cruelty. When costs came to be discussed counsel for the party cited stated that he did not propose to ask for any order as to costs in favour of the party cited against the respondent, but he asked for the usual order in relation to a legally aided person. The commissioner then asked to see the figures, and, when he found that the party cited had to make a substantial contribution towards his own costs, he proceeded to make an order against the party cited, although he was successful, for £75. In the course of the discussion he said:

"I have an absolute discretion?" Counsel: "I think so. One cannot say he brought this action about." The commissioner: "Why should the taxpayer subsidise this man? That is what you are asking me to do?"

He then made the order for £75.

Counsel, citing *Gray v. Lord Ashburton* (1), submitted that in the case of a successful defendant—and a party cited is in the same position as a defendant—there was no jurisdiction to make an order ordering him to pay costs. The same matter was considered so far as the courts of equity and common law were concerned under the Supreme Court of Judicature Act, 1875, sched. I, Ord. 55, in *Re Foster v. Great Western Ry. Co.* (2). It is unnecessary to consider whether in the circumstances of this case the court would have jurisdiction to make an order that the party cited should contribute towards the costs where he was successful, because counsel is content to base his submission for the purpose of this appeal on the proposition that it would be only in the most exceptional circumstances that such an order could be made judicially and that the criticisms of the party cited made by the learned commissioner in this case do not approach circumstances which would justify the making of such an order. I agree with that. I do not think they would justify the making of such an order, assuming there was jurisdiction to make it. I think the explanation of the order made by the learned commissioner in this case is to be found in the observation which he made in the course of the discussion: "Why

should the taxpayer subsidise this man?" The effect of the order made by the commissioner would be to relieve the taxpayer to some extent in respect of the respondent's costs because the respondent was himself legally aided. So far as that is concerned, I think the Legal Aid and Advice Act, 1949, s. 1 (7) (b), is relevant, and it provides:

"Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised." A

Therefore, I do not think it would be right to exercise this discretion, assuming it exists, in a particular way merely because its effect would be to relieve the taxpayer quoad the person in whose favour the order for costs was made. For these reasons I think that the order against the successful party cited cannot stand and it should be set aside. B

JENKINS, L.J.: I agree. On the assumption that the court has jurisdiction in a proper case to order payment of costs by a wholly successful defendant, in my view that can be the right order to make only in most exceptional circumstances. It is clear that the observations made by the learned commissioner in regard to the injudicious conduct of the party cited in this case fall far short of providing ground on which such an exceptional step could properly be taken. I agree with my Lord that it appears from the discussion at the end of the judgment that the learned commissioner was led, in part at all events, to take the course he took by the circumstance that the parties were State-aided litigants. That, as my Lord has pointed out, was a circumstance that he should not have taken into account. Accordingly, I agree that the learned commissioner erred in making this order for costs and that the appeal should be allowed. C D

HODSON, L.J.: I agree and have nothing to add. E

Appeal allowed.

Solicitors: *Blundell, Baker & Co.* (for the party cited).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

GRAFF BROTHERS ESTATES, LTD. v. RIMROSE BROOK JOINT SEWERAGE BOARD AND ANOTHER.

[COURT OF APPEAL (Singleton and Morris, L.J.J.), July 1, 1953.]

Practice—Striking out pleading—Statement of claim—Claim in writ for damages “for wrongfully taking away the support of the plaintiffs’ land and houses”—Allegation in statement of claim of negligence in not preventing support being withdrawn—R.S.C., Ord. 2, r. 1; Ord. 3, r. 2.

In an action against a statutory authority and contractors carrying out work on their instructions the plaintiffs indorsed their writ, issued on Mar. 5, 1952: “The plaintiffs’ claim is for damages for wrongfully taking away the support of the plaintiffs’ land and houses.” In their statement of claim delivered on Apr. 20, 1953, they alleged: “(3) . . . the defendants entered into the said land of the plaintiffs by driving tunnels through the same and pumped water from the said land and thereby withdrew support from the said land and buildings of the plaintiffs. (4) The said entry and pumping constituted a trespass. (5) Alternatively the defendants were negligent in failing to take any or any sufficient precautions to prevent support being withdrawn from the said land and buildings of the plaintiffs by the said tunnels and the said pumping of water from the said land.” In an application to strike out para. (5) of the statement of claim on the ground that it constituted a new cause of action which was not covered by the indorsement on the writ,

HELD: the indorsement on the writ stated the “nature of the claim” as required by R.S.C., Ord. 2, r. 1, without setting forth “the precise ground of complaint”, as was permitted by Ord. 3, r. 2, and was sufficient to cover a claim for nuisance, negligence, trespass, or withdrawal of support, and, therefore, para. (5) did not set up a new cause of action and would not be struck out.

Marshall v. London Passenger Transport Board ([1936] 3 All E.R. 83), distinguished.

FOR THE LIMITATION ACT, 1939, s. 21 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 13, p. 1180.

Cases referred to:

(1) *Large v. Large*, [1877] W.N. 198.

(2) *Johnson v. Palmer*, (1879), 4 C.P.D. 258; 13 Digest 489, 390.

(3) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.

(4) *Lockgelly Iron & Coal Co., Ltd. v. M’Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.

APPEAL by the plaintiffs against an order of BARRY, J., dated June 12, 1953, affirming an order of the district registrar, Liverpool district registry, dated May 27, 1953, striking out para. (5) of the statement of claim in an action against a statutory authority on the ground that it sought to set up a new cause of action, not covered by the indorsement on the writ, more than twelve months after the cause of action accrued, contrary to the Limitation Act, 1939, s. 21 (1). The plaintiffs contended that the paragraph did not constitute a new cause of action.

Levy, Q.C., and *E. D. Sutcliffe* for the plaintiffs.

Viscount Hailsham, Q.C., and *O’Malley* for the defendants.

SINGLETON, L.J.: This is an appeal from an order of BARRY, J., who, sitting in chambers, upheld the order of the district registrar striking out para. (5) of the statement of claim in the action. The writ, which was issued on Mar. 5, 1952, by its indorsement says:

"The plaintiffs' claim is for damages for wrongfully taking away the support of the plaintiffs' land and houses."

The statement of claim, which was not delivered until Apr. 20, 1953, reads:

"(1) The plaintiffs are the owners of and in possession of certain land and houses erected thereon in number thirty-nine and known as Nos. 2 to 78 Langton Road, Litherland, in the county of Lancaster. (2) The first defendants are a statutory body constituted to carry out a drainage scheme in Litherland aforesaid. At all material times the second defendants were contractors who on the instructions of the first defendants carried out the works hereinafter complained of. (3) During the months of March, April and May, 1951, the defendants entered into the said land of the plaintiffs by driving tunnels through the same and pumped water from the said land and thereby withdrew support from the said land and buildings of the plaintiffs. (4) The said entry and pumping constituted a trespass."

Paragraph (5), which was struck out by the order of the master, upheld by the judge, is:

"Alternatively the defendants were negligent in failing to take any or any sufficient precautions to prevent support being withdrawn from the said land and buildings of the plaintiffs by the said tunnels and the said pumping of water from the said land."

Paragraph (6) is:

"By reason of the premises the houses of the plaintiffs numbered 42 to 78 Langton Road aforesaid were damaged and the houses of the plaintiffs numbered 2 to 40 Langton Road aforesaid are likely to suffer damage."

The damage is set out and the paragraph ends in this way:

"The subsidence which caused the above stated damage has been checked, but the plaintiffs contend that its operation is continuing and that damage to the houses numbered 2 to 40 Langton Road aforesaid will inevitably occur. And the plaintiffs claim damages against both defendants."

There is surprisingly little material before this court. The plaintiffs, in para. (2) of the statement of claim say that the defendants are a statutory body constituted to carry out a drainage scheme. We have not seen the statute under which they were constituted or under which they were acting, and counsel for the plaintiffs told us he had not seen it and knew nothing about it. Nor do we know anything more of the facts than that which is set out in the plaintiffs' statement of claim. The defendants' solicitors, on behalf of both defendants, issued a summons dated May 11, 1953, which asks for an order that para. (5) of the plaintiffs' statement of claim be struck out on the ground that it sets up a cause of action which is not indorsed on the writ of summons and which was barred by the Limitation Act, 1939, s. 21 (1), at the time of the delivery of the statement of claim, and that the plaintiffs pay the costs. If para. (5) did set up a new cause of action, it appears to be clear that that cause of action was barred by s. 21 (1) of the Act of 1939, at least looking merely at the dates with which we have been supplied.

Section 21 (1) of the Limitation Act, 1939, provides:

"No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued: Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have

accrued, for the purposes of this sub-section, until the act, neglect or default has ceased."

We have had no argument on that section as applicable to the facts of this case, nor has consideration been given, so far as I can see, to the fact that there are two defendants, one a statutory body, and the other contractors acting, it may be, under contract with them. The real question is whether
 A the indorsement on the writ is sufficiently wide to embrace para. (5) of the statement of claim. In the ANNUAL PRACTICE, 1953 ed., are set out forms for the indorsement of writs and of those at pp. 2538 and 2539 one relates to negligence, another trespass to land, another support, and another nuisance.

When this appeal was opened to the court, counsel for the plaintiffs said that the defendants' contention was that the indorsement on the writ covered
 B nuisance and nothing else and that the defendants applied to strike out para. (5) of the statement of claim which sets up as an alternative a claim for negligence. Those facts led MORRIS, L.J., to ask counsel for the defendants in the course of the argument: "Why did you not apply to strike out the claim for trespass?" His reply was that at least he had been modest.

The indorsement on the writ is precisely in the form set out in the ANNUAL
 C PRACTICE, 1953 ed., p. 2538, under "Support", which is in these words:

"The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [or house or mine]."

It is not very clear what is the true category of an action in which damages are claimed for loss of support. The subject is dealt with in SALMOND ON
 D TORTS, 11th ed., p. 284, in a chapter which is headed "Nuisance", and it would seem that it is treated by the authors as a private nuisance which gives rise to an action for a civil wrong. The passage on p. 284 is:

"It is an actionable wrong to withdraw the support to which land or buildings are entitled, and thereby wilfully or negligently to cause a subsidence of the land or structural injury to the buildings. No action
 E for damages lies until and unless actual subsidence or other damage has occurred. The wrong consists not in withdrawing the support which the dominant tenement is receiving, but in doing damage by means of such a withdrawal."

Order 2, r. 1, of the Rules of the Supreme Court provides:

"Every action in the High Court shall be commenced by a writ of
 F summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned."

The first requirement of that rule is that the writ of summons should be indorsed with a statement of the nature of the claim made. It appears to me
 G that this writ, as indorsed, does state the nature of the claim made. The writ is regular. No objection can be taken to the indorsement on the writ. Order 3, r. 2, provides:

"In the indorsement required by Ord. 2, r. 1, it shall not be essential
 H to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled."

It seems clear that the indorsement on the writ in this case is within the two rules to which I have referred. The claim is for damages for wrongfully taking away the support of the plaintiffs' land and houses.

The forms to which I referred a few moments ago appear to give substance to the submission that, in a case in which the plaintiff has been deprived of support to his land, there may be a claim for damages for taking away support, there may be a claim for damages for nuisance, there may be a claim for damages

for negligence, and there may be a claim for damages for trespass. If subsidence, which affects a block of houses belonging to the plaintiff, takes place, and all that the plaintiff knows is that the defendants are working under those houses, it is difficult for him to say precisely what his cause of action may be. He may, and probably will, know much more about it on discovery. But if he indorses his writ in the way in which the writ is indorsed in this case, he clearly is stating the nature of the claim made, and he is not required to set forth the precise ground of complaint. A

Having done that, the plaintiff is at some time faced with the necessity of delivering a statement of claim. In this case the plaintiffs in para. (3) set out the facts on which they relied. In para. (4) they alleged that those facts amounted to a trespass. In para. (5) they pleaded that, alternatively, the defendants were negligent in that they failed to take any or any sufficient precautions to prevent support being withdrawn. B

It is said by counsel for the defendants that para. (5) sets up an entirely new cause of action, and if it does, it is something which cannot be allowed. Order 20, r. 4, provides:

"Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ." C

In the notes under that order, I find this:

"In a general indorsement it is 'not essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled' (Ord. 3, r. 2). Hence the plaintiff is permitted in his subsequent statement of claim, to alter, modify, or extend his original claim to any extent, and to claim further or other relief, without amending his writ (*Large v. Large* (1) [1877] W.N. 198; *Johnson v. Palmer* (2) 4 C.P.D. 258); provided he does not completely change the cause of action indorsed on the writ without amending the latter." D

Counsel for the defendants pointed out that there had been no application to amend the writ, and he said that any application that was made would be refused, undoubtedly, because of the position in which the defendants would be placed in regard to the Limitation Act, 1939, s. 21 (1). E

I have formed the conclusion that para. (5) ought not to be regarded as the setting up of an entirely new cause of action. I like to see simplicity of pleading as far as possible. By the writ in this case the plaintiffs showed the nature of their complaint. In the statement of claim they set out in different ways the nature of the remedy or remedies which they sought, having regard to the facts pleaded. I do not think that it is setting up a new cause of action when plaintiffs have indorsed the writ in that way, if in their statement of claim they say: "Alternatively, if you did this and did not give support in place of that support which you have taken away, you were guilty of negligence." F

I think that the plaintiffs were entitled so to plead in their statement of claim and that it does not amount to completely changing the cause of action indorsed on the writ. I look at it in this way. The plaintiffs knew little of what had happened under the ground, except that damage had been caused. If they had not pleaded para. (5) of the statement of claim, the defendants might have pleaded in their defence that they did that which they did under their statutory powers. It seems to me that it would then have been open to the plaintiffs to plead by way of reply: "In the exercise of your statutory powers you ought to have taken precautions not to damage your neighbour by doing either that which the statute provides or that which a reasonable person or body acting as you were doing should do." Counsel for the defendants submitted that the plaintiffs would not be able to plead that by way of reply as it would be setting up a new cause of action, and that they could not do G H

that without an amendment of the writ, for which it was too late. I do not agree. I think the plaintiffs would have been entitled so to plead by way of reply to such a defence. If they could do that, it really comes to this, that in their statement of claim they are setting out something which is no embarrassment to the defendants and which they are entitled to plead under this general indorsement. In other words, the plaintiffs have indorsed their writ generally according to the rules. As indorsed it appears to me to be sufficient to cover any one of the four specimen grounds, if I may so describe them, which have been mentioned in this case, nuisance, negligence, trespass and withdrawal of support. I think it is wide enough to cover all or any of them, and I do not feel that the plaintiffs ought to be shut out from alleging the alternative in para. (5) of the statement of claim.

We have been referred to certain authorities which do not seem to me to help greatly towards the solution of this question. I recognise that it has been said in the courts time and again that the plaintiff is not to be allowed to set up a new cause of action if the period provided by the Limitation Act has run. Indeed, they ought not to be allowed to set up a new cause of action without amending the writ, speaking generally. But this is not a new cause of action. The facts are set out in the statement of claim. That part of the statement of claim is unobjectionable. So, too, I think, is the alternative way of pleading on those facts set out. For those reasons I would allow this appeal, and would order that the summons of the defendants of May 11, 1953, should stand dismissed.

MORRIS, L.J.: I am of the same opinion and agree with the judgment which my Lord has just delivered. It seems to me that what the plaintiffs did in this case was fully warranted by the provisions of R.S.C., Ord. 3, r. 2, and Ord. 20, r. 4, to which my Lord has referred. Paragraph (5) of the statement of claim, in my judgment, does not introduce a new cause of action or a new case. The position here is entirely different from that in *Marshall v. London Passenger Transport Board* (3), in which the plaintiff was injured in a collision between his bicycle and a tramcar and issued a writ claiming damages for personal injuries and consequential loss sustained by reason of the negligence of the defendants, their servants or agents. At a later date, the plaintiff sought leave to amend his particulars by setting up a case of neglect to keep the tram track and highway in repair, describing that neglect as a breach of statutory duty. It was held that he could not do that. **LORD WRIGHT, M.R.,** said ([1936] 3 All E.R. 88):

“The claim originally indorsed on the writ was for damages for personal injuries caused by the negligent driving of the defendants’ servant—that is, a claim based on negligence in driving and negligence of a vicarious character; it proceeds on the liability of the defendants for their servant’s default. The amendment which is proposed is based upon what I regard as something entirely different, not as a claim for negligent driving and not as a claim for breach of duty by the defendants’ servant for which the defendants are liable; it is based on a claim for breach of statutory duty that may indeed be regarded as statutory negligence, as explained in the recent case of *Lochgelly Iron & Coal Co., Ltd. v. M’Mullan* (4), but it is certainly an entirely different claim from a claim for negligent driving, and it is a claim which is not based on vicarious liability. It is a claim for breach of a statutory duty, which is a liability personal to the corporation and not capable of being delegated; but in addition to that it involves, as I read the proposed amendment, a quite different set of ideas, quite a different allegation of fact.”

Here, in my judgment, para. (5) of the statement of claim does not embark on a different set of ideas or on a different allegation of fact. In a sense,

para. (5) of the statement of claim might be regarded as a new explanation or a new allegation as to how the wrongful taking away of support may have come about, but it is the same complaint as is denoted by the indorsement on the writ. By "complaint", of course, I am not referring to damage, but to cause of action. In my judgment, there was in para. (5) no allegation of a new cause of action. Nothing in the nature of a new case was set up. Paragraph (5), in my judgment, is all under the umbrella raised by the indorsement of the writ. I, therefore, concur in the judgment that my Lord has delivered.

Appeal allowed.

Solicitors: *J. Tickle & Co.*, agents for *Owen, Dawson & Wynn-Evans*, Liverpool (for the plaintiffs); *Berrymans*, agents for *Barrell & Co.*, Liverpool (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

DEAN v. PRINCE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), June 24, 25, 26, 1953.]

Company—Shares—Transfer—Disposition on death—Article of association providing for sale to directors at price certified by auditor as fair value—Auditor acting as expert—Finality of auditor's certificate—Basis of valuation explained—Wrong basis.

The nominal capital of a small private company, which carried on a light engineering business, was £200, divided into two hundred shares of £1 each. The deceased was a director and the chief shareholder, holding one hundred and forty shares. The other two directors each held thirty shares. Article 9 (g) of the company's articles of association provided that, if a member died, "his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an [arbitrator] . . ." On Nov. 6, 1951, the deceased died, and on Dec. 6, 1951, the auditors certified that a fair value for his shares, for the purpose of art. 9 (g), was £7 a share. The plaintiff, his personal representative, being dissatisfied with the valuation, the auditors let her have the notes on which it was based. The notes showed that the auditors were of the opinion that, if the company was regarded as a going concern, the shares were merely of nominal value, and that they made their valuation on the basis that the company was wound-up immediately after the deceased's death and that the assets were sold, as so many loose chattels, at an auction as soon as possible thereafter. On this basis the machinery was valued at £1,785, whereas, according to the evidence, its value to anyone taking over the factory as a going concern would have been £4,800. The auditors completely disregarded the fact that the shares held by the deceased carried with them the right to control the business. In an action by the plaintiff for, *inter alia*, a declaration that the auditors' certificate was not binding,

HELD: (i) if the auditors had not given the basis of their valuation, the plaintiff could not have questioned their certificate, but, as they had done so, the court could examine their reasons and criticise them if they were wrong, notwithstanding the provisions of art. 9 (g) of the company's articles.

(ii) the auditors were wrong, not only in making their valuation on the basis that the company was being wound-up and was in urgent need of having its assets sold immediately under a forced sale, but also in failing completely to take into consideration the fact that the person who bought

the deceased's shares would have the right to control the business, and, therefore, the valuation was wrong and was not binding on the plaintiff.

AS TO POSITION OF AUDITORS, see HALSBURY, 1949 Edn., Vol. 5, pp. 437, 438, paras. 693, 694; and FOR CASES, see DIGEST, Vol. 9, pp. 553-556, Nos. 3656-3674.

Cases referred to:

- A (1) *Johnston v. Chestergate Hat Manufacturing Co., Ltd.*, [1915] 2 Ch. 338; 84 L.J.Ch. 914; 113 L.T. 1148; 9 Digest 545, 3597.
(2) *Attorney-General of Ceylon v. Mackie*, [1952] 2 All E.R. 775.

B ACTION by the personal representative of a former director of the third defendant, Dean and Mulhall, Ltd., for (i) a declaration that the valuation of the shares in the company, as at the date of the deceased's death, given by the certificate of the auditors in accordance with art. 9 (g) of the company's articles, was arrived at on a wrong basis and was not binding; and (ii) an injunction restraining the first and second defendants, the remaining directors of the company, from transferring the shares held by the deceased at the valuation figure. The defendants took the preliminary point that, under the company's articles, the decision of the auditors was final, and, therefore, the action could not be maintained.

C *H. E. Francis* for the plaintiff.

D. S. Chetwood for the defendants.

D **HARMAN, J.:** This is a preliminary point taken by the defendants. The plaintiff, as the personal representative of a member of the defendant company, seeks to have re-opened the valuation of certain shares held by the deceased in the company. Article 9 (g) of the company's articles of association reads:

E "In the event of the death of any member his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an [arbitrator] and accordingly the Arbitration Act, 1889, shall not apply. Unless they otherwise agree the directors shall take such shares equally between them."

F The deceased died on Nov. 6, 1951. Shortly after his death the auditors issued a certificate pursuant to a request by the defendant directors for a valuation of the shares in the company. They certified to the defendant directors on Dec. 6, 1951, in these terms:

"As requested we have valued the shares in your company as at Nov. 6 in accordance with the requirements of art. 9 (g). In our opinion a fair value for this purpose is £7 a share."

G The plaintiff is dissatisfied with that value. Her husband, the deceased, held a controlling interest in the company, being the registered holder of one hundred and forty of the two hundred shares, and she expected to get more than that for them. Her solicitors took the matter up on her behalf and put a certain amount of pressure on the auditors to explain how they had arrived at the value of £7 a share. Eventually, on Feb. 12, 1952, the auditors wrote as follows:

H "We enclose a few notes which we have prepared to show you how the points you raised at our discussion last week have been allowed for in our valuation in so far as we considered them appropriate. We trust that they will enable you to satisfy [the plaintiff] that £7 a share represented a fair value."

From those notes it appears that a certain basis of valuation has been taken which the plaintiff says is a fundamentally wrong basis. Whether or not that

is so I have not yet considered, nor do I pause to do more than assume that it might be proved to be wrong. The point taken by the defendants is that the certificate is final and binding, that on the face of the certificate there is nothing wrong with the valuation, and that it is not legitimate to go beyond the certificate and to look at explanations subsequently offered by the auditors to show that they proceeded on a wrong basis.

In my judgment, there is nothing in that point. It is well settled that those who have a discretion, e.g., trustees who have powers to apply income for maintenance and directors who have powers to admit members to a company, can maintain a silence in regard to the reason for their decision which the court will not oblige them to break, and that, if they do maintain silence, no action will lie against them, but, if they choose, for whatever reason, to disclose the motives which impelled them to their decision, the plaintiff may come to the court to impeach those motives. That seems to me to be analogous to what has happened here. It is true that the auditors are dealing as experts and that they have to arrive at what is their opinion about the fair value. It may well be that their opinion, although wrong in the eyes of others, may prevail, but, if they have founded themselves on an entirely wrong basis and have chosen to explain that basis, I cannot see that the provisions of art. 9 (g) of the company's articles preclude the plaintiff from attacking it. In *Johnston v. Chestergate Hat Manufacturing Co., Ltd.* (1) the manager of a company brought an action for a declaration that, on the true construction of an agreement between the parties, the company was not entitled to deduct income tax from its profits before paying him a certain percentage of the "net profits". The agreement was that, as soon as the profits had been ascertained and certified by the company's auditors, a certain percentage of the "net profits" should be paid to the plaintiff. There was then a definition of "net profits" for that purpose and again a reference to a certificate by the auditors. A subsidiary point taken by the company was that, by the terms of the agreement, the auditors' certificate was conclusive and binding. SARGANT, J., held that, the certificate being based on a wrong principle, the court was not bound by it. He said ([1915] 2 Ch. 344):

"In my opinion, if I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter. The object of such a certificate is to enable the auditors to deal with matters of account, and so on; and here on the face of the balance sheet, and on the face of the certificate, looking at the two together, it seems to me quite clear that the auditors have proceeded upon a wrong principle."

SARGANT, J., did not, therefore, confine himself to the certificate. He looked at the balance sheet on which it was based. It seems to me that I am not precluded from looking at the documents other than the certificate, or, indeed, other than the balance sheet which was before the auditors. I repeat that, if they had chosen to keep silence, I do not think that any court could have requested them to explain their reasons, but they were not strong-minded enough to do that. Therefore, I think it is open to the plaintiff to question them, and the preliminary point does not, therefore, succeed.

Preliminary objection overruled.

Argument on the plaintiff's claim was then heard.

HARMAN, J.: The defendant company was incorporated in 1938 and adopted its present name in 1943. Its nominal capital is £200, divided into two hundred shares of £1 each. At the relevant time the deceased, who was the chairman, held one hundred and forty shares, and the first and second defendants, who are also directors, each held thirty. The company's business, which is carried on in Sheffield, is small light engineering. Like many businesses of the kind, it had a considerable degree of prosperity during the war, but recently

it has not been prosperous. Each of the three directors worked whole-time in it and drew each year a modest sum from it, and, when those drawings had been made, each year except one of those under review has shown some loss. In recent years the company was kept afloat largely by the fact that part of sums paid by way of excess profits tax had been recovered and reserves against taxation which were found not necessary were brought back into the profit and loss account, so that, at the end of the last year of the deceased's life, there was £4,000 still standing to the credit of that account. It appears from the balance sheet for the year ending May, 1951, that there was a trading profit of £1,100 but a net loss of £352, which was brought about by the emoluments of the then two working directors, the first and second defendants. The deceased, apparently, was not at work during that year. The plant and machinery, fixtures, fittings and motor vehicles appear together in the balance sheet at £4,000, being cost less a depreciation of more than half their value, which had been going on every year, and which appears to have been a very large degree of depreciation. The current liabilities about equal the current assets on the balance sheet, the main liability being £1,300 due to the deceased and another £800 or so due to his wife, the plaintiff, neither of whom, in the circumstances, was likely to press overmuch for those amounts.

Article 9 of the company's articles of association deals with the transfer and transmission of shares. It starts in a usual form, compelling a member who desires to transfer to offer his shares to the other members. He may name a value, and, if the directors accept that, then that is the value at which he may transfer them, but, if not, the article provides that "the fair value shall be the auditors' valuation of the current worth of the company's shares". Thus, the words "current worth" are used as synonymous "fair value". In 1943 that article was altered by adding to it further paragraphs, including para. (g). [His LORDSHIP read art. 9 (g) and continued:] It is an unusual type of article, because, instead of entitling the directors to take shares, it is mandatory on them to do so. Whether that is a right which the personal representative of the deceased member could enforce against the directors seems to me a matter of great doubt, but it does not fall to me to determine that question at this stage of the action. On the death of the deceased it was assumed that the defendant directors would take his shares, and steps were immediately taken to that end. The auditors assumed the burden of certifying in writing their opinion as to the fair value. On Dec. 6, 1951, they wrote to the defendant directors, delivering what must be taken to be their certificate under art. 9 (g). [His LORDSHIP read the terms of the certificate, and continued:] The plaintiff was extremely dissatisfied with their valuation, but she would, in my judgment, have been powerless in the matter if the auditors had declined to expand their views. Short of fraud or dishonesty, which no one attributes to the auditors in this action, there was no way of questioning the certificate if the auditors declined to give reasons for the result at which they had arrived, as the members of the company had committed themselves to be bound by their opinion. Unfortunately for the defendants, the auditors did not keep quiet, and, being pressed to explain how they arrived at what the plaintiff (who knew a good deal about the company, having acted as book-keeper and being the owner of the factory where most of the business was carried on) thought was an incorrect valuation, they answered her solicitors on Feb. 12, 1952. [His LORDSHIP read the letter and continued:] By way of preliminary point in this case, I was asked to hold that the court was bound by the certificate and could not look at the notes enclosed by the auditors with their letter, and that, therefore, there was no cause of action. I held that that was not so, the case being analogous to the well-known cases where directors refuse to accept transfers and, if they maintain silence, no one can question their refusal if it is honest, but, if they give reasons, those reasons can be impeached.

Therefore, in the present case, the plaintiff is entitled to bring to the court's notice the reasons which have been given, and the court is entitled to look at them and to criticise them as being bad.

The notes, which were enclosed with the auditors' letter of Feb. 12, 1952, are headed: "Notes on valuation of shares as on Nov. 6, 1951". At the top the auditors set out certain figures from the last balance sheet, and then what they call "the trading results". That is not quite an accurate expression, as they were not the trading results. The trading results had shown a profit in each of the four preceding years, but, in three of them, the profit and loss account had shown a loss by reason of the fact that the directors' remuneration was deducted. It was explained to me that the directors were working in the business and received no other wage, and, no doubt, it was quite right to deduct their remuneration. Paragraph 3 reads:

"In view of these trading results, and taking into account to some extent the difficult position in which the company would be placed if the amounts due to Mr. and Mrs. Dean [the deceased and the plaintiff] had to be paid, it was clear that no value could be put on the shares on a normal going concern basis other than something purely nominal. It became necessary, therefore, to consider the only other basis which could apply; i.e., break-up value."

That is the basis on which the auditors proceeded. In his evidence, Mr. Jenkinson, a partner in the firm of auditors, adhered to the view that, though the physical assets of the company, if sold at an auction in a most disadvantageous way, would possibly produce a value of £7 a share, the shares were of no value at all if looked at on what he called a "going concern basis". Although it was pointed out to him that this was nonsense, he adhered to his view. What he meant, I suppose, was that, if he were advising a client who was going to buy a parcel of these shares, he would advise him to buy them only at a nominal price because, in his view, the company's prospects were very poor. If a person were buying an interest such as that of one of the defendant directors, i.e., thirty shares in a private company which was making a loss, as this company was doing, it would be right to assume that the buyer would be in an unhappy position as he would not get a dividend. But Mr. Jenkinson did not look at the substance of the matter, viz., that what was for sale was not thirty shares of the company, or some small parcel of shares, but one hundred and forty shares, which carried with them the right to control the company. It never occurred to him that it made any difference whether he was valuing a minority or a majority interest, and he left that matter altogether out of his calculations. Being of the opinion that the company ought to be wound-up, he instructed a local valuer to value the machinery on the basis that the company had ceased business on the day of the deceased's death and that its physical assets were sold at the earliest auction sale to which they could be taken. The valuer said that he valued the machines as so many loose chattels to be sold at auctions, and some of the machines were old and, accordingly, had only scrap value. He went on to say: "A valuation in situ would have been higher, but I was not asked to value on that basis." In the circumstances one is not surprised to find that he valued the machinery at a very low sum. His valuation was given on Nov. 23, and his report to Mr. Jenkinson was in these terms:

"As requested, we have inspected the fast and loose plant and machinery, office furniture and motor vehicles owned by the above company, as per detailed inventory herewith, with a view to giving you our opinion of what these articles would be likely to realise if offered for sale by auction; i.e., their break-up value."

The figure arrived at was £1,785. After deductions in respect of the depreciation

of another machine and "bad debts", the auditors treated the plant and machinery as being worth £1,400, instead of £4,000, which was the value at which they appeared in the company's accounts. There being two hundred £1 shares, the auditors valued each share at £7.

A Counsel for the defendants contended that, even if the basis of valuation were wrong, it was merely an error of judgment on the part of the auditors, and the parties, having agreed to be bound by the auditors' judgment, could not now complain if it proved to be bad. There is a good deal of force in that argument, but the answer, I think, is that the auditors did not merely make a valuation on a wrong basis—namely, break-up value, which I regard as the wrong basis—but they left out of account altogether the question of control. Mr. Jenkinson said that he would have valued a minority parcel of shares on exactly the same lines as he valued the shares belonging to the deceased. The company had made a trading profit for a number of years. B There was no urgency to put an end to its life, it had no creditors who were threatening to destroy it, it had a factory and machinery which was well maintained, and yet no inquiry was made whether factory and machinery could not be sold as an entirety. Evidence was given before me that at this time in Sheffield factory space was short, that trade in the light engineering world C was good, and that it was likely that someone could have been found who would come forward and make a bid for the whole concern. If anyone purchased the deceased's shares, he would be in a position to turn out the defendants, re-organise the factory and put in his own business, or sell everything. None of those possibilities was considered. The auditors left out of account the control factor, and that, in my view, shows that their valuation was altogether D wrong. I do not doubt that the company had no goodwill, but it does not seem to me that the alternative to that is to treat the company as being closed down and in urgent need of having its assets sold under a forced sale. It can be sold as a going concern. That does not necessarily mean that, when so sold, the machinery will fetch more than its value, but, of course, it all depends on how it is sold. A representative of one of the largest dealers in second-hand machinery in the country told me that he had examined the E machinery and valued it at £4,800, which was more than the balance sheet figure by some considerable amount, and he said that, in his opinion, that was the value of the machinery to anyone entering the factory to take it over.

Even if one deals with the assets purely on the basis of their physical value, the price must be very different if the machinery is sold on the footing that F it is ready to operate immediately, fixed in a factory, than if each piece is removed and sold at an auction. This is usefully illustrated by *Attorney-General of Ceylon v. Mackie* (2), a decision of the Privy Council on the question of the valuation of shares for the purposes of the Ceylon Estate Duty Ordinance, 1938. The question was similar to that of valuing the shares of an English company for the purpose of English estate duty. There was a dispute between G the Crown and the taxpayer on the method of valuation. The judgment of the Board was delivered by LORD REID, who said ([1952] 2 All E.R. 779):

H "No doubt, the value of an established business as a going concern generally exceeds and often greatly exceeds the total value of its tangible assets. But that cannot be assumed to be universally true. If it is proved in a particular case that at the relevant date the business could not have been sold for more than the value of its tangible assets, then that must be taken to be its value as a going concern."

In this case the auditors made their valuation on the basis that the company was to be wound-up immediately and that the buyer of the deceased's shares would have no control over the fortunes of the business. In both those matters they were wrong, and, in my judgment, the valuation cannot stand. I propose, therefore, to declare that the valuation is not binding on the plaintiff, and, if

necessary, to restrain the defendant company from acting on the valuation. The plaintiff desires the court to take on itself the burden of ascertaining the value of the shares, i.e., to make a declaration of the basis on which the valuation should be made, and then direct an inquiry on that footing. I decline to do either of those things. I do not see what jurisdiction the court has to put itself in the place of the valuer whom the parties have chosen. I do not propose to do more at this stage than to relieve the plaintiff of any obligation that may be on her to accede to the present valuation. Accordingly, I declare that the valuation is not binding and restrain the defendant company from acting on it.

Judgment for the plaintiff.

Solicitors: *J. R. Pullon, Walters & Co.*, agents for *Elliott & Slater*, Sheffield (for the plaintiff); *Allen & Overy* (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

TAYLOR v. WILLOUGHBY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), June 26, 1953.]

Rent Restriction—Death of tenant—Disagreement between members of tenant's family residing with him at time of his death regarding right to remain in possession—Action by one member to eject the other—No application made to county court under Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920 (S.R. & O., 1920, No. 1261), r. 1 (d), r. 19—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

At the time of the death of a statutory tenant of a dwelling-house within the Rent Restrictions Acts his son and his step daughter were residing with him. No agreement could be reached between them as to who was entitled to succeed to the tenancy of the house under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The landlord having given a rent book to the step daughter and accepted rent from her, she commenced ejectment proceedings against the son on the ground that he was a trespasser. The county court judge regarded himself as bound by the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, and he dismissed the action and directed the parties to apply for the determination of their dispute under r. 19.

HELD: the judge was not bound by the rules to dismiss the action; his direction was not certainly effective since neither party was compelled to make an application; and his intention could be better achieved if the action stood over to give the parties an opportunity of applying under r. 19, with liberty to both parties to apply to restore the action when, if no application under r. 19 had been made, the county court judge could require, as a term of any further adjournment, that one or other of the parties would apply under the rules.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 999.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) RULES, 1920, r. 1 (d), r. 19, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 12, pp. 123, 129.

APPEAL by the plaintiff from an order of His Honour JUDGE EMLYN JONES at Warrington County Court, dated Apr. 17, 1953.

The plaintiff was the step sister of the defendant and for several years prior to 1950 they had lived at a house of which the defendant's father was the

A statutory tenant. During that time the defendant paid a weekly sum to the plaintiff in return for her looking after him. In 1950 the defendant's father died. Six weeks after the father's death the landlord of the house gave the plaintiff a rent book and thereafter accepted rent from her. Later, the plaintiff ceased to render any services to the defendant and he ceased to pay her any money, but they both continued to live in the house. The plaintiff having instituted proceedings in the county court for the ejectment of the defendant, the judge dismissed the action and directed that proceedings should be brought under the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, r. 1 (d) and r. 19, for the determination of the question who succeeded to the statutory tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). The plaintiff appealed.

B *Pigot* for the plaintiff.

Alan Fletcher for the defendant.

SIR RAYMOND EVERSHED, M.R., stated the facts and continued: Counsel for the plaintiff put as his case, briefly, that the plaintiff, having obtained a contract of tenancy, or at least recognition of some kind, from the landlord, has the right to possession of this house at law, and that, unless the defendant can establish some other right to remain there, she is entitled to evict him. The learned judge thought that the best course would be to dismiss this action, he taking the view that the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1920, for solving this question between members of a family were mandatory in their effect.

D I am not persuaded that that is right. The Act provides at the end of s. 12 (1) (g) that in such circumstances as have arisen here the expression "tenant" shall include "such member of the tenant's family . . . as may be decided in default of agreement by the county court". Rule 1 of the rules of 1920 provides:

E "An application to the county court under the Act . . . (d) by a member of the tenant's family under s. 12 (1) (g) . . . may be made . . . to the court in the district of which the premises are situate."

The rules seem to me to be doing what rules, *prima facie*, are only competent to do, namely, to provide a means whereby a particular matter specified in the Act under which they are made can take effect. Rule 19 provides that where a member of the family requires the decision of the court the judge "shall" give directions as to the procedure to be followed, and he may do certain other things as well. The judge, however, taking the view which I have indicated and which he expressed thus:

"It seemed to me that I was bound by the provisions of these rules", dismissed this action and directed that proceedings should be brought by one party or the other before him to have decided the question which of them was the tenant.

H If that direction were certainly effective, it may well be that the form of order which he made would be the best one, but I do not see how such a direction can be certainly effective. If neither party makes application, nothing will happen. On the whole, therefore, it seems to me that what was in the judge's mind can be better achieved, and should have been achieved, not by a dismissal of the action, but by standing it over to give either party an opportunity of making an application under the rules. I do not want to interfere with the judge's discretion in this case any more than I need, and, I think, it will suffice if the order dismissing the action is set aside. I contemplate that the proceedings will then be treated as standing over, and either party will be at liberty to apply under the rules, or in this action to amend the pleadings, or for any other purpose that they like. But, to make it clear, I think that each of the parties should be given express liberty to apply to restore the action, so that, if neither

party makes a move under the rules of 1920, either of them may apply to restore. In particular, the plaintiff may wish, if, after a reasonable interval, nothing is done by the other side, to restore this action and seek to prove a contractual tenancy with such consequences as may follow.

In making that last observation, I am not to be taken as suggesting that the plaintiff ought not herself to make the application under the rules and that she would be necessarily justified in waiting for the defendant to do so. One or other of them, plainly, should apply. Possibly they might forget their family differences and apply together. The proceedings, I gather, are of an informal character. But, taking the view that I do, namely, that it is, or may be, futile to direct one or other to make the application, I suggest that the order be discharged and this action be treated as standing over. If neither party takes the necessary steps under the rules the matter can come before the judge, and he may require as a term of any further adjournment an undertaking from one or other that he or she will proceed under the rules. These are matters, however, which, I think, should be left to the learned judge.

BIRKETT, L.J.: I agree.

ROMER, L.J.: I agree.

Appeal allowed; order discharged.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Steels*, Warrington (for the plaintiff); *Cunliffe & Airy*, agents for *Forshaw, Richmond & Co.*, Warrington (for the defendant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* ROGERS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 14, 1953.]

Criminal Law—Indecent assault on female—Child told to commit indecent act by father.

On two occasions, when the respondent was alone in the house with his daughter, aged eleven, he put his arm round her shoulders, led her upstairs, and there exposed his person to her and told her to masturbate him. He used no force or compulsion, and the child made no objection or resistance. On the second occasion, knowing the nature of his intention, she did not wish to accompany him upstairs, but she neither objected nor resisted, but submitted to his request.

HELD: as the respondent had used no compulsion or force and had not acted in a hostile manner towards the child, there was no assault on her, and, consequently, no indecent assault.

Fairclough v. Whipp ([1951] 2 All E.R. 834), applied.

AS TO THE OFFENCE OF INDECENT ASSAULT, see HALSBURY, Hailsham Edn., Vol. 9, p. 486, para. 837; and FOR CASES, see DIGEST, Vol. 15, pp. 853, 854, Nos. 9363-9370.

Cases referred to:

- (1) *Beal v. Kelley*, [1951] 2 All E.R. 763; 115 J.P. 566; 2nd Digest Supp.
- (2) *Fairclough v. Whipp*, [1951] 2 All E.R. 834; 115 J.P. 612; 2nd Digest Supp.

CASE STATED by Kent justices.

At a court of summary jurisdiction sitting at Hythe on Jan. 13, 1953, the appellant, the Director of Public Prosecutions, preferred two informations against the respondent, charging that on two occasions between Oct. 27, 1952, and Nov. 7, 1952, he indecently assaulted at Hythe, Beryl Cissie Caroline

Rogers, his daughter, then aged eleven years, in each case contrary to the Offences against the Person Act, 1861, s. 52.

A It was proved or admitted that the respondent at all material times lived with his wife and daughter. On two occasions between Oct. 27, 1952, and Nov. 7, 1952, he put his arm round his daughter's shoulders and led her upstairs. She made no objection or resistance, and no force or compulsion was used. He then exposed his person to the child and told her to masturbate him. On both occasions the child obeyed him although she did not wish to do so. On both occasions he was alone in the house with the child. On the first occasion he committed the indecent conduct on the landing and on the second occasion in his bedroom. On both occasions when he put his arm round his daughter's shoulders he did so to lead her upstairs, intending to conduct himself indecently towards her. On the first occasion the child neither minded nor objected to his putting his arm round her shoulders, but on the second occasion, knowing the nature of his intention towards her, she did not wish to accompany him upstairs, but, nevertheless, she neither objected nor resisted, but submitted to his request.

C It was contended on behalf of the appellant that the placing of the respondent's arm round the child's shoulders could be an assault, and, in the absence of consent by the child, would be an assault. As there were circumstances of indecency accompanying this act, the child could not consent to it, and, therefore, the justices could hold that he had assaulted her. The facts, as proved, disclosed more than a mere invitation by the respondent to touch his person. Apart from these contentions, it was further contended that an assault could be inferred from the particular circumstances of the case, in that on both occasions D the child was alone in the house with the respondent, she was ordered by him with all the weight of parental authority to masturbate him, her touching his person was an involuntary act by reason of his exercising his parental authority, and that all these facts could, and did, constitute an assault, having regard to her age.

E It was contended on behalf of the respondent that there was no case for him to answer on the grounds (i) that the acts of masturbation were invitations made by him to his daughter to touch his person, which alone could not constitute an assault on her, and (ii) that a hostile act was a necessary ingredient of an indecent assault on a child under sixteen years of age, and no evidence had been adduced of any such hostile act since the placing of his arm round her shoulders was an entirely separate transaction from the subsequent indecency and was not an assault because it was not a hostile or unfriendly F act, even if (which was denied) it formed one transaction with the subsequent indecency.

The justices dismissed the informations and the appellant appealed.

G *J. M. G. Griffith-Jones* for the appellant.
Collard for the respondent.

H **LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Kent sitting at Hythe, before whom the respondent was charged with an indecent assault on his daughter, aged eleven. [His LORDSHIP stated the facts and continued:] Before you can find that a man has been guilty of an indecent assault, you have to find that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and, if it could be shown here that the respondent had done anything towards this child which, by any fair use of language could be called compulsion, or had acted, as I have said in other cases, in a hostile manner towards her—that is, with a threat or a gesture which could be taken as a threat, or by pulling a reluctant child towards him—that would, undoubtedly, be assault, and, if it was accompanied by an act of indecency, it would be an indecent assault.

The first case to which we were referred, *Beal v. Kelley* (1), was quite different from the present matter because there the defendant exposed himself to a boy and asked the boy to handle him, and, when the boy refused to do so and began to go away, the defendant ran after him, took hold of him, and pulled him towards him. There can be an assault without battery, and in that case there was, undoubtedly, an assault because the boy wanted to get away from the disgusting behaviour. The assault was accompanied by indecency, and, therefore, there was an indecent assault. That case must be compared with *Fairclough v. Whipp* (2), where the respondent exposed himself in the presence of a girl aged nine, saying: "Touch it", which she did. We had to hold that that was not an indecent assault because there was no authority which said that where one person invites another to touch him that can amount to an assault on the person invited.

I think that the justices were right in saying that, in principle, they could not distinguish the present case from *Fairclough v. Whipp* (2). There might be a case in which the evidence showed that what was done was against the will of the child, but, as the respondent used nor compulsion, no force, on the child to go upstairs, however much we may regret that we cannot punish him for doing an act which deserves the reprobation of every decent man, we feel that the only thing we can do is to say that the justices came to a right decision and reluctantly dismiss this appeal.

PARKER, J.: I feel constrained to agree, but with extreme reluctance.

DONOVAN, J.: I agree.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions* (for the appellant); *G. F. Hudson, Matthews & Co.*, agents for *Frederic J. Hall*, Folkestone (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

BUTTLE v. BUTTLE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), June 26, 1953.]

Justices—Husband and wife—Maintenance—Amount of—Serving soldier.

A Home Office circular sent to clerks to justices stated, inter alia, that, in assessing a soldier's income in order to fix the amount of a maintenance order against him, it would be proper to take into account his pay, the amount of the marriage allowance, and the fact that in addition to receiving pay a soldier was normally clothed, fed and lodged at the public expense. The circular set out in an appendix the minimum amount which in relation to any particular soldier would normally be received by a wife by way of allotments and allowance, and stated that: "10 . . . In the absence of private income of either the husband or the wife the court *should* take the figure so arrived at as a general guide to a minimum amount for the maintenance order. 11. Where either the husband or the wife has other sources of income these should be taken into account in fixing the amount to be paid under a maintenance order. There will, no doubt, be cases in which a wife is in employment and may be earning a considerable wage. In any case of this kind, however, allowance should be made for the value of the issues in kind received by the soldier in order to maintain the proper balance between the respective incomes of the parties." The husband was a corporal in the Royal Horse Guards. He made an allotment of £1 8s. per week to the wife, and she had a marriage allowance of £2 9s. per week, making a total of £3 17s. The wife also earned £6 10s. per week. On a summons by the wife under the Summary Jurisdiction (Separation and

Maintenance) Acts, 1895 go 1949, charging the husband with desertion the husband admitted desertion, and the justices, purporting to act in accordance with the advice contained in the circular, awarded the wife £3 17s. per week as maintenance. On appeal by the husband,

HELD: while, if the amount had been fixed strictly in accordance with the circular, but had been fixed on a wrong basis, compliance with the circular would of itself be no justification, the justices had purported to follow the advice contained in the circular, but had misunderstood or misapplied it for they had ignored the wife's earned income, and, therefore, they had misdirected themselves, and the case must be sent back for further consideration.

Per LORD MERRIMAN, P.: If it is intended to convey, as might be thought from a literal reading of para. 11, that it is only in cases where the wife has a separate income, either by her own earnings or otherwise, that the advantages to the husband of what are called the "issues in kind" should be taken into account, I should differ. These calculations should always be made in assessing the husband's means, and not only in cases of which it can be said that they are necessary to counter-balance some private income of the wife's.

AS TO ORDERS FOR MAINTENANCE BY COURTS OF SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 840, para. 1342; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 705-709, Nos. 6729-6762.

Case referred to:

(1) *Collins v. Collins*, [1943] 2 All E.R. 474; [1943] P. 106; 112 L.J.P. 82; 169 L.T. 184; 27 Digest, Replacement, 632, 5933.

APPEAL by the husband against the amount of a maintenance order made in favour of the wife on Feb. 24, 1953, by the Domestic Proceedings Court sitting at Chelsea (constituted under the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I., 1952, No. 1860), being a court of summary jurisdiction "for the city of London and that part of the metropolitan police court area as is for the time being assigned to the Bow Street and West London police courts for the purpose of the hearing and determination of domestic proceedings.")

The husband was a corporal in the Royal Horse Guards, and by his making an allotment of £1 8s. per week to his wife, she qualified for the marriage allowance of £2 9s. per week, making a total of £3 17s. per week. The wife having issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion, the husband admitted desertion and the wife admitted that she was earning £6 10s. per week. Purporting to act in accordance with a Home Office circular (H.O. 259/52) entitled "Enforcement of Maintenance Orders and Affiliation Orders against members of Her Majesty's Forces other than Commissioned Officers", the justices awarded the wife £3 17s. per week as maintenance. The husband appealed on the question of the amount awarded.

Coode for the husband.

S. H. Noakes for the wife.

LORD MERRIMAN, P., stated the facts and continued: In their reasons the justices, the chairman of whom was one of the learned metropolitan magistrates, say that the desertion was, not only proved, but actually admitted by counsel for the husband, and they go on to say:

"The amount of the order is the amount the wife normally received or would normally receive by way of qualifying allotment and married allowance if the parties were not estranged from each other, and is, in fact, the amount she had been receiving."

So the question whether it is a mere coincidence that the amount of the order equals the combined amount of the allotment and the married allowance is put beyond the slightest doubt. It was deliberate. They continue:

"This is in accordance with the advice given to clerks to justices by the Home Office in their circular letter . . . of Dec. 1, 1952, as to the arrangements made by the service departments with regard to separated wives of members of the forces."

I pause there to observe that, even if the amount had been fixed strictly in accordance with the circular, but had been fixed on a wrong basis, the compliance with the circular would of itself be no justification. The justices would not be entitled to shelter behind advice or directions given by a government department if that advice were demonstrably wrong, for then they would plainly have misdirected themselves. But if the advice has been misunderstood, and, while purporting to follow the advice, the court has in truth and in fact not followed it, but has thought that it was following it, plainly there is a misdirection of itself by the court, and the matter is open to review by the appellate tribunal.

That brings me to the relevant paragraphs of the circular. Paragraph 8 refers to the subject of estrangement, and para. 9 reads:

"In assessing a soldier's income in order to fix the amount of a maintenance order it would be proper to take into account the following items."

Nobody can take exception to that wording. The first item is the soldier's pay, which is stated at the lowest rate; the next is the amount of the married allowance which would be payable if normal domestic relations existed between the parties, which is obviously a matter properly to be taken into account; and, thirdly, is the fact that in addition to receiving pay a soldier is normally clothed, fed and lodged at the public expense, or else receives a cash allowance in lieu in special cases. There is a note to that item:

"It is impossible, however, to ascribe an accurate cash value to the food, clothing and lodging provided, and it would, therefore, be for the court to decide the value to be placed on issue in kind in each particular case."

I think it is impossible to take exception to that as a statement of the general principles. It happens to coincide, in effect, with something I am reported as having said in this court ([1943] 2 All E.R. 476) in *Collins v. Collins* (1), in connection with a maintenance order made against an officer in the forces which PEARCE, J., tells me is constantly followed as a matter of practice by the registrars in similar cases. Paragraph 10, which has been criticised, reads:

"From the particulars given in appendix (A) the court should be able to ascertain in relation to any particular member of the forces the minimum amount which would normally be received by the wife by way of allotments and allowance if the parties were not estranged from each other."

That is perfectly clear and accurate, and the figures in this case are the qualifying allotment of the sum of £1 8s., which attracts the marriage allowance of £2 9s. The words "minimum amount" are used because there is nothing in these schedules to prevent a man from making a voluntary allotment in addition to the compulsory qualifying allotment. But the sentence then continues in these words:

"In the absence of private income of either the husband or the wife the court *should* take the figure so arrived at as a general guide to a minimum amount for the maintenance order."

I am bound to say that I think that that sentence is subject to the criticism that it appears to be an attempt by a government department to dictate to a court how it should decide the question of the amount of a maintenance order, and I deprecate any such attempt. Obviously, a slight modification of the words would meet that difficulty. It is a difficulty which confronts judges every day of the week in addressing juries on matters which are peculiarly within the province of the jury and not of the judge, and I do not think that it is necessary for us to substitute any particular formula for that which has here been adopted. But, as it happens, if it is to this particular paragraph, as it obviously is, that the learned chairman is referring in the statement of the reasons, the decision is not in accordance with the advice, because the advice that the court should take the figure so arrived at as a general guide to the minimum amount for the maintenance order is qualified by the statement that this is "in the absence of private income of either the husband or the wife", and it is clear that the wife in the present case has a gross income of £6 10s. a week. Be it said at once that that sum has never been analysed so as to show what spending money she really has out of it, or anything of that sort, but that she has a private income by her own exertions of £6 10s. a week was common ground.

I should like to make another observation on this circular. Paragraph 11 reads:

"Where either the husband or the wife has other sources of income these should be taken into account in fixing the amount to be paid under a maintenance order. There will, no doubt, be cases in which a wife is in employment and may be earning a considerable wage. In any case of this kind, however, allowance should be made for the value of the issues in kind received by the soldier in order to maintain the proper balance between the respective incomes of the parties. Regard should also be had to any allowance received by the wife under the provisions of the Family Allowances Act, 1945."

As a direction that all sources of income should be taken into account in making the assessment, I have nothing to say by way of criticism of that, but if it is intended to convey, as might be thought from a literal reading of the paragraph, that it is only in cases where the wife has a separate income, either by her own earnings or otherwise, that the advantages to the husband of what are called the "issues in kind" should be taken into account, I should differ, because in any event, in my opinion, the fact that in addition to his pay the husband receives his food, his clothing (or some of his clothing, at any rate), and his quarters free, is a matter to be taken into account, if for no other reason because, putting it generally, it leaves his pay more or less without deduction for his own spending purposes. I am not intending that to be taken literally, because one knows that there are certain necessary expenses—for extra messing, games, and the like—which, no doubt, also ought to be taken into account in assessing his receipt of pay in cash, and other benefits in kind. These calculations should always be made in assessing the husband's means, and not only in cases of which it can be said that they are necessary to counter-balance some private income of the wife's.

It seems to me that there is only one conclusion to which this court can come, viz., that the justices have erred by purporting to follow the advice given in a circular, which is not in itself wholly accurate, and having, in fact, misunderstood or misapplied that advice. That, as I have already indicated, plainly involves the result that they have misdirected themselves, and, therefore, although this court does not interfere with mere questions of amount, it seems to me that this is clearly a case in which there is an error in principle, and the matter must be sent back for further consideration.

PEARCE, J.: I agree.

Order accordingly.

Solicitors: *Frank Taylor, Nightingale & Baker*, Putney (for the husband);
Watson, Sons & Room (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

OAKLAND METAL CO., LTD. v. D. BENAIM & CO., LTD.

[QUEEN'S BENCH DIVISION (Parker, J.), July 2, 1953.]

Award—Validity—Arbitrator not qualified to act—Put forward by party seeking to have award declared invalid—Estoppel.

By a contract dated Dec. 6, 1951, buyers agreed to buy from sellers a quantity of zinc ingots. One of the clauses in the contract provided that any dispute under the contract should be settled by arbitration in accordance with the rules and regulations of the London Metal Exchange or the National Association of Non-ferrous Scrap Metal Merchants. In January, 1952, the goods were delivered, but the buyers refused to accept them on the ground that they were not in accordance with the contract specification. The sellers claimed arbitration and eventually arbitrators were appointed, the sellers' arbitrator being qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants and the buyers' arbitrator under the rules of the London Metal Exchange. The arbitration was conducted under the rules of the National Association, and an award was made in favour of the sellers. In an action by the buyers for a declaration that the award was a nullity,

HELD: the buyers had acted throughout as if their arbitrator was qualified to act under the rules of the National Association, and, therefore, it was not open to them to contend after the award had been made that he had not the necessary qualifications, and the award was valid.

Dicta of PICKFORD, J., in *Jungheim, Hopkins & Co. v. Foukelmann* ([1909] 2 K.B. 957), applied.

AS TO APPOINTMENT OF ARBITRATORS, see HALSBURY, Hailsham Edn., Vol. 1, p. 644, para. 1093; and FOR CASES, see DIGEST, Vol. 2, pp. 399-401, Nos. 578-586.

Case referred to:

(1) *Jungheim, Hopkins & Co. v. Foukelmann*, [1909] 2 K.B. 948; 78 L.J.K.B. 1132; 101 L.T. 398; 2 Digest 401, 584.

ACTION for a declaration that an arbitrators' award be declared a nullity.

By a contract dated Dec. 6, 1951, the plaintiffs, the Oakland Metal Co., Ltd., metal alloy manufacturers and refiners, agreed to buy, and the defendants, D. Benaim & Co., a firm in Gibraltar, agreed to sell, twenty thousand kilos of zinc ingots of a specification demanding ninety-eight per cent. or more to be zinc, at the price of £280 per metric ton c.i.f. Rotterdam. Eighty per cent. of the value of the goods was to be paid on presentation of documents in London, and the balance was to be paid after verification of weight and quality at destination. There was an arbitration clause providing that any dispute arising under the contract was to be settled in accordance with the rules and regulations of the London Metal Exchange or the National Association of Non-ferrous Scrap Metal Merchants. In January, 1952, the sellers shipped 1,518 zinc ingots to Rotterdam and eighty per cent. of their value was paid by the buyers. On arrival at Rotterdam samples were taken and assayed and the buyers refused to accept the goods on the ground that they did not correspond with the contract specification, in particular, because the amount of zinc in the ingots was less than it should have been. A further analysis, made at the sellers' request, confirmed the previous one. On June 10, 1952, the sellers wrote suggesting that the whole question be submitted to arbitration, but the buyers refused

A to agree to this, claiming the return of the money they had paid to the sellers. On Sept. 4, 1952, the sellers demanded payment of a balance on general account, including the outstanding twenty per cent. of the price of the ingots shipped to Rotterdam. On Nov. 13, 1952, unknown to the buyers, the sellers wrote to the National Association of Non-ferrous Scrap Metal Merchants to obtain a copy of their panel of arbitrators. On Nov. 25, 1952, the sellers wrote to the buyers informing them that the partnership of D. Benaim & Co. had been taken over by a company, D. Benaim & Co., Ltd., to which the buyers replied, on Dec. 10, 1952, that they noted the establishment of the company. Thereafter, the buyers wrote to, and dealt with, the company. On Nov. 26, 1952, the buyers said they would agree to go to arbitration according to the rules of the London Metal Exchange. On Dec. 19, 1952, the sellers wrote to the buyers that they had appointed an arbitrator under the rules of the National Association of Non-ferrous Scrap Metal Merchants, and on Dec. 24, 1952, the buyers replied that they had also appointed an arbitrator. In fact, their arbitrator was only qualified to act under the rules of the London Metal Exchange and not under the rules of the National Association of Non-ferrous Scrap Metal Merchants. The parties made written submissions to the arbitrators, who, on Feb. 16, 1953, made an award under the rules of the National Association of Non-ferrous Scrap Metal Merchants in favour of the sellers.

C The buyers now sought a declaration that the arbitrators' award was a nullity on the grounds (i) that they had not agreed to arbitration under the rules of the National Association of Non-ferrous Scrap Metal Merchants, and that, therefore, the award was not binding on them, (ii) that they had not agreed to arbitrate with the company, but with the partnership, (iii) that, as their arbitrator was not qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants, the arbitrators had no jurisdiction to make an award, and, therefore, the award was a nullity, and (iv) that the award made was out of time.

D *J. F. Donaldson* for the buyers.

E *Widgery* for the sellers.

F **PARKER, J.**, stated the facts, found (i) that the sellers were entitled to think that there was an agreement to arbitrate under the rules of the National Association of Non-ferrous Scrap Metal Merchants, and (ii) that, by their conduct, the buyers had caused a novation of the original contract between themselves and the partnership, and continued: The third point is, to my mind, the most interesting one. Mr. Brenner [the buyers' arbitrator] was not qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants, though he was qualified to act under the rules of the London Metal Exchange, and the buyers seek to say that, as he, in fact, was not qualified, he and his co-arbitrator, Mr. Lazarus (who was qualified), had no jurisdiction to make this award and, accordingly, that it is a nullity. This is a matter, G of course, which goes to jurisdiction and one which the courts will look at very closely, but, if a man puts forward an arbitrator, in effect telling the other side: "Here is a man whom we appoint who is qualified to act on our behalf" and the matter proceeds to award, I do not see why, as a matter of principle, that person is not estopped from setting up the non-qualification of his arbitrator.

H The matter is, apparently, devoid of authority except for dicta in *Jungheim, Hopkins & Co. v. Foukelmann* (1), where both the arbitrators concerned had not got the necessary qualifications. They should have been principals engaged in the corn trade in one capacity or another and also members of the London Corn Exchange, the Baltic, or the London Corn Trade Association, and they failed in those qualifications. The plaintiffs succeeded before **PICKFORD, J.**, in claiming a declaration that the award was null and void because there was no jurisdiction, and they did that despite the fact that

the defendants claimed that they were entitled to succeed on the basis of estoppel. PICKFORD, J., with regard to this point, said this ([1909] 2 K.B. 957):

"Inasmuch as the plaintiffs had no knowledge of the want of qualification of the arbitrators there has been no waiver here."

That is dealing with waiver. Then he goes on to estoppel (*ibid.*):

"With regard to estoppel, it is said that by going on with the arbitration the plaintiffs represented that the qualification of the arbitrators was in order, and that their appointment was valid and the proceedings regular, and that they thereby induced the defendant to go on with the arbitration and to incur expense. I think that, so far as their own appointed arbitrator is concerned, that may well be so. If they choose, without proper inquiry, to appoint a person as arbitrator who has not the proper qualification, thereby putting him forward as properly qualified, and attend the proceedings before him, and thus induce the other party to go on, most probably they cannot afterwards be heard to say that the arbitration is invalid as being before an unqualified arbitrator. But I do not see how that reasoning can apply to the qualification of the arbitrator appointed by the other party."

It is true that those remarks were quite unnecessary for the decision in that case, but I have no hesitation in adopting them in the present matter, for I entirely agree with PICKFORD, J.'s reasoning. The buyers put forward Mr. Brenner's name in circumstances in which any reasonable person would accept him as an arbitrator put forward as qualified to act under the rules of the National Association of Non-ferrous Scrap Metal Merchants, and thereafter, by proceeding with the arbitration and putting forward their case, they represented, and continued to represent, that Mr. Brenner was so qualified. In those circumstances, I do not think that they can thereafter be heard to say that he did not have the necessary qualifications.

[HIS LORDSHIP extended the time for making the award by one month, under the Arbitration Act, 1950, s. 13 (2), and concluded:] In these circumstances, it seems to me that this claim fails and there must be judgment for the sellers.

Judgment for the sellers.

Solicitors: *Thomas Cooper & Co.* (for the buyers); *William A. Crump & Son*, agents for *Isola & Isola*, Gibraltar (for the sellers).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

R. v. NAILSWORTH LICENSING JUSTICES. *Ex parte* BIRD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 15, 1953.]

Licensing—Justices—Bias—Application for off-licence—Petition in favour of licence signed by justice—Objection taken after decision announced.

At the hearing before a licensing committee of an application for an off-licence, a petition in favour of the licence, signed by members of the local community, was tendered in support of the application. Objection as to its admissibility was made by those opposing the application through the secretary of the licensed victuallers' association, but the justices overruled the objection. The petition was not read out in court, nor was it handed to the justices for their inspection. While the justices were in retirement, considering their decision, it was observed that one of them had previously signed the petition. The justices returned into court and announced that the licence was granted. Objection was then made that a justice who had signed the petition had adjudicated on the matter which was the subject of the petition, but the justices declined to alter their decision. On a motion for an order of certiorari to quash the justices' order on the ground of bias and that in the circumstances justice was not seen to have been done,

HELD: (i) although it was undesirable that a justice who had signed a petition should sit and adjudicate on the subject-matter of the petition, to justify the setting aside of a decision of justices there must be something in the nature of real bias; merely that a justice might be thought to have formed some opinion on a licensing matter beforehand was not a ground on which the decision of the committee could be upset; and, therefore, the order for certiorari would not go.

A (ii) the objection could, and should, have been made before the decision of the justices had been announced, and on that ground also the court, in its discretion, would refuse the application.

AS TO THE DISQUALIFICATION OF MAGISTRATES BY BIAS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 538-542, paras. 955-958; and FOR CASES, see B DIGEST, Vol. 33, pp. 292-294, Nos. 83-97, and Digest Supps.

Cases referred to:

(1) *R. v. Taylor, etc., JJ. & Laidler. Ex p. Vogwill*, (1898), 14 T.L.R. 185; 42 Sol. Jo. 235; 33 Digest 293, 89.

(2) *R. v. Caernarvon Licensing JJ. Ex p. Benson*, (1948), 113 J.P. 23; 93 Sol. Jo. 119; 2nd Digest Supp.

C MOTION for an order of certiorari to bring up and quash a decision of the licensing committee of the Nailsworth division of Gloucestershire granting to one Francis Adlington Stokes, a director of Joseph Burton & Sons, Ltd., a beer off-licence in respect of Price's Stores at Nailsworth. The application was opposed by the applicant for certiorari, Harold Bird, a licensee and the secretary of the Stroud and District Licensed Victuallers' Association and Protection D Society.

The committee was composed of three justices, including one Alice Waine. At the hearing of the application a petition in favour of the licence was produced by the manager of Price's Stores, and the solicitor for the applicant objected that it was not admissible in evidence. The objection was overruled, but the petition was not read out to the court nor handed up to the justices for their E inspection. After the justices had retired to consider their decision it was observed that Alice Waine had signed the petition in favour of the licence. The justices returned and announced that the licence was granted. The solicitor for the applicant thereupon objected that Alice Waine had both signed the petition and sat as a member of the committee. The two other justices then retired and on their return stated that the committee's decision had been given F and could not be changed.

On Apr. 14, 1953, the applicant gave notice of the present motion for an order of certiorari to quash the grant of the licence on the ground that an adjudicating member of the licensing committee was biased in that she had signed the petition which had been put in as evidence, so that justice was not seen to be done. The said Alice Waine stated in her affidavit that on the day before the proceedings before the licensing committee she was requested to take the place on the bench of other justices who were unable to attend the court next day; that she was not informed that any licensing application was due to be heard and she was not given details of the court's list for that day; that, until the objection was made, she did not remember that she had signed the petition which she had signed some weeks before the date of the hearing when she was shopping in Price's H Stores; that she had not told the other two justices that she had signed it; that she had never, at any time, any interest in granting or refusing the application, but she knew that Price's Stores bore a good reputation and was convinced that the licence applied for would be desirable for the benefit of the neighbourhood, and that the applicant for the licence had made out a need for such a licence which would enable beer to be delivered to persons living in country districts in their own homes, whereas otherwise it might be impossible or inconvenient for them to visit licensed premises for the purpose of buying beer.

Fearnley-Whittingstall, Q.C., and *E. B. C. Clifford* for the applicant for certiorari.

Gage for the justices.

LORD GODDARD, C.J., stated the facts and continued: It is, of course, undesirable that a justice should sit and adjudicate on a matter in favour of which he has previously signed a petition. No one, however, suggests that Mrs. Waine was conscious about this matter when she came to the court, and I am not attaching any blame to her. She was asked in an emergency to sit on the committee, but it is said that justice was not seen to be done because the parties found out, while the justices were out of court in their own room, that she had signed this petition. It is obvious from the affidavit of the acting clerk to the justices, who did not happen to be the regular clerk of the court, that, while the justices had retired, a member of the licensed victuallers' association, which was opposing this application, called their solicitor's attention to the fact that the name of Mrs. Waine was on the petition and that she had been sitting. The solicitor did not make any objection then. The justices were out of the court, and, if he had wanted to make an objection, I am satisfied from the clerk's affidavit that he could have said: "We are going to object to Mrs. Waine. We find she signed this petition". He did not make an objection either then or when the justices came back and before they announced their decision. I think it is clear that he let the matter go on, saying to himself: "Here we have an opportunity of getting this order quashed if they find in favour of the application, and, of course, if they do not find in favour of the application, well and good". I think that would be a complete answer to the present application, for certiorari is a discretionary remedy where the justices have acted within their jurisdiction.

But the more important point is whether or not we are bound to quash this order on the ground of bias simply because Mrs. Waine had signed this petition. I do not in the least want to depart from what my predecessors have said on the subject because it is most important that justice should be seen to be done. Objection cannot be taken to everything which might raise a suspicion in somebody's mind—as *DAY, J.*, said in *R. v. Taylor, etc., JJ. & Laidler. Ex p. Vogwill* (1) (14 T.L.R. 185): "anything at any time which could make fools suspect". It is not something which raises doubt in somebody's mind that is enough to cause an order or a judgment of justices to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject-matter before the court which he does not disclose, has always been held to be enough to upset the decision of the court, but merely that a justice may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so. Licensing matters are left by Parliament to justices for the very best of reasons—that justices have local knowledge—and it is impossible to suppose that any justice who sits on a licensing committee knowing that there is an application for a licence or opposition to the renewal of a licence has not got his own view as to the grant or refusal of the licence. The anomaly has often been pointed out that whereas a person interested in a brewery may not sit as a licensing justice, a person who is a very active teetotaler may do so, but it cannot be said, if an application is refused, that the justice necessarily acted improperly because he happened to be a total abstainer. In all these cases it must be a question of degree.

Our attention has been called to *R. v. Caernarvon Licensing JJ. Ex p. Benson* (2), in which the court, consisting of myself and *HILBERY* and *BIRKETT, JJ.*, granted an order of certiorari to set aside a refusal of justices. In that case one of the justices was a deacon of a chapel which had called a meeting for the express purpose of considering whether the licence should be opposed, and although the justice did not actually vote at the meeting, he took part in it. In that case we thought that a justice who had practically

made himself a party to the body which was going to oppose the licence should not sit on the bench. In the present case, on the other hand, a justice at some time—it is not clear when—when entering a grocer's shop signed a petition which indicated that she thought an off-licence would be justified. We do not think that in those circumstances we ought to say that she was so biased that she was unfit to sit on the bench. She was perfectly entitled to tell anybody: "I think Mr. Jones might very well have a licence", or "I think it would be a convenience to the neighbourhood if there was a licence here".

Having carefully considered the affidavits, we refuse the order on two grounds—(i) because we do not think it was established that there was any real bias on the part of this justice or that there was anything done which would make it appear improper, and not merely undesirable, for her to sit (and we have no reason to suppose that she would have signed this petition if she had known she was going to sit); (ii) because we think there was ample opportunity for any objection to have been made before the decision was given. For those reasons, we refuse the application.

PARKER, J.: I agree.

DONOVAN, J.: I also agree.

Application refused.

Solicitors: *Speechly, Mumford & Craig*, agents for *Little & Bloxam*, Stroud (for the applicant); *Gustavus Thompson & Sons*, agents for *Scott & Fowler*, Gloucester (for the justices).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re LORD BROUGHAM AND VAUX'S SETTLED ESTATES.

[CHANCERY DIVISION (Vaisey, J.), July 2, 13, 1953.]

Settled Land—Repairs—Expenditure by tenant for life—Recoupment out of capital money—"Landlord"—Tenant for life bankrupt—Settled Land Act, 1925 (c. 18), s. 73 (1) (iv) (as amended by Agricultural Holdings Act, 1948 (c. 63), s. 96 (1))—Agricultural Holdings Act, 1948 (c. 63), s. 81 (1), sched. III, para. 23.

In 1932, by a deed of family arrangement, the tenant for life under a real settlement assigned his equitable life interest to the trustees of the settlement to be held on specified trusts. In 1948 the tenant for life directed the execution on agricultural land, which was subject to the settlement, and which had been leased to tenants, of certain works including (a) "improvements to Dutch barn, sheeting west end, erecting extra stanchions, repairs to gutters and drain-pipes, painting, etc.," and (b) "improvements of a general nature repairs to doors and gates, guttering and downpipes, painting all existing farm buildings, etc." In 1950 the tenant for life was adjudicated bankrupt. On an application by the tenant for life for an order that the trustees should meet the cost of the works out of capital moneys,

HELD: notwithstanding that he was not at the material time entitled to receive the rents and profits of the property, the tenant for life was a "landlord" within the Settled Land Act, 1925, s. 73 (1) (iv), as a person having the statutory powers; the words "other than repairs which the tenant is under an obligation to carry out" in the Agricultural Holdings Act, 1948, sched. III, para. 23, were not imported into the Settled Land Act, 1925, s. 73 (1), as being part of the description of the improvements mentioned in s. 81 (1) of the Act of 1948, and, accordingly, the repairs mentioned in para. 23 were incorporated into s. 73 (1) (iv) of the Act of 1925 without qualification; and, therefore, although the tenant of the relevant land was responsible for repairs, the works were properly authorised

by the tenant for life as improvements within s. 73 (1) of the Act of 1925 and the cost should be met out of capital moneys.

Re Northumberland (Duke) ([1950] 2 All E.R. 1181), applied.

AS TO APPLICATION OF CAPITAL MONEY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 704-714, paras. 985-991; and FOR CASES, see DIGEST, Vol. 40, pp. 748-753, Nos. 2778-2822.

Cases referred to:

(1) *Re Northumberland (Duke)*, [1950] 2 All E.R. 1181; [1951] Ch. 202; 30 Digest, Replacement, 319, 87.

(2) *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27.

ADJOURNED SUMMONS asking that the respondents, the present trustees of the settlement, be directed (by virtue of the provisions of the Settled Land Act, 1925, s. 84 to s. 87, the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, s. 81 (1)) to apply £3,273 17s. 7d. out of capital moneys arising under the Settled Land Act, 1925, and subject to the settlement in payment for certain works and improvements executed on the lands subject to the settlement between June and December, 1948, on the directions of the applicant, the Right Honourable Victor Henry Peter Baron Brougham and Vaux, as tenant for life or person having the powers of tenant for life.

By a settlement dated Apr. 16, 1931, made in contemplation of marriage (which was shortly thereafter solemnised) between the settlor, of the first part, his intended spouse, of the second part, and the original trustees, of the third part, estates in Westmorland, Cumberland and Somerset, to which the settlor was absolutely and beneficially entitled, were settled, subject to certain rent-charges, in trust for the settlor for life without impeachment of waste, with remainders over, and the original trustees were appointed to be trustees of the settlement for all the purposes of the Settled Land Acts.

By cl. 19 (1) of the settlement it was (inter alia) provided that capital money might be applied, subject (except as thereafter mentioned) to the regulations of the Settled Land Acts as to the application of capital money, (a) in payment either directly or by way of reimbursement to the tenant for life or his executors for the making or execution on or in connection with and for the benefit of the settled land of any of the following works or any works for any of the following purposes and any operations incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of those works or purposes, as well as for improvements authorised by the Settled Land Acts in like manner as if such works and operations were included in Part I of sched. III to the Act of 1925 that was to say: (i) The erection reconstruction enlargement or improvement of any stables coach-houses garages or other out-buildings used or to be used in connection with or for the purpose of any principal mansion house. (ii) The execution of structural or architectural improvements to any principal mansion house. (iii) Any new or additional or improved provision in any principal mansion house and the stables and out-buildings belonging thereto for hunting or in that or any other house or buildings for lighting draining or supplying water to the same. (iv) Any other works which a competent engineer or able practical surveyor nominated by the trustees should certify to be of permanent value and such as might reasonably be paid for out of capital and not out of income; (b) in payment to the tenant for life of any sum in respect of which he would, under the Agricultural Holdings Act, 1923, s. 20, be entitled to obtain from the Ministry of Agriculture and Fisheries or charge on any part of the settled land without the necessity of his first obtaining such a charge. By cl. 19 (2) it was provided that the trustees might, in any case in which they should in their absolute discretion think fit, dispense with any certificate as mentioned in s. 84 (2) (i) of the Act of 1925.

By a deed of family arrangement dated Mar. 22, 1932, the settlor conveyed and assigned to the trustees of the said settlement (inter alia) his equitable life estate in the settled lands and in the capital moneys subject to the settlement on the trusts therein declared concerning the same. By a subsidiary vesting deed dated Mar. 3, 1948, certain freehold property, known as Allington Grange and Battens Farm at Allington in Wiltshire, was conveyed to the tenant for life to be held on the same trusts as were declared in the settlement.

By an agreement dated June 2, 1948, Allington Grange and Battens Farm, Chippenham, were leased to Grazing Estates, Ltd., for one year certain commencing Mar. 1, 1948, and thereafter from year to year, the tenant for life being described in the lease as "the surety" and the landlords being the trustees of the subsidiary vesting deed.

Between June and December, 1948, considerable improvements, alterations, and other works to Allington Grange and Battens Farm were carried out by Wiltshire Farmers, Ltd., on the instructions of the tenant for life. The respondents, the trustees, declined to meet the costs, in particular of (a) improvements to Dutch barn, sheeting west end, erecting extra stanchions, repairs to gutters and drainpipes, painting, etc., and (b) improvements of a general nature, repairs to doors and gates, guttering and downpipes, painting all existing farm buildings, etc. In August, 1950, the tenant for life was adjudicated bankrupt.

Bathurst, Q.C., and *W. F. Waite* for the applicant, the tenant for life.

S. Pascoe Hayward, Q.C., and *D. A. Thomas* for the respondents, the trustees.

Cur. adv. vult.

July 13. **VAISEY, J.**, read the following judgment. The applicant in this summons is Lord Brougham and Vaux who is the tenant for life, or a person having the powers of a tenant for life, under the Settled Land Act, 1925, of certain settled lands in the county of Wilts. He asks that sums amounting in the aggregate to £3,273 17s. 7d. may be raised out of capital moneys of the settlement in payment for or reimbursement in respect of certain works and improvements carried out on the settled land between June and December, 1948. The respondents to the summons are the trustees of the settlement for the purposes of the said Act.

No serious question seems to arise as to the greater part of the said sum, which relates to matters which are improvements under the said Act, but there are two headings of expenditure as to which doubts are said to exist. They are (a) £231 0s. 11d. for "Improvements to Dutch barn, sheeting west end, erecting extra stanchions, repairs to gutters and drain-pipes, painting, etc.", and (b) £239 16s. 1d. for "Improvements of a general nature, repairs to doors and gates, guttering and downpipes, painting all existing farm buildings, etc." Some of the items thus briefly specified may well be improvements in the fullest sense, but it is equally clear that others are mere repairs. To distinguish between "improvements" and "repairs" in this case would appear to involve a difficult and expensive inquiry, but, in my judgment, these two sums of money may properly be allowed under the authority, so far as they are only for repairs, of *Re Duke of Northumberland* (1), as to which case I desire to say in the first place that I am glad that *HARMAN, J.*, in *Re Sutherland Settlement Trusts* (2), has pointed out an error for which I was there responsible.

Several points were taken by the respondents at the hearing, and it was suggested that the present applicant did not satisfy the description of "landlord" (as construed by me in the *Northumberland* case (1)) because he was not at the material time entitled to receive the rents and profits of the property. In my judgment, however, he is within the definition as a person having the statutory powers. It was also urged that the words "other than repairs which the tenant is under an obligation to carry out" in the Agricultural

Holdings Act, 1948, sched. III, para. 23, was part of the description of the improvement mentioned in s. 81 (1) of the same Act, and that, as here there was a tenant responsible for repairs, the paragraph was not available to the applicant. I do not think that this is the right view. The words in question appear to me (like the headings of the two parts of the same sched. III) not to be imported into the Settled Land Act, 1925, with the result that improvements which can be paid for out of capital moneys include "repairs to fixed equipment reasonably required for the proper farming of the [land]" without qualification. It is difficult to suppose that the Settled Land Act, 1925, s. 73 (1) (iv), was not intended to import into the Act the additional improvements, having regard to their nature as improvements, and disregarding every reference in any Agricultural Holdings Act to the particular relationship between agricultural landlord and agricultural tenant. Of course, the two kinds of Act, having different subject-matters, are difficult to fit together, but the form of the Agricultural Holdings Act, 1948, s. 81 (1), seems to me fully to justify my treating the question broadly.

I will allow the application as regards the whole amount in question. The capital moneys must also provide the costs of the application on both sides, and such costs must be taxed as between solicitor and client.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. G. Smith & Son*, Melksham (for the applicant); *Tylee & Co* (for the respondents).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

WOODS v. W. H. RHODES AND SON, LTD. AND OTHERS.

[COURT OF APPEAL (Lord Goddard, C.J., Birkett and Hodson, L.J.J.), July 3, 10, 1953.]

Dock—Safety provisions—Working place and approach—Maintenance—Injury to workman through article placed on floor—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 1.

Court of Appeal—Indemnity—Judgment against two defendants—Order against one defendant to indemnify other defendant—Successful appeal by first defendant against judgment only—Order for indemnity nullified.

The deceased, a dock labourer, was employed by a firm of stevedores to move goods from a dock shed to the quayside. The docks were under the general management and control of the defendant board for the purposes of the Docks Regulations, 1934, Part I. Between the shed and the quayside was a sliding door which opened by being pushed along the outer wall of the shed. On Dec. 18, 1948, men employed by another firm of stevedores reared a large wooden platform in the shed against the wall with the sliding door, and on Dec. 29, 1948, when the deceased attempted to open the door the platform fell on him and he was fatally injured. The widow of the deceased claimed damages against his employers and the defendant board in respect of his death, the claim against the board being based on a breach of their statutory duty under reg. 1 of the regulations of 1934. Judgment was entered against both defendants and, *inter alia*, the board were ordered to indemnify the employers against fifty per cent. of their liability thereunder. The board appealed, but their notice of appeal merely asked that the judgment against them should be set aside and it made no reference to the order of indemnity.

HELD: (i) the obligation, imposed by reg. 1 of the regulations of 1934, to maintain the approaches and working places in a dock with due regard to the safety of the persons employed was directed to the structure of the approaches and working places, or, if there was no structure, to their

surface and condition apart from chattels which might be placed on them from time to time; the use of the word "maintained", in relation to the working place, was confined, in its application, to the actual working place and did not extend to any article which might be brought on the floor of the working place and left there for a few moments or a longer space of time; and, therefore, the board were not in breach of the regulation.

A *Latimer v. A.E.C., Ltd.* (ante, p. 449), applied.

(ii) as the judgment against the board in favour of the plaintiff was set aside, the board were under no liability to the plaintiff, the foundation of the order of indemnity went, and that order became a nullity, and, therefore, the notice of appeal was sufficient notwithstanding that it contained no reference to the order of indemnity.

B *Court of Appeal—Ground of appeal—Action for negligence and breach of statutory duty—Allegation of negligence in writ, but no such allegation in statement of claim or at hearing—Judgment based on breach of statutory duty—Right to raise issue of negligence on appeal.*

The widow of a dock labourer, who was fatally injured in an accident at the dock, brought an action for damages against his employers for negligence and against the dock board for breach of statutory duty.

C Although the writ contained an allegation of negligence against the board, in the statement of claim the allegation against the board was confined to breach of statutory duty. The employers by their pleadings made no allegation against the board, and at the hearing of the action the plaintiff made no allegation of negligence against the board. The plaintiff obtained judgment against both defendants. The judgment against the board dealt with breach of statutory duty only. On an appeal by the board to the Court of Appeal, the employers contended that the board were liable at common law as well as for breach of statutory duty.

D **E** HELD: the appeal must be confined to the question which was pleaded in the statement of claim and dealt with at the trial and which the judge decided, viz., the liability of the board for breach of statutory duty.

FOR THE DOCKS REGULATIONS, 1934, reg. 1, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 164.

Cases referred to:

- F** (1) *Latimer v. A.E.C., Ltd.*, [1953] 2 All E.R. 449.
 (2) *Galashiels Gas Co., Ltd. v. O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.
 (3) *Callaghan v. Fred Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525; [1944] 1 K.B. 560; 113 L.J.K.B. 381; 170 L.T. 368; 2nd Digest Supp.

G APPEAL by the fifth defendants, Mersey Docks and Harbour Board (referred to hereinafter as "the board") from an order of PEARSON, J., made at the Liverpool Summer Assizes, and dated June 12, 1952. The plaintiff, who was the widow and administratrix of Thomas Woods, a dock labourer, claimed damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband.

The deceased was employed by the first defendants, W. H. Rhodes and Son, Ltd., a firm of stevedores (referred to hereinafter as "the employers"), at No. 3 berth, Victoria Wharf, Birkenhead, his job being to handle and move goods from the shed to the quayside for them to be loaded in ships. Between the shed and the quayside was a sliding door which opened by being pushed along the outer wall of the shed. To begin their work the men on the night shift had to open the door as it was closed when the day shift ended. On Dec. 18, 1948, the fourth defendants, Thomas Swift and Co., Ltd., another firm of stevedores (referred to hereinafter as "the stevedores"), brought their gear into No. 3 berth for stowage. The gear included a large wooden platform, called

a "save-all", which was eighteen feet six inches long and nine feet ten inches wide. The stevedores reared the "save-all" in a corner of the shed, against the wall with the sliding door. On Dec. 29, 1948, the deceased came on duty on the night shift, and, as he and two other men were attempting to open the sliding door, the "save-all" fell on him and he suffered severe injuries from which he died.

On June 24, 1949, the plaintiff commenced an action against the first defendants (the employers), the second defendants, T. and J. Brocklebank, Ltd., shipowners, and the third defendants, T. and J. Harrison, the managers of a ship, who were alleged to be the occupiers of the shed at the time of the accident. By an order, dated Dec. 21, 1949, the plaintiff obtained leave to add the stevedores as fourth defendants and the board as fifth defendants. On Apr. 9, 1951, the action against the shipowners and against the stevedores was discontinued.

By her statement of claim the plaintiff alleged that the board were at all material times the persons having the general management and control of the dock for the purposes of Part I of the Docks Regulations, 1934, and that they were in breach of their statutory duty under reg. 1 of the regulations. Her claims against the defendants other than the board were based on negligence at common law. PEARSON, J., found that the "save-all" was left in a dangerous position and that the risk of it causing injury should have been appreciated by anyone looking at it with the safety of the men in mind. He gave judgment for the plaintiff against the employers and the board, and for the third defendants against the plaintiff. He assessed the damages at £2,808, ordered the employers to indemnify the board, and the board to indemnify the employers, against fifty per cent. of the liability, and, inter alia, gave liberty to the employers to sign judgment against the board for fifty per cent. of the amount of the judgment debt and costs in the event of their paying those sums to the plaintiff.

The employers and the board appealed from the judgment of PEARSON, J. By their notice of appeal the board asked that the judgment against them should be set aside and that judgment should be entered for them with costs, but they did not refer to the order for indemnity. On May 13, 1953, the Court of Appeal dismissed the appeal by the employers. The board's appeal was allowed to stand over until the decision of the House of Lords in *Latimer v. A.E.C., Ltd.* (1) was known.

Nelson, Q.C., and Crichton, Q.C., for the Mersey Docks and Harbour Board.
Sir Noel Goldie, Q.C., and J. G. Burrell for the plaintiff.

Sir Frank Soskice, Q.C., and Trotter for the employers, W. H. Rhodes and Son, Ltd.
Cur. adv. vult.

July 10. LORD GODDARD, C.J.: I will ask BIRKETT, L.J., to read the first judgment.

BIRKETT, L.J., read a judgment in which, after stating the facts, he said: The learned judge found that the board were in breach of their statutory duty as the persons having the general management and control of the dock, wharf, or quay where the deceased met with his death, and it is against that finding that the present appeal is brought. It is important to observe that the plaintiff in her statement of claim makes no allegation against the board that they were liable at common law, although in the writ she did so. The allegations were confined to the breach of statutory duty, and the judgment of the learned judge dealt with breach of statutory duty only. Counsel for the employers made no allegations against the board in the pleadings, but, when invited by the court to make any submissions on the case which counsel for the board had presented, he submitted that the board were liable at common law as well as on the ground found by the learned judge. In all the circumstances, I am of opinion that the appeal must be confined to the question which

was pleaded and which the judge decided, viz., the breach of statutory duty, and I express no opinion on the question of the board's liability, if any, at common law.

Paragraph 10 and para. 11 of the statement of claim were as follows:

A "10. At all material times [the board] were the persons having the general management and control of the said dock wharf or quay (including the said dock shed erected thereon) for the purposes of Part I of the Docks Regulations, 1934. 11. The vicinity of the said door was a working place on shore where the process referred to in para. 2 was carried on and/or the said door was a regular approach over the said quay which persons employed (including the deceased) in the said processes had to use for going to or from a working place and [the board] were in breach of their statutory duty under reg. 1 of the said regulations. Particulars. The said working place or approach was not maintained with due or any regard to the safety of the deceased in that the said save-all was too close to the said door and/or was unlashed and/or was leaning insecurely and/or was too close against the said wall and/or was liable to fall upon him."

B Paragraph 6 of the board's defence was:

C "These defendants admit para. 10 of the statement of claim but deny that they were in breach of statutory duty as alleged or at all. Each of the allegations of breach of statutory duty contained in the statement of claim is denied as fully as if the same were hereinafter set out seriatim and separately traversed."

D In the Docks Regulations, 1934, the following paragraphs appear under the heading "Duties":

E "(a) It shall be the duty of the person having the general management and control of a dock, wharf, or quay, to comply with Part I of these regulations; provided that if any other person has the exclusive right to occupation of any part of the dock, wharf, or quay, and has the general management and control of such part, the duty in respect of that part shall devolve upon that other person . . . (d) It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV of these regulations."

F By reg. 1, which is in Part I of the regulations:

"Every regular approach over a dock, wharf or quay which persons employed have to use for going to or from a working place at which the processes are carried on and every such working place on shore shall be maintained with due regard to the safety of the persons employed."

G The all-important words, therefore, so far as this appeal is concerned, are:

" . . . every such working place on shore shall be maintained with due regard to the safety of the persons employed."

H It was conceded that the board had the general management and control of the dock, and that the place where the fatal accident took place was a "working place on shore", but the board submitted that they had maintained the working place with due regard to the safety of the persons employed.

In *Latimer v. A.E.C., Ltd.* (1), a recent decision of the House of Lords, the meaning to be attached to the word "maintained" in the circumstances of that case was discussed. A film of oil had been deposited by flood water on the floor of the respondents' factory. At a place where sawdust had not yet been applied to it the appellant, without realising the danger, tried to get a heavy barrel on to a trolley. He was standing on one foot and using considerable force with the other when he slipped and received severe injuries. He alleged

that the respondents were guilty of a breach of the Factories Act, 1937, s. 25 (1), which provides:

"All floors . . . shall be of sound construction and properly maintained."

The word "maintained" is defined in s. 152 (1) of the Act in these words:

" 'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

LORD REID said (ante, p. 454):

"The appellant argues that a floor cannot be in an efficient state if people are liable to slip on it, but, again, I think one must ask whether the danger comes from the floor or from something which happens to be on it. It would be going a long way to say that a floor, perfectly good in itself, ceases to be in an efficient state whenever there is something on it which gives rise to danger. If there is any ambiguity, one is entitled to look at the consequences of adopting each of the possible interpretations. It is one thing to say that an employer is absolutely responsible for the condition of his floors, even if the unsafe condition has come about through no fault of his or his servants, and could not have been remedied before the accident, but I would expect clearer words if it were intended that he should also be held responsible if something dangerous got on his floor and made it for the time being 'inefficient' through some inevitable accident or the fault of some other person not his servant. But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state: it is that the floor shall be maintained in an efficient state. 'Maintained' is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor 'properly' as required by s. 25 (1) and maintaining it 'in an efficient state' as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it."

In the present case PEARSON, J., held that the board were liable because they failed to maintain the working place with due regard to the safety of the persons employed, and that their default lay in not removing the "save-all" from the place where it was standing, it being a source of potential danger to persons employed. I cannot think that the board's duty was so extensive. Their duty was to maintain the working place with due regard to the safety of the persons employed. For example, if the working place is within a building, the board must see that the floor is not liable to collapse, or that the roof is not a source of danger. The whole structure of the working place must be sound, and due regard must be had for the safety of persons employed. If the working place is not in a building, then that working place must be maintained with due regard for the safety of persons employed, and this would depend on many factors affecting the particular place. But, in my opinion, the use of the word "maintained" in reg. 1 of the regulations of 1934 does not extend to articles on the floor of the working place which may be there for a few moments or for a longer space of time. This view is confirmed to some extent and supported by the speeches in *Latimer v. A.E.C., Ltd.* (1). I will quote a passage from the speech of LORD PORTER (ante, p. 452):

"It has still, however, to be determined what it is which has to be in an efficient state. Does it include the elimination of some matter which is temporarily superimposed on the floor, or is the requirement confined to the floor itself? To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation on the employer. Indeed, it was conceded that

it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation. Primarily, in my opinion, the section is aimed at some general condition of the gangway, e.g., a dangerously polished surface, or the like, or possibly some permanent fitment which makes it unsafe. But I cannot think the provision was meant to, or does, apply to a transient and exceptional condition. If it had been directed to such a state of affairs it would have been easy to say so. Indeed, in s. 34 (2) the kind of language appropriate to such an object is to be found where there is provision that 'all means of escape . . . shall be properly maintained and kept free from obstruction'."

A

B It is true that, in the present case, the learned judge placed a limited duty on the board when he said:

C "The obligation is far from being absolute. It is not an obligation to keep the working places safe; it is an obligation to maintain them 'with due regard to the safety of the persons employed'. The obligation has to be performed in respect of often busy and sometimes congested docks, covering in this case a very large area, where numerous people are carrying on their own business for their own purposes. The board, having the general management and control of the docks, cannot be held responsible for the details of other persons' operations, or for the temporary unsafe condition of premises when such unsafe condition is created without the knowledge of the board by casual acts of negligence by other persons. In my opinion, the board have under this regulation an obligation to keep the approaches and working places free from dangerous chattels, but only to such extent as can reasonably be expected of persons having only the general management and control of the docks."

D

E But, in my opinion, the construction of the word "maintained" in the regulation is confined to the actual working place itself, and does not extend to any article that may be brought on the floor of the working place. I think, therefore, that the appeal should be allowed.

Counsel for the employers raised another point, viz., that the learned judge had ordered that the board

F "do indemnify the [employers] against fifty per centum of the liability of £2,808 of the [employers] under the plaintiff's judgment herein."

G The board's notice of appeal of Sept. 9, 1952, made no reference to this order, and merely asked that the judgment against them should be set aside, and that judgment should be entered for them with the costs of the action. Counsel for the employers argued that, even if the appeal of the board succeeded against the plaintiff and judgment was entered for them, nevertheless, because the notice of appeal had not asked for the order above recited to be quashed, he was entitled to hold to the indemnity. I am of opinion that this point fails. The order of the learned judge was based on his decision that the plaintiff was entitled to succeed against the employers and the board. If he had found the board free from blame, no such order could possibly have been made. When this court finds the board free from liability to the plaintiff and reverses H the learned judge's finding against them, it seems to me to follow that the order as to indemnity is no longer in force. The indemnity arose out of third-party proceedings brought by the board against the employers to which the employers were not required to plead, and in the order of June 12, 1952, the employers were ordered to indemnify the board against fifty per centum of the liability of £2,808, and the board were ordered to indemnify the employers in the like manner. In my opinion, the notice of appeal by the board was sufficient. It asked that the judgment for the plaintiff against them should

be set aside and judgment entered for them. In this the board have been successful, and they are under no liability to the plaintiff whatsoever. In my opinion, this is enough to make the order in question a nullity. If it were necessary formally to discharge that part of the order I should do so, but, in my opinion, once the board are made free from all liability to the plaintiff that part of the order ceases to have any effect.

HODSON, L.J., read a judgment in which, after stating the facts, he said: The board has appealed against so much of the judgment of the learned judge as directed judgment to be entered for the plaintiff for £2,808 with costs against the board, and has also appealed against part of his order for costs in favour of the plaintiff. By the amended statement of claim the plaintiff's claim against the board was confined to paras. 1, 2, 3, 6, 10, 11, 12, 13 and 14 thereof. Paragraphs 1, 2 and 3 deal with matters of inducement. Paragraph 6 reads:

"The sole cause of the matter complained of in para. 3 was the negligence and/or breach of statutory duty hereinafter appearing."

Paragraphs 7, 8 and 9 give particulars of the negligence of other defendants "hereinafter appearing" and make no reference to the board. [HIS LORDSHIP read para. 10, which was admitted by the board, and para. 11, and continued:] The allegation in para. 11 was denied by the board. Paragraphs 12, 13 and 14 give details of the nature of the plaintiff's claim.

I have summarised the pleadings in view of the way the hearing developed on appeal to this court. After counsel for the board and counsel for the plaintiff had presented their arguments, counsel for the employers addressed the court. His first contention was that, in view of the limited extent of the notice of appeal, that part of the learned judge's order which directed the board to indemnify the employers against fifty per cent. of the liability of £2,808 under the plaintiff's judgment and gave liberty to the employers to sign judgment against the board for fifty per cent. of the amount of the judgment debt and costs in the event of their paying the amount of the judgment debt and costs to the plaintiff must stand. He contended that, no application for leave to amend the notice of appeal having been made at any time, the board could not, as the record stood, resist this contention. I think that this contention fails since, if the judgment against the board in favour of the plaintiff is reversed, the whole foundation for the indemnity goes with it, notwithstanding that no separate notice of appeal has been given against the part of the order which gives liberty to the employers to sign judgment against the board in the event stated.

The second contention of counsel for the employers was directed to the liability of the board (a) at common law, and (b) under reg. 1 of the regulations of 1934. He pointed out that the employers had made no allegation against the board in their pleadings, but he was invited to address the court on the basis of the plaintiff's allegations against the board as contained in the statement of claim. The statement of claim contains no allegation against the board of negligence at common law. The negligence "hereinafter appearing", alleged in para. 6, is found in para. 7, para. 8, and para. 9, each of which contains express averments of negligence against defendants other than the board. Paragraph 10 and para. 11, in which allegations are made against the board, contain averments of breach of the Docks Regulations, 1934, only. Further, no allegation was made by the plaintiff at the trial to make a case of negligence at common law against the board. I think it is now too late to do so. Accordingly, I express no opinion whether or not, if such a case had been made on the pleadings and pursued at the trial, a judgment in favour of the plaintiff against the board on the ground of negligence at common law could have been sustained.

This leaves only the question of breach of regulations on which both counsel for the plaintiff and counsel for the employers supported the learned judge's judgment which was attacked by counsel for the board. Regulation 1 of Part I of the regulations of 1934 provides (inter alia):

A "Every regular approach over a dock, wharf or quay which persons employed have to use for going to or from a working place at which the processes are carried on and every such working place on shore shall be maintained with due regard to the safety of the persons employed."

B The controversy has centred around the meaning of the word "maintained". No definition of "maintained" is contained in the regulations (unlike in the Factories Act, 1937) and the word "maintained" has to be construed according to its context and the subject-matter of the regulations. The judge summarises his conclusion as follows:

C "In my opinion, the board have under this regulation an obligation to keep the approaches and working places free from dangerous chattels, but only to such extent as can reasonably be expected of persons having only the general management and control of the docks."

D This is, I think, an interpretation which the language of the regulation in its setting will not bear. That which is in the contemplation of the regulation appears to me to be the structure of the regular approaches and working places in docks, or, if there is no structure, their surface and condition apart from chattels which may be placed on or in them from time to time. I find a difficulty in construing the words "with due regard to the safety of the persons employed" as limiting the duty to an obligation to keep the regular approaches and working places free from dangerous chattels, but only to such an extent as can reasonably be expected of persons having only the general management and control of the docks. The learned judge was, I think, saying in effect that the question is one of degree, and, while he would not regard a piece of orange peel or a banana skin dropped on the dock as likely to give rise to a breach of the regulation, yet this "save-all", standing, as it did, for some days in a dangerous position, was in a different category. It seems to me that the provision is not directed at all to transient and exceptional matters like the deposit of chattels on the floor of a shed, nor does its language import the concept of degree. The working place is not to be looked at in an abstract sense, as counsel for the employers submitted, but rather in a concrete sense, which does not include the contents of that place.

F I think assistance is to be gained from *Latimer v. A.E.C., Ltd.* (1), a recent decision of the House of Lords on a kindred topic, viz., s. 25 (1) of the Factories Act, 1937, and the definition of "maintained" in s. 152 (1) of that Act. LORD REID said (ante, p. 454):

G "I do not think that maintaining a floor includes keeping dangerous things away from it."

H These observations seem to me to apply directly to the regulation now under consideration. As LORD REID pointed out (ibid.), different considerations apply when the maintenance of a machine in efficient working order is in question, as in *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (2). Similarly, other considerations have been applied in construing the provisions of the Factories Act, 1937, s. 26, under which an occupier of a factory is required to maintain safe means of access to every place at which any person has at any time to work: see, e.g., *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (3). I would, accordingly, allow the appeal of the board against the finding of the learned judge that they are in breach of reg. 1 of Part I of the Docks Regulations, 1934.

LORD GODDARD, C.J.: I agree with both judgments which have been delivered, and I do not think I can usefully add anything.

Appeal allowed.

Solicitors: *R. H. Bransbury*, Liverpool (for the board); *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff); *Herbert J. Davis, Berthen & Munro*, Liverpool (for the employers).

[Reported by *F. GUTTMAN, Esq., Barrister-at-Law.*]

A

FENWICK v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), June 8, 9, 10, July 20, 1953.]

Special Contribution—Relief—Income received representing more than income attributable to a full year if income accrued from day to day—“A full year’s income”—Discretion of commissioners in selecting relevant year—Finance Act, 1948 (c. 49), s. 61 (1).

B

A taxpayer was assessed to special contribution under the Finance Act, 1948, Part V, in respect of his aggregate investment income for 1947-48. He received part of such income by virtue of his holding of stock in a limited company which made up its accounts to Dec. 31 in each year and which paid to him dividends as follows:

C

Date declared	Date received (and date on which payable)	Description	Period in respect of which paid	Gross amount before deduction of income tax
A 4.7.1946	1.8.1946	3% interim	Calendar year 1946	£ s. d. 388 10 0
B 15.5.1947	31.5.1947	12% final	Calendar year 1946	1,554 0 0
C 24.7.1947	1.9.1947	3% interim	Calendar year 1947	388 10 0
D 18.3.1948	23.4.1948	7% second interim	Calendar year 1947	543 18 0
E 21.7.1948	1.9.1948	3% interim	Calendar year 1948	233 2 0
F 7.4.1949	13.4.1949	7% final	Calendar year 1948	543 18 0

D

E

F

The taxpayer claimed relief under s. 61 (1) of the Act of 1948 on the ground that the income so received by him in 1947-48 represented more than the income which would be attributable to a period of one full year if the income were to be deemed to accrue from day to day.

HELD: the words “a full year’s income” at the end of s. 61 (1) did not justify the reading into the latter part of that sub-section of any part of the wording of para. (b) thereof so as to entitle the taxpayer (by virtue of s. 61 (2)) to have the dividends treated as accruing from day to day during the period in respect of which they were payable; and, furthermore, on the true construction of s. 61 (1), the commissioners had a discretion to select a year the income in which was to be regarded as equivalent to a full year’s income, and it could not be said that in selecting the calendar year 1946 (as they had) the commissioners had exercised that discretion improperly.

G

H

FOR THE FINANCE ACT, 1948, s. 61, see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 858.

APPEAL by the taxpayer from an order of the Court of Appeal dated July 25, 1952, allowing an appeal by the Crown from an order of DONOVAN, J., dated

Mar. 7, 1952, who reversed a decision of the Special Commissioners of Income Tax.

A The taxpayer, being assessed to special contribution under the Finance Act, 1948, Part V, in respect (inter alia) of dividends arising from the ordinary stock of a limited company, claimed relief under s. 61 (1) of that Act, and contended that a process of day to day apportionment was contemplated as the means for arriving at the relief to be granted. The Special Commissioners rejected that contention, holding that the natural meaning of "a full year's income" at the end of s. 61 (1) was a full year's income in reality, and that, having regard to the circumstances, the most natural test was to consider the dividends in respect of the successive financial years of the company.

Cyril King, Q.C., and H. H. Monroe for the taxpayer.

B The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), Graham-Dixon, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.

The House took time for consideration.

July 20. The following opinions were read.

C LORD NORMAND: My Lords, this appeal arises out of an assessment made on the appellant, under Part V of the Finance Act, 1948, to special contribution in respect of his aggregate investment income for the year 1947-48. The matter in dispute is the construction and application of the provisions for relief in s. 61 of the Act.

D The special contribution was imposed by the Finance Act, 1948, as a tax for one year only, payable by individual taxpayers whose total income for 1947-48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250. The contribution was payable on or before Jan. 1, 1949. Total income was to be ascertained in the same manner as for the purposes of surtax. Investment income was defined as meaning income from any source other than a source of earned income. The contribution was assessable by the Special Commissioners to whom also an appeal lay. For the purposes of this case s. 61 is the important section and I, therefore, cite it in full:

F " (1) Where—(a) either before or after an assessment to contribution is made, but in any case before such an assessment has become final, application is made to the Special Commissioners for relief under this section, and (b) the Special Commissioners are satisfied as respects any assets that, by reason of the provisions of the Income Tax Acts which require that income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, the income from the assets represents more than the income which would be attributable to a period of one full year if the income were deemed to have accrued from day to day, the Special Commissioners shall in ascertaining total income and aggregate investment income for the purposes of this Part of this Act make such reduction, if any, as may be appropriate to secure that there shall be taken as representing the income from the assets an amount equivalent to a full year's income therefrom. (2) Sub-section (1) of s. 36 of the Finance Act, 1927 (which specifies the period over which income is deemed to have accrued from day to day) shall apply for the purposes of para. (b) of the last foregoing sub-section as it applies for the purposes of s. 34 of the said Act of 1927 (which makes in relation to surtax the like provision as sub-s. (1) of this section)."

H The appellant at all relevant times before Dec. 11, 1947, held £12,950 ordinary stock in a colliery company. His holding was reduced in December, 1947, in consequence of a reduction of the company's capital, but no evidence was laid before the commissioners to connect this reduction in any relevant way with the problem which arises in this appeal and I shall, therefore, make no

further reference to it. The company's accounts were made up to Dec. 31 in each year, and the appellant received dividends on the stock held by him, as shown conveniently in the following table:

	Date declared	Date received (and date on which payable)	Description	Period in respect of which paid	Gross amount before deduction of income tax			A
					£	s.	d.	
A	4.7.1946	1.8.1946	3% interim	Calendar year 1946	388	10	0	
B	15.5.1947	31.5.1947	12% final	Calendar year 1946	1,554	0	0	
C	24.7.1947	1.9.1947	3% interim	Calendar year 1947	388	10	0	B
D	18.3.1948	23.4.1948	7% second interim	Calendar year 1947	543	18	0	
E	21.7.1948	1.9.1948	3% interim	Calendar year 1948	233	2	0	
F	7.4.1949	13.4.1949	7% final	Calendar year 1948	543	18	0	

In consequence of the provisions of the Finance Act, 1927, s. 39, and of the provisions of the Finance Act, 1948, s. 48, that total income shall be ascertained as it is ascertained for the purposes of surtax, the two dividends marked B and C, which were those paid in the fiscal year ending Apr. 5, 1948, fell to be included in the appellant's total income for the fiscal year 1947 to 1948, and, accordingly, the gross amount of these dividends was included in his aggregate investment income for the purposes of the assessment to the special contribution. The appellant applied to the Special Commissioners for relief under s. 61 on the ground that the income from his stock in the company included in his aggregate investment income represented more than the income which would be attributable to a period of one full year if the income were to be deemed to have accrued from day to day.

Section 61 makes reference to s. 34 and s. 36 of the Finance Act, 1927, which deal with surtax. The Finance Act, 1927, s. 34, made provision for relieving the taxpayer of the hardship of paying surtax on the fortuitously swollen income of any assets in a particular year, a hardship which might involve payment of tax both on a larger sum than is equitable and at a higher rate. It was foreseen that the same hardship might arise also in the reckoning and payment of the special contribution. Paragraph (b) of s. 61 (1) prescribes the antecedent condition for the grant of relief and it employs substantially the same terms as the Finance Act, 1927, s. 34 (a). Under both Acts the Special Commissioners have to be satisfied that

"as respects any assets that, by reason of the provisions of the Income Tax Acts which require that income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, the income from the assets represents more than the income which would be attributable to a period of one full year if the income were deemed to have accrued from day to day."

For surtax purposes there is another condition prescribed by the Finance Act, 1927, s. 34 (b). It is that the Special Commissioners must also be satisfied that the amount of surtax payable by the applicant for the year exceeds by more than five per cent. the amount which would have been payable if the amount of his income from the assets had not exceeded the amount which would be attributable to a period of one full year if the income from those assets were deemed to have accrued from day to day. The Finance Act, 1927, s. 36 (1) (which is applied by the Finance Act, 1948, s. 61 (2), for the purposes of para. (b) of s. 61 (1)), provides that income which is deemed to have accrued from day to

day shall (a) if payable in respect of any stated period, be deemed to have accrued from day to day during that period. The Finance Act, 1927, s. 36 (1) (b), provides for the case where the income is not payable in respect of any stated period. In the present case, however, the dividends on the appellant's holding in the company receivable in the fiscal year 1947-48 were paid in respect of stated periods, dividend B being stated to be the final dividend in respect of the calendar year 1946, and dividend C being an interim dividend in respect of the calendar year 1947. All the other dividends are similarly assigned to a stated period.

When the application for relief first came before the Special Commissioners they held that the condition for the grant of relief as prescribed by s. 61 (1) (b) had not been fulfilled, but this decision was reversed by DANCKWERTS, J., who remitted the case to the Special Commissioners to consider what relief, if any, should be granted. The decision of DANCKWERTS, J., has been accepted by the parties in the proceedings which have followed on it. It would, nevertheless, be necessary to consider what was the exact ratio of his decision, and what was the precise construction which he put on the words in s. 61 (1) (b) which define the preliminary condition, if the construction of that part of the sub-section which deals with the amount of the relief to be granted depends on them. But that is itself the main issue in the appeal, and if, as I think, there is no such dependence, it is unnecessary to consider further the judgment of DANCKWERTS, J., or the construction of the words defining the preliminary condition. Nor would it be desirable to prejudice unnecessarily a question which may yet come to this House for decision.

In the debate, the appellant's counsel submitted for consideration several alternative constructions of the final part of s. 61 (1). All of them had one common feature; in all of them the Special Commissioners were required, in arriving at the relief to be granted, to make a calculation attributing to a period of twelve months the income received from the appellant's holding in the company on the footing that the income was deemed to have accrued from day to day. Two examples may be given. The income thus to be attributed was in one of the alternative submissions the dividends C, D, E and F in the table, that is, the whole dividends which were in fact paid (at whatever date) in respect of the calendar years 1947 and 1948, and the Special Commissioners were then to take the portion attributable to the twelve months of the fiscal year 1947-48 as the equivalent of a full year's income. According to another of the alternative submissions it was the income receivable in the fiscal year 1947-48, viz., dividends B and C, which was to be apportioned and the portion attributable to any consecutive period of twelve months out of the twenty-four months of the calendar years 1946 and 1947 was to be taken. The basis of all these submissions is that the words "a full year's income" at the end of the sub-section "echo" the words "the income which would be attributable to a period of one full year if the income were deemed to have accrued from day to day", and, therefore, by virtue of s. 61 (2) and the Finance Act, 1927, s. 36 (1), entitle the applicant to have the dividends treated as accruing during the period in respect of which they were payable.

The Special Commissioners rejected the basis of the appellant's contention that a process of day to day apportionment was contemplated as the means for arriving at the relief to be granted. They said that the natural meaning of "a full year's income" in the context was a full year's income in reality and that having regard to all the circumstances the most real and natural test was to take the dividends in respect of the company's successive financial years, each of which coincides with a full calendar year. The two years to which they thought it was most natural to turn were 1946 and 1947, and they selected 1946 since the dividends received in it were equivalent to the statutory income for the fiscal year 1947-48. They, therefore, made no reduction.

DONOVAN, J., reversed the decision of the Special Commissioners. He held that they were not entitled to select some representative year for the purpose of s. 61, and that they ought to have apportioned dividends B and C or B, C, D and E in the manner described above. The Court of Appeal unanimously reversed the judgment of DONOVAN, J., and restored the decision of the Special Commissioners. Judgments were delivered by SOMERVELL and ROMER, L.JJ. DENNING, L.J., concurred with SOMERVELL, L.J. The court rejected the basic contention of the appellant that the words "a full year's income" in their natural sense required any method of apportionment, or that they were capable of bearing, the meaning "the income attributable to the financial year 1947-48 on the basis that dividends referable to these years were apportioned as accruing from day to day."

My Lords, I agree with the Court of Appeal on this point, for reasons which I will presently state. Both SOMERVELL, L.J., and ROMER, L.J., gave additional reasons for rejecting the appellant's contention. I do not propose to deal with them because the rejection of the day to day attribution of income goes to the root of the appellant's case and whatever other reasons there may be for dismissing the appeal are superfluous.

There are two points to be considered in their bearing on the main issue. First, do the words "a full year's income" "echo" the words "the income which would be attributable to a period of one full year if the income were deemed to have accrued from day to day"? In my opinion, the "echo" is a false echo and does not justify the reading into the final part of s. 61 (1) of any part of the wording from the paragraph relating to what I have called the antecedent condition. I cannot think that the legislature would have left the crucial words by which the income is deemed to have accrued from day to day to be implied from the mere fact that the words "a full year's income" recall the words "a period of one full year". There is no reason why the words "a full year's income" should bear any artificial meaning or be stretched by implication into a meaning which they seem to be incapable of supporting. If the words "deemed to have accrued from day to day" are not to be read in, then the Finance Act, 1927, s. 36, cannot help the appellant. It may be noted that these crucial words are repeated in each of the two paragraphs of s. 34 of the Finance Act, 1927, and that they are not left to implication in the second of the two paragraphs.

This brings me to the second point for consideration. If attribution by accrual from day to day is excluded, the consequence must be that, unless the Special Commissioners have some degree of discretion, there is no means of arriving at the relief to be granted. The appellant contended that the Special Commissioners had no discretion to select a year the income in respect of which was to be regarded as equivalent to a full year's income. If that contention is well founded, and if the appellant's method of arriving at the relief is to be rejected, the result might be that s. 61 is abortive. The questions whether the Special Commissioners have a discretion and how far it extends depends on the words of the section itself. We were invited to contrast them with other words in other sections or statutes in which a discretion was given to the Special Commissioners. Such comparisons have little or no value and I have not been helped by them. The Special Commissioners are, by the concluding words of s. 61 (1), directed, and to that extent the sub-section is directory, to make such reduction, *if any*, as may be *appropriate* to secure that there *shall be taken as representing* the income from the assets *an amount equivalent* to a full year's income therefrom. The whole wording seems designed, not to define what the relief must be, but to allow some latitude of judgment in deciding what it may fairly be. The words which I have italicised are specially apt if the Special Commissioners' duty is to exercise a discretionary judgment. How far it may extend it is not necessary to decide here. The year they have chosen is one

of the years in respect of which the dividends received in 1947-48 were paid. They might have taken 1947, but it cannot be said that they either ignored relevant matters or took into account irrelevant matters or acted capriciously in choosing 1946. Whether they might have gone further back than 1946 in certain circumstances and have taken a year the income in respect of which had no connection with the dividends received in 1947-48, is a question which does not arise, and I express no opinion on it. My conclusion is that the appeal should be dismissed with costs.

My Lords, I am asked to say that my noble and learned friends, **LORD OAKSEY** and **LORD MORTON OF HENRYTON**, concur in this opinion.

LORD REID: My Lords, I concur.

B LORD COHEN: My Lords, I also agree.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Frank H. Jessop*, Mansfield (for the taxpayer); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

C

DALE AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), June 11, 17, 18, 24, 25, 29, July 20, 1953.]

D Special Contribution—"Investment income"—"Earned income"—Annuity to trustee conditional on his acting as such—Income Tax Act, 1918 (c. 40), s. 14 (3) (a)—Finance Act, 1948 (c. 49), s. 47 (1).

The testator, by his will, under which the taxpayer was one of five trustees, directed that the taxpayer should receive an annuity of £1,000 a year free of income tax and surtax so long as he should continue to act as trustee. The duties of the trusteeship were onerous, and the taxpayer had been chosen for his special qualifications. He was assessed to the special contribution under the Finance Act, 1948, s. 47 (1), on the basis that his income as trustee was investment, and not earned, income.

E HELD: a trusteeship was an office, and, if a testator attached remuneration to it, it was an office of profit, and, therefore, the annuity paid to the taxpayer was income arising in respect of remuneration from an office of profit within the meaning of the Income Tax Act, 1918, s. 14 (3) (a), and so it was not "investment income" within the Finance Act, 1948, s. 47 (1), and the taxpayer was not liable for special contribution in respect of it.

F Per LORD NORMAND: the definition of "earned income" in s. 14 (3) of the Income Tax Act, 1918 (made applicable to special contribution by s. 68 (2) of the Act of 1948), was self-contained, and did not require reference to the schedules in order to determine what categories of income were to be regarded as earned income under the section.

G Decision of the COURT OF APPEAL ([1952] 2 All E.R. 89), reversed.

H FOR THE INCOME TAX ACT, 1918, s. 14 (3), which has been replaced by the Income Tax Act, 1952, s. 525 (1), see **HALSBURY'S STATUTES**, Second Edn., Vol. 31, p. 488.

Cases referred to:

- (1) *A.-G. v. Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 Digest 46, 297.
- (2) *Re Pooley*, (1888), 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73; 42 Digest 122, 1178.
- (3) *Re Thorley*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 21 Digest 52, 345.

- (4) *Re White*, [1898] 2 Ch. 217; 67 L.J.Ch. 502; 78 L.T. 770; 24 Digest 603, 6341.
- (5) *Baxendale v. Murphy*, [1924] 2 K.B. 494; 93 L.J.K.B. 974; 132 L.T. 490; 9 Tax Cas. 76; 28 Digest 87, 497.

APPEAL by the taxpayer from an order of the Court of Appeal dated May 21, 1952, and reported [1952] 2 All E.R. 89, reversing an order of HARMAN, J., dated July 4, 1951, and reported [1951] 2 All E.R. 517, holding that the annuity payable to the taxpayer was remuneration from his office of trustee and so was earned income within the meaning of the Income Tax Act, 1918, s. 14 (3) (a). The Court of Appeal (SIR RAYMOND EVERSHED, M.R., BIRKETT and ROMER, L.J.J.), held that the annuity was not remuneration from the taxpayer's office of trustee, but was derived from the bounty of the testator and was, therefore, to be regarded as investment income.

Millard Tucker, Q.C., and *F. N. Bucher* for the taxpayer.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), *Pennycuik, Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

The House took time for consideration.

July 20. The following opinions were read.

LORD NORMAND: My Lords, we have in this appeal to decide a question of importance in income tax law though it arises in relation to the special contribution imposed by Part V of the Finance Act, 1948. The question, shortly stated, is whether an annuity bequeathed by the will of the late Sir Henry Wellcome to the appellant, Sir Henry Dale, as executor and trustee under the will, is "investment income".

The testator appointed five persons, including Sir Henry Dale, to be his executors and trustees, and directed that each trustee was to receive the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. He expressed a desire that, as far as possible, at all times two of his trustees should be men experienced and well qualified in medicine and allied sciences and that two should be men of wide practical business experience one or both being of high standing and ability in the practice of law and with exceptional experience and qualifications in the conduct and administration of large and important estates. The special duties of the trustees included the exercise of wide powers in relation to the control of the Wellcome Foundation, Ltd., the administration of the research fund established by the will and the application of moneys to and among the various research objects indicated by the will, and the administration of the research museum and library fund which were also established by the will. The testator left a written memorandum which set out his policy and aims for the guidance of his trustees. The trustees held frequent meetings, which were necessary for the performance of their duties, and Sir Henry Dale, who was at one time President of the Royal Society and chairman of the Scientific Advisory Committee to the War Cabinet, habitually spent about two hours a day dealing with the affairs of the trust.

Sir Henry Dale's assessment to special contribution under the provisions of Part V of the Finance Act, 1948, included, as part of his aggregate investment income, the sum of £1,446, which represented the sum (together with the appropriate additions thereto in respect of income tax and surtax) received by him in the financial year 1947-48 by virtue of the provision by which he was to be paid the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. Sir Henry Dale appealed against this assessment on the ground that the sum of £1,446 was income arising in respect of remuneration from his office of profit within the meaning of s. 14 (3) (a), or, alternatively, income from property which formed part of the emoluments of his office of profit within the meaning of s. 14 (3) (b) of the Income Tax Act, 1918, and that it was, therefore, "earned income". He and the trustees also

appealed against notices given to them under s. 60 (2) (a) of the Finance Act, 1948, but these are subordinate and consequential appeals, which stand or fall by the decision on the appeal against the assessment of Sir Henry Dale, whom I call hereafter the appellant. The Special Commissioners held that the source of the income was the bequest of an annuity and not an office of profit. Against this determination an appeal was taken to the High Court. There, HARMAN, J., allowed the appeal and reversed the determination. In the Court of Appeal, the Master of the Rolls, ROMER, L.J., and BIRKETT, L.J., unanimously reversed the decision of HARMAN, J., and restored the determination of the Special Commissioners.

The special contribution imposed by the Finance Act, 1948, is payable by individuals whose total income for the year 1947-48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250. "Investment income" means income from any source other than a source of earned income (s. 49 (1) of the Finance Act, 1948). Expressions in Part V of the Finance Act, 1948, are, under s. 68 (2) thereof, to have the same meanings as in the Income Tax Acts. Section 14 (3) of the Income Tax Act, 1918, provides:

"For the purposes of this section the expression 'earned income' means—

(a) any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation, or other allowance, deferred pay, or compensation for loss of office, given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in respect of the past services of any deceased person, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay, or not; and (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual; and (c) any income which is charged under sched. B or sched. D, or the Rules Applicable to sched. D, and is immediately derived by the individual from the carrying on or exercise by him of his trade, profession, or vocation, either as an individual, or, in the case of a partnership, as a partner personally acting therein."

The question in the appeal is, in the simplest terms, whether the annual sum receivable by the appellant under the testator's will is income arising in respect of remuneration from an office of profit. It is not contended that it is income from an "employment of profit", for that contention would encounter the difficulty discussed in several of the reported cases that there is no employer. The words "of profit", I have no hesitation in saying, qualify the word "office". The first point to consider is whether trusteeship is within the ordinary sense of the word an "office", and on this I can only say that "office" is an apt word to describe a trustee's position, or any position in

which services are due by the holder and in which the holder has no employer. In *A.-G. v. Eyres* (1) CHANNELL, J., held that a trustee is "the holder of an office" within the meaning of s. 2 (1) of the Finance Act, 1894. The word "office" is used both in s. 14 (3) of the Finance Act, 1948, and in s. 2 (1) of the Finance Act, 1894, in its ordinary sense, uncontrolled by any special context, and I agree with CHANNELL, J., in thinking that it includes trusteeship. If

the trustee is given an annuity under a will on condition that he continues to act as trustee, I cannot doubt that he holds an office of profit. The phrase is not a term of art and there is again no context which prevents it from being understood in its ordinary sense. To my mind, a remunerated office is an office of profit. Equally clearly the income received by the appellant because he continues to act as trustee is income arising in respect of remuneration from his office of trustee. My conclusion is that the opening words of s. 14 (3) (a) seem clearly and unambiguously to apply to the disputed income in the present

case, and that was, I think, the ground on which HARMAN, J., decided the case in favour of the appellant.

What, then, is said on the other side? The learned Master of the Rolls (SIR RAYMOND EVERSHED) held that a trustee could not be described as the holder of an office of profit because "the office itself involves a denial of any right to make a profit out of its performance". In other words, the receipt of a profit for the performance of the duties of a trustee is repugnant to the nature of trusteeship. My Lords, it is with regret that I feel constrained to differ from the Master of the Rolls, but I think that he has here incorrectly described the fiduciary duty of trustees. The fiduciary duty may arise, not only from trust, but also *ex lege* and *ex conventionione*. The duty was recognised by the civil law, and it is, I think, acknowledged in the jurisprudence of all civilised communities. The duty is, to use the Latin phrase, that the person subject to it must not become *auctor in rem suam*. It applied to tutors and curators in the civil law, and it applies to tutors and curators in the Scots law. It applies also to judicial factors appointed by the courts in Scotland, and to partners and to agents under a contract of agency, and, of course, to trustees under a settlement or under a will. That by no means exhausts the area of its operation, but for illustrative purposes the examples I have given will suffice. Some who are subject to the duty are never entitled to remuneration; some are *ex lege* entitled to payment for their services; some are entitled to payment *ex conventionione*; and some are entitled to payment if the settlor or testator so directs. The rule is the same for all: it is not that reward for services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust deed under which he acts, as the case may be. In England, moreover, the court has power to order payments to be made to trustees for whom the truster has made no such provision, a power which it is difficult to reconcile with a general principle that remuneration is repugnant to trusteeship.

The true rule is, indeed, stated by the Master of the Rolls himself in the judgment under consideration. He says ([1952] 2 All E.R. 93):

"... it has long been established that, *in the absence of some special dispensation*, the trustee can never derive any profit or advantage for himself out of his trust and should be scrupulous to prevent any conflict between his duty and his interest."

The italics are mine. The Master of the Rolls referred to certain cases (*Re Pooley* (2), *Re Thorley* (3), *Re White* (4)) which, as he said, decided (*ibid.*):

"... that remuneration made payable to a trustee by the terms of the instrument of trust is properly regarded as bounty on the part of the settlor or testator, in all material respects on the same footing as the bounty conferred on the other beneficiaries under the trust instrument and distinguished only from those others by the characteristic that acceptance of the obligation of the 'office' is the condition on which the benefit may be taken."

I think there is confusion here between the source of the payment, which is the testator's bounty as expressed in his will, and the quality of the payment as earned or not earned. There need be no incompatibility in saying that the income is the conditional gift of the testator but that it has to be earned by compliance with the testator's condition of serving as a trustee. I would observe more generally that the question whether income is earned or not is a question which arises between the trustee and the Inland Revenue, and it has no relation either to the legal duty which a trustee owes to the trust and the beneficiaries, or to the legal conception that such a payment as that under consideration derives from a testator and can be regarded as a legacy. The source of the sum and its character as a receipt in the hands of the trustee

are two separate and unconnected things. In my opinion, therefore, the reasoning on which the Master of the Rolls proceeded and in which the other learned lords justices concurred does not justify us in refusing to give the ordinary meaning to the words of s. 14 (3) (a) which are now under consideration.

- My Lords, counsel for the Crown urged another view of s. 14 (3). It is not, they said, a self-contained definition, or, as they phrased it, a dictionary definition. It contains, so the argument ran, an implicit reference to the
- A schedules to the Act and their Cases and rules, and there is such identity of the language of the sub-section with the language of the schedules as to require reference to the schedules in order to determine what categories of income are by the section entitled to be regarded as earned income. For example, no income which appears on first reading of the sub-section to be income arising from remuneration in respect of an office of profit is to be treated as earned
- B income unless it falls to be taxed *eo nomine* (that is, as income arising from remuneration in respect of an office of profit) under one of the schedules. Now, since 1924 (*Buxendale v. Murphy* (5)), annual remuneration payable to a testamentary trustee *qua* trustee has been regarded as taxable only under Case III of sched. D, and as payable after deduction of tax in accordance with r. 19 or r. 21 of the All Schedules Rules. The rule applicable was, it was held,
- C r. 1 (a) of Case III, and the sum payable annually to the trustee was taxed under the head or description "an annual payment payable by virtue of a will". Counsel for the Crown contended that income of this kind was properly taxed under Case III and under that description, and that, in any event, the long-standing practice should not be altered to the possible detriment of beneficiaries who might, in consequence, be deprived of the benefit which they
- D at present derive from the application of r. 19. Nor did counsel for the appellant press us to hold that it was wrong to tax this income under Case III. In my judgment, this argument breaks down in limine. First, the charging section (s. 47 (1)) imposes the special contribution only on investment income and there is no charge on any income which is not investment income. It then becomes necessary to define "investment income". That was achieved by
- E s. 49 (1) of the Finance Act, 1948, and by s. 14 (3) of the Income Tax Act, 1918. By s. 49 (1) "investment income" means income from any source other than a source of earned income. There is no reference here to the schedules. Section 14 (3) defines "earned income". It is a definition which, by para. (a), enlarges rather than narrows the meaning which "earned income" might normally bear, for it includes as earned income payments made to the husband or parent in respect of the past services of a deceased wife or son. The
- F conception "investment income" cuts across the schedules to the Act, and, accordingly, para. (a) does not treat the schedules or Cases as divisible into those which tax earned income and those which tax investment income. The natural inference from reading the sub-section as a whole is that you may find in any one of the schedules or Cases income from a source of earned income.
- G It is significant that para. (c) expressly refers to scheds. B and D, and to certain income taxed under these schedules. It appears, therefore, that the schedules are referred to when reference to them is necessary or appropriate, and that reference to them is omitted when it is not necessary or appropriate. Then it is to be noted that the language of s. 14 (3) (a) does not, in fact, correspond with the language of the schedules. For example, the phrase "emolument
- H of any office or employment of profit" is not schedule language, and the only mention of "office" in the schedules is to be found in sched. E, where there is a limitation, absent in s. 14 (3) (a), to "public offices". I, therefore, reject the contention that s. 14 (3) is not a self-contained definition of "earned income".

My Lords, many cases were cited on this part of the argument. They dealt with the question which schedule, Case or rule is the appropriate schedule, Case or rule for taxing annual payments receivable by a trustee as such.

Some may need consideration on a future occasion, but they are of no relevance to the appeal if s. 14 (3) is a self-contained definition, and I think that it would be inexpedient to discuss them. I must, however, notice an argument *ab inconvenienti* advanced by the Crown. It was said that a decision in favour of the appellant would involve anomalies. An argument of this sort is of value as an aid to construction only if there is some ambiguity in the words to be construed. At best, it is an unhandy weapon. For it often means that the court is to attempt to construe the difficult language of that part of an enactment which is properly before it for construction by the aid of another part of the enactment which is not really before it at all. It is, therefore, a method which should be shunned unless there is agreement or it is perfectly plain that the decision proposed will in fact lead to the supposed anomaly. Lastly, it cannot be right to decide an action on a balance of competing anomalies when anomalies must arise whatever construction be adopted.

Since I have already said that I find no ambiguity in the language of s. 14 (3) (a) the whole argument *ab inconvenienti* falls to the ground, but it may be useful to record what were the anomalies which the Crown said must result from the decision of this appeal in the appellant's favour. First, it was said that it would result in a transfer of the assessment from Case III of sched. D to sched. E and a consequential loss of the advantage which the beneficiaries obtain from r. 19. This is disputed by counsel for the appellant, and the dispute led to the citation of a number of authorities and an examination of the schedules and of s. 18 of the Finance Act, 1922. I cannot say that the matter is at all clear, and I will express no opinion about it nor shall I refer to the authorities, some of which may yet have to be re-considered. Secondly, it was said, that, if the appellant is to succeed, any bequest of an annuity to a trustee payable so long as he continues to be a trustee will be earned income within the meaning of s. 14 (3), without any inquiry as to the amount of work done to earn it. This is, I think, true, and it must clearly be understood that the appellant succeeds because he has complied with the condition, by continuing to act as trustee, and not because he has in fact performed very valuable and unusual services outside the ordinary scope of a trustee's duty. But if the Crown is right, we have the anomaly that the appellant must be regarded as having received investment income and as having earned nothing by his services, though it is obvious from the testator's will that he expected services from his trustees. Thirdly, it is said that if an annuity given to a trustee as such is to be regarded as remuneration, and, therefore, as earned income, so also must a lump sum legacy given to a trustee on condition of his accepting the trust. This proposition is denied by counsel for the appellant and the controversy is not one which can be decided in this appeal. It has become unnecessary to consider s. 14 (3) (b) in detail. But, in my opinion, it does not apply to the annuity enjoyed by the appellant under Sir Henry Wellcome's will. The appeal should be allowed with costs throughout.

LORD OAKSEY: My Lords, I have had the advantage of reading the opinion of the noble Lord on the Woolsack and I agree with it. As, however, your Lordships are differing from the considered judgments of the Court of Appeal, I wish to add a few words on certain points.

The judgment of the Master of the Rolls proceeds on the basis that trusteeship is an office, but that it is not an office of profit because ([1952] 2 All E.R. 93)

" . . . it has long been established that, in the absence of some special dispensation, the trustee can never derive any profit or advantage for himself out of his trust."

But as in the present case there is a special dispensation, I am unable to see how this trusteeship can be said not to be an office of profit. It is said that the special dispensation proceeds from the bounty of the testator, but, in my

opinion, it is no more a matter of bounty than the appointment of a particular person to any office of profit may be said to be the bounty of the person who makes the appointment. The condition on which the appointment is made is the performance of the office. The words "office of profit" do not relate to the creator of or appointer to the office, but to the holder of the office, and, whether the emoluments of the office come from the bounty of the creator of, or appointer to, the office or not, they are profits of the office from the point of view of the holder of the office, who is entitled to consider, as it seems to me, that the profits are paid to him as remuneration for performance of the office and not as the bounty of anyone. I see no sound distinction between solicitors who are frequently appointed trustees under wills which provide that they shall be remunerated and the case of Sir Henry Dale. The only distinctions suggested are that a solicitor is a professional man and remunerated according to costs settled by law, but, in my opinion, Sir Henry Dale is also a professional man, and money is just as much earned when it is paid on an annual basis as when it is paid on a quantum meruit. The cases of tips to waiters and cab drivers are dismissed by the Court of Appeal by saying that trusteeship has an almost sacred character which involves a denial of any right to make a profit out of its performance. If the character of trusteeship did involve such a denial it would, of course, be true to say that there is no analogy with the case of gratuities, but in point of fact it is admitted that trusteeship does not involve any such denial. Gratuities may, in my opinion, much more accurately be said to be the bounty of the payer than an annual payment fixed before the creation of the office and payable only so long as the office is performed.

LORD MORTON OF HENRYTON: My Lords, I, too, would allow this appeal. The only question which arises for decision is whether the sum received by the first appellant, Sir Henry Dale, as trustee of the will of Sir Henry Wellcome, deceased, during the fiscal year 1947-48, was or was not "earned income" as defined by s. 14 (3) of the Income Tax Act, 1918. The appellants contend that this sum comes within s. 14 (3) (a) as being income arising in respect of remuneration from an office of profit held by the first appellant. My Lords, in agreement with the Court of Appeal, I feel no doubt that the trusteeship of this will is an "office". Is it an "office of profit"? These are not words of art, and I can find no context in the Act of 1918 which should lead your Lordships to give them a meaning which they would not ordinarily bear. To my mind, an "office of profit", in the ordinary sense of the words, is an office which carries with it remuneration, as distinct from an honorary office. The testator in the present case has, undoubtedly, attached remuneration to the office of trustee of his will. The Master of the Rolls and ROMER, L.J., point out that this remuneration is regarded as bounty on the part of the testator, and that, for this reason, the trustee can never compete with creditors for his remuneration: see *Re Thorley* (3); *Re White* (4). I agree, but, in my view, these facts are in no way inconsistent with the first appellant's office of trustee being an office of profit. The testator chose to make it an office of profit by attaching remuneration thereto. The first appellant was free to accept or reject that office. He chose to accept it with its remuneration, and, to my mind, from the moment of acceptance he held an office of profit and the remuneration was in his hands remuneration from that office of profit. If so, it comes exactly within the words of s. 14 (3) (a) of the Act of 1918, and the fact that it had its origin in the bounty of the testator seems to me irrelevant. With regard to the argument *ab inconvenienti* advanced by the Crown, I agree with all that has been said by my noble and learned friend on the Woolsack, and I have nothing to add thereto.

LORD REID: My Lords, I have had the opportunity of reading the speech of my noble and learned friend on the Woolsack. I agree with it, and I cannot usefully add anything to it.

LORD COHEN: My Lords, I agree entirely with the observations that have fallen from my noble and learned friend on the Woolsack and I only desire to add a few words of my own to explain why I differ from the Court of Appeal. As I read the judgments of the Master of the Rolls and ROMER, L.J., they base their conclusion on one ground only, namely ([1952] 2 All E.R. 97) that:

"The office of trustee is . . . an office of honorary service and not an office of profit—so much so, indeed, that if a trustee makes a profit out of his trusteeship he gets into serious trouble."

The authorities cited for this proposition are *Re Pooley* (2); *Re Thorley* (3); and *Re White* (4). In *Re Pooley* (2) a direction that a solicitor-trustee should be entitled to charge for his services as a solicitor was held to be a beneficial interest under the will and to be void under s. 15 of the Wills Act, 1837, as the trustee in question had witnessed the will. In *Re Thorley* (3) it was held that annual sums payable under the will of a testator to his trustees while they were carrying on the testator's business, and to his son while managing the business in conjunction with the trustees, were legacies liable to legacy duty under s. 4 of the Stamp Duties Act, 1845. In *Re White* (4) it was held that a solicitor-trustee is not entitled to profit costs when the estate is insolvent since the authority to him to receive such costs is an act of bounty by the testator and no legatee can claim bounty until the creditors are satisfied. These cases, undoubtedly, establish that a trustee cannot make a profit out of his trusteeship unless authorised so to do by the instrument creating the trusteeship or by an order of the court, and that if a testator attaches remuneration to the trusteeship, that remuneration is, as between the trustee and the estate, bounty, liable to legacy duty while that duty was leviable and postponed to the claims of creditors if the estate was insolvent, but it is clear, and was, I think, admitted, that a trusteeship is an office, and I am unable to see anything in these decisions which prevents a trusteeship being properly described as an office of profit if a testator creates the office and attaches remuneration to it. On the contrary, the expression "office of profit" seems to me an exact description of the trusteeship so created. I would add that a decision that the source of a payment is the bounty of the testator seems to me of little relevance to the question which arises between the trustee and the Inland Revenue as to its character as a receipt in the hands of the trustee. The Master of the Rolls was, I think, also influenced by the argument addressed to the Court of Appeal and repeated before this House that acceptance of the appellant's case would disturb a long-established practice operating to the benefit of the persons interested in trust premises in the great majority of cases. I agree with my noble and learned friend, LORD NORMAND, that this is a consideration which could only influence your Lordships' decision if the meaning of s. 14 (3) was ambiguous and that in the present case, for the reasons he gives, there is no ambiguity. For this reason I, too, prefer to express no opinion as to whether this argumentum in terrorem was well founded. For these reasons, I am able to arrive at the conclusion which was reached by HARMAN, J., and which, as I read the judgments in the Court of Appeal, they, too, would have been glad to accept had they not felt themselves bound by authority to reject it. In doing so, I do not think your Lordships will detract from the fundamental principle of equity law that a trustee cannot receive anything for his services except so far as he may be authorised so to do by the instrument creating the trust or by the court. I would allow the appeal and restore the order of HARMAN, J.

Appeal allowed.

Solicitors: *Markby, Stewart & Wadsons* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

THE ALBION.

FRANCE, FENWICK & TYNE AND WEAR CO., LTD. v. SWAN,
HUNTER, AND WIGHAM RICHARDSON, LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), June 4, 5, 8, 9,
July 2, 1953.]

A *Shipping—Towage—Indemnity clause in contract—Claim to indemnity by tug owners when in breach of terms of contract.*

On Aug. 3, 1949, France, Fenwick & Tyne and Wear Co., Ltd., tug owners, and Swan, Hunter, and Wigham Richardson, Ltd., ship builders, entered into a contract whereby France, Fenwick were to tow the uncompleted aircraft carrier, Albion, from the Tyne to Rosyth and, inter alia, to provide navigation lights. Conditions incorporated in the contract included the following clause: "That to all intents and purposes whatsoever the master and crew of the tug or tugs employed shall be deemed . . . to be the servants of the owners master and crew of the vessels or crafts towed the tug owners being in no way liable for any of their acts or of any of the consequences thereof. That the owners of the tugs are not held liable for any loss or damage whatsoever which may happen to or be occasioned by any vessel or craft . . . during any towage contract whether arising from or occasioned by any accident or by any omission breach of duty mismanagement negligence or default of them or their servants . . . nor for any of the consequences of the causes above excepted. The owners or persons interested in the vessel or craft being so towed and the cargo on board of same shall and do undertake to bear satisfy and indemnify the tug owners against all liability for the foregoing matters." On Oct. 18, 1949, off the north-east coast of England a collier, s.s. Maystone, sank as a result of a collision with the Albion which was being towed by three tugs. In an action by the owners of the Maystone the findings against the Albion were (i) defective port light, (ii) failure to exhibit "not under command lights", and (iii) defective planning in putting to sea in the prevailing weather conditions. France, Fenwick were found to have been negligent in respect of (i) and (iii), and damages were apportioned as to one-third to France, Fenwick and as to two-thirds to Swan, Hunter. In an action by France, Fenwick under the clause in their towage conditions for an indemnity against Swan, Hunter in respect of their liability Swan, Hunter, by way of cross-action, claimed damages for breach of contract. Swan, Hunter contended that France, Fenwick were precluded from relying on the exception clause and the indemnity by reason of their own breaches of contract, and they further contended that the negligence on the part of France, Fenwick was to be regarded as having occurred at a time anterior to that covered by the exception clause or the indemnity.

Held: there was no such fundamental breach of contract by France, Fenwick as to preclude them from relying on the general words in the exception clause, and the fact that they were in breach of contract did not preclude them from claiming an indemnity; the "aforegoing matters" referred to in the clause must include cases in which liability to a third party had arisen out of or been occasioned by negligence or default which also constituted a breach of contract between France, Fenwick and Swan, Hunter; the words in the clause "being so towed" merely identified the parties liable to indemnity and did not cut down the earlier words "during any towage contract", which had been inserted to define the period which the exceptions were to cover; and, therefore, France, Fenwick were entitled to be indemnified.

Cases referred to:

- (1) *Smackman v. General Steam Navigation Co.*, (1908), 98 L.T. 396; 13 Com. Cas. 196; 41 Digest 427, 2684.
- (2) *Cunard S.S. Co. v. Buerger*, [1927] A.C. 1; 96 L.J.K.B. 18; 135 L.T. 494; 41 Digest 489, 3192.
- (3) *London & North Western Ry. Co. v. Neilson*, [1922] 2 A.C. 263; 91 L.J.K.B. 680; Digest Supp.
- (4) *The Cap Palos*, [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 41 Digest 683, 5126.
- (5) *The West Cock*, [1911] P. 208; 80 L.J.P. 97; 104 L.T. 736; 41 Digest 676, 5055.

APPEAL by France, Fenwick & Tyne and Wear Co., Ltd., from a decision of WILLMER, J., dated Apr. 25, 1952.

By a contract dated Aug. 3, 1949, France, Fenwick & Tyne and Wear Co., Ltd., a firm of tug owners, agreed with Swan, Hunter, and Wigham Richardson, Ltd., a firm of ship builders, to tow the uncompleted aircraft carrier, Albion, which was being built by Swan, Hunter, from the Tyne to Rosyth, to fit the ship out for the voyage, and, inter alia, to provide navigation lights. Conditions incorporated in the contract included the following clause:

"That to all intents and purposes whatsoever the master and crew of the tug or tugs employed shall be deemed and considered to be the servants of the owners master and crew of the vessels or crafts towed the tug owners being in no way liable for any of their acts or of any of the consequences thereof. That the owners of the tugs are not held liable for any loss or damage whatsoever which may happen to or be occasioned by any vessel or craft . . . during any towage contract whether arising from or occasioned by any accident or by any omission breach of duty mismanagement negligence or default of them or their servants or any defect or imperfection in the tugs or any of them . . . nor for any of the consequences of the causes above excepted. The owners or persons interested in the vessel or craft being so towed and the cargo on board of same shall and do undertake to bear satisfy and indemnify the tug owners against all liability for the foregoing matters."

On Oct. 18, 1949, off the north-east coast of England a collier, s.s. Maystone, sank as a result of a collision with the Albion which was being towed by three tugs, the property of France, Fenwick.

The owners of the Maystone brought an action against the Admiralty as owners of the Albion, Swan, Hunter, and France, Fenwick, in which the Admiralty were held not to blame. The findings against the Albion were (i) defective port light, (ii) failure to exhibit "not under command" lights, and (iii) defective planning in sailing in the conditions shown by the falling barometer. France, Fenwick were found to have been negligent in respect of (i) and (iii) and the damages were apportioned as to two-thirds to Swan, Hunter and as to one-third to France, Fenwick.

In the present proceedings France, Fenwick claimed an indemnity against Swan, Hunter in respect of their liability for one-third of the damages under the clause in their towage conditions. Swan, Hunter resisted their claim and claimed damages for breach of contract by way of cross-action. WILLMER, J., held that the general words of the exception clause were not sufficiently clear to cover the matters in respect of which France, Fenwick were found at fault, being matters which constituted plain breaches of specific terms of their contract, and gave judgment for Swan, Hunter. France, Fenwick appealed.

Carpmael, Q.C., and *Boyes* for France, Fenwick & Tyne and Wear Co., Ltd.
Nelson, Q.C., and *Hene* for Swan, Hunter and Wigham Richardson, Ltd.

Cur. adv. vult.

July 2. **SOMERVELL, L.J.**, read the following judgment of the court. In our previous judgment ([1953] 1 All E.R. 978) we decided that the second and third defendants, whom we will refer to as Swan Hunter and France Fenwick, were liable to the plaintiffs for damages arising out of the collision. The Admiralty claimed against France Fenwick for damage to the Albion, and, in our judgment, France Fenwick were liable on that claim. In these proceedings France Fenwick claim an indemnity against Swan Hunter in respect of their liability under a clause in their towage conditions. Swan Hunter resist this claim on various grounds and claim by cross-action to recover, by way of damages, for breach of contract, any amount they may be called on to pay by reason of the collision. We were asked, as was the learned judge, to apportion blame provisionally between the two parties subject to the rights which are relied on in these proceedings. With respect, we think that this was a waste of time. If the case goes to the House of Lords we would most respectfully suggest that the issues raised in the present proceedings should not be, as they have been before us, postponed for argument at a second hearing.

The towage conditions relied on were not expressly referred to in the contractual document of Aug. 3, 1949. On the question whether it was part of the contract, the learned judge said:

"I have already decided that the order of Aug. 3, 1949, constituted the contract under which the towage was performed, and that there was no subsequent variation by agreement. But it is not now in dispute that the terms of the order must be interpreted in the light of the correspondence which passed between the parties. This correspondence made it quite clear that France Fenwick were only prepared to quote on the basis that Swan Hunter accepted their towage conditions, and that those towage conditions were to be incorporated as terms of any contract that was made."

We agree with what the learned judge there said and the position was the same before us.

We will deal first with the claim of France Fenwick for indemnity. The clause on which they rely is set out in their statement of claim and is as follows:

"That to all intents and purposes whatsoever the master and crew of the tug or tugs employed shall be deemed and considered to be the servants of the owners master and crew of the vessels or crafts towed the tug owners being in no way liable for any of their acts or of any of the consequences thereof. That the owners of the tugs are not held liable for any loss or damage whatsoever which may happen to or be occasioned by any vessel or craft or any of the cargoes on board of the same during any towage contract whether arising from or occasioned by any accident or by any omission breach of duty mismanagement negligence or default of them or their servants or any defect or imperfection in the tugs or any of them or the machinery or ropes of any part of them or shortage of bunker coal owing to bad weather or other unforeseen circumstances or any delay stoppage or slackness of speed however occasioned or from any perils of the seas rivers or navigation or from strikes lockouts labour disturbances disputes or anything done in contemplation or furtherance thereof whether the tug owners be parties thereto or not nor for any of the consequences of the causes above excepted. The owners or persons interested in the vessel or craft being so towed and the cargo on board of same shall and do undertake to bear satisfy and indemnify the tug owners against all liability for the foregoing matters."

In our previous judgment our findings against the Albion were summarised in these words: (i) defective port light; (ii) failure to exhibit "not under command" lights or other illuminations to warn oncoming shipping; (iii) defective planning in sailing in the conditions shown by the falling barometer,

and, having sailed, in not broadcasting warnings to other shipping. With regard to (i), France Fenwick had under their contract undertaken to provide navigation lights. The sentence in which we dealt with their liability to the plaintiffs in respect of this matter is in the following words:

"France Fenwick cannot, however, escape from blame themselves, since, having provided the defective light, they towed the Albion to sea equipped with that light which, as the learned judge found, brings them into a relationship of proximity with other vessels which might be encountered at sea."

France Fenwick were not concerned with (ii). With regard to (iii) there was some discussion as to the expression "defective planning". The relevant negligence was, however, in sailing in the conditions which prevailed at the time. The loss of or damage to the Maystone and the Albion was, as it seems to us, plainly loss or damage happening to or occasioned by any vessel within the meaning of the clause. Further, France Fenwick's liability to the plaintiffs arises on our findings from their, France Fenwick's, negligence or default and not from any wilful or malicious act. It is submitted, in the first place, that France Fenwick are precluded from relying on the exceptions in this clause and the indemnity by reason of their own breaches of contract. In the second place, it is submitted that the relevant negligence was or ought to be regarded as having occurred at a time anterior to that covered by the exceptions or the indemnity.

In considering the first of these submissions, the learned judge, in the first instance, accepted and applied a principle, as submitted by counsel for Swan Hunter, that general words in exception clauses could not be relied on if the loss or damage flowed from a fundamental breach which went to the root of the contract. A familiar example of a breach which prevents general words in an exception clause being relied on is "deviation" in a contract of carriage. On the other hand, general words of exception for negligence have been held to relieve against mis-delivery by negligence: *Smackman v. General Steam Navigation Co.* (1). In *Cunard S.S. Co. v. Buerger* (2) goods were to be carried to Odessa. There was a clause in the contract making liability for mis-delivery conditional on a declaration of value by the shipper which had not been made. The goods had been lost, and in a claim for damages the defendants sought to rely on this clause. The history of the goods were complicated and need not be set out. It was argued in the House of Lords that the Court of Appeal, which had decided against the defendants, had treated mis-delivery as if it was equivalent to a deviation in its effect on the clause and that this was wrong. LORD SUMNER in his opinion did not proceed on the basis that any fundamental breach ousted the exception, and mis-delivery was, as one would have thought, such a breach. He analysed the judgments in the Court of Appeal ([1927] A.C. 6) and held that they had not proceeded on the basis of mis-delivery but had found an abandonment of the voyage or such unreasonable delay as amounted to a deviation. In a later part of his speech (*ibid.*, 8) he speaks of

"... a fundamental departure from the course of the agreed transit, after which such a clause of exception would cease to apply."

The same criterion was adopted in *London & North Western Ry. Co. v. Neilson* (3). In that case the goods were, under the contract, to be carried to "B". Owing to negligence, they were unloaded at an intermediate station and dispersed, with consequent delay. Under the contract the goods were to be delivered at "B" on a stated day, and, the goods being theatrical properties, this term might well have been regarded as fundamental and going to the root of the contract. The House of Lords did not proceed on these lines. It was held that the protection afforded by the general words in the clause could not be relied on because the agreed transit had been departed from.

In *The Cap Palos* (4) the claim arose under a contract of towage. The defendants sought to rely on an exception clause exempting them from liability for damage occasioned by their neglect or default. The tow, owing to negligent navigation by the defendants' servants, had got into a position of danger in Robin Hood's Bay and the tugs had left her there. The next and essential stage in the carrying out of the contract was to get her from there to a place of safety. The tug owner, believing erroneously that a salvage association were going to do this, cancelled an order which he had previously given to one of his tugs to go to the tow's assistance. The headnote, we think, accurately summarises the decision ([1921] P. 458):

"Held, that as the defendant had at any rate temporarily given up any attempt to continue the towage and had left the performance of his duty to others, he could not avail himself of the words 'default of the steam tug owner', which only extended to cover defaults during the actual performance of the duties of the contract."

The court would, we think, have held, if damage had been caused by negligence or default up to the time when the defendant gave up the attempt to tow the vessel to a place of safety, that the clause would have applied.

We have referred to these cases because we think that the words "fundamental breach" might be read in this context in a wider sense than the decisions justify. Having applied the test in the wide form to which we have referred, the learned judge said this:

"I cannot find any such fundamental breach of contract or any such radical departure from the work contracted for on the part of France Fenwick as would dis-entitle them from relying on their towage conditions to the extent that these protect them."

We agree, so far as the navigation light is concerned, that there was no abandonment even of that subsidiary term. A navigation light was delivered, thought by both parties to be a proper light. The judge found, and we have upheld his finding, that it fell short of the proper degree of luminosity. The learned judge had found that four tugs should have been provided. This was, to use a non-technical term, a more serious breach than those which we have found against France Fenwick. The learned judge then proceeded to hold that the clause could not be relied on for different reasons and he summarises his conclusion in this way:

"I do not think that the general words of the towage conditions are sufficiently clear to cover the matters in respect of which France Fenwick have been found at fault, matters which as between themselves and Swan Hunter constituted plain breaches of specific terms of their contract."

We feel a difficulty about this. If the test is whether or not there is a breach of a specific term, it seems difficult to reconcile this test with the test based on breach of a fundamental term which is in the nature of a deviation. It was at one time in the course of the argument suggested that a breach of an express term might differ in its effect on the clause from a breach of an implied term. We cannot follow this suggestion. We agree that, if there is a direct conflict, a written term in a contract will override or prevent the application of general words in a printed condition, or, at any rate, will normally do so. If, for example, there was an express undertaking to take all reasonable care with regard to "X", that would prevent a general exception of liability for negligence applying to "X". As the cases which we have stated show, there is no inconsistency between an express undertaking, for example, to delivery to "X", and an exception against liability if this undertaking is broken through negligence.

Counsel for Swan Hunter sought to argue that in no case could an indemnity be claimed by a party in breach. It seems to us impossible to suggest that

parties are precluded from coming to such an arrangement. We think it is precisely what the present clause provides for. The earlier words plainly apply, inter alia, to damage done by the tug to the tow, occasioned by the negligence or default of the tug owner or his servants. This negligence or default would, except in possibly very exceptional circumstances, be a breach of contract, but the indemnity clause refers to all liability for the "aforegoing matters". It seems to us impossible to take out of "the foregoing matters" cases in which the liability to a third party has arisen out of or been occasioned by negligence or default which also constituted a breach of contract as between France Fenwick and Swan Hunter. The second submission was that the acts should be regarded as having occurred at a time anterior to that covered by the exception clause. We were referred to *The West Cock* (5), where on quite different words this point arose. Counsel for France Fenwick relies on the words "during any towage contract" and submits that this period plainly covers all the happenings which lead to the liability of the plaintiffs. We agree. Counsel for Swan Hunter invited us to cut down these words by reason of the words in the last sentence, "being so towed", and to hold that this created an ambiguity which would, on familiar principles, lead to the construction less favourable to the defendants. These words relate back, we think, to the first paragraph in the clause, and, in our opinion, are plainly words identifying the parties liable to indemnify and cannot be read as cutting down the words in the earlier part of the clause which have clearly been inserted in order to define the period which the exceptions are to cover. In any case, we doubt if the defendants could succeed on this ground, even if one regarded the exceptions as limited to the towage. The negligence with regard to the light, which led to France Fenwick's liability, was the setting to sea after having supplied it. Again, the setting out to sea, having regard to the falling barometer, would seem to be in the course of the towage. For this reason we think that France Fenwick's claim succeeds and that they are entitled to be indemnified.

We have not thought it necessary to refer to or rely on Swan Hunter's responsibility as found, both by the learned judge and this court, in respect of the lamp or to their responsibility, with France Fenwick, for setting out in the weather conditions which prevailed. Their knowledge may well be regarded as supporting the view that there was no abandonment of the contract or an essential part of it. We do not, however, find it necessary to base our decision on these facts as amounting to waiver and express no opinion whether that principle would or would not be applicable, assuming we are wrong in the reasons which have led us to our conclusion. It was not suggested that, if France Fenwick succeeded, as we hold they do, on their claim for an indemnity, Swan Hunter could succeed on the cross-claim for damages. That is plainly inconsistent with the terms of the towage clause, if applicable.

Appeal allowed.

Solicitors: *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for France, Fenwick & Tyne and Wear Co., Ltd.); *Bentleys, Stokes & Lowless*, agents for *Wm. Mark Pybus & Sons*, Newcastle-upon-Tyne (for Swan, Hunter, and Wigham Richardson, Ltd.).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

R. v. DURKIN.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Parker and Donovan, JJ.), July 13, 14, 1953.]

Court-Martial—Need for commanding officer's signature on charge sheet—Dissolution of court-martial—Powers of convening authority—Army Act, s. 53, s. 54 (6)—Rules of Procedure, 1947 (S.R. & O., 1947, No. 2354), r. 56.

A At his trial before a district court-martial on charges of larceny the appellant raised a plea in bar of trial on the ground of condonation because, after being first placed under close arrest, he was told by his commanding officer that a summary of evidence would be taken and meantime he would be released to open arrest and must resume his ordinary duties. When the summary of evidence had been taken he was again brought before his commanding officer and relieved of his duties but he remained under open arrest. The court-martial held that the offence had been condoned when the appellant's commanding officer ordered him, while under open arrest, to continue with his duties, but that finding was not confirmed. When the matter came before the Directorate of Army Legal Services it was observed that the charge sheet had been signed by the brigadier and not by the appellant's commanding officer, and a letter was sent to the G.O.C., Aldershot District, stating that because of this the court-martial might not have jurisdiction to try the appellant and that the best course was to dissolve the court in being and convene a new court to try the case on a charge sheet signed by the commanding officer. Accordingly, the first court-martial court was dissolved and a second court was assembled before whom the appellant was tried and convicted.

D HELD: (i) there was no provision in the Army Act or the Rules of Procedure which required a charge sheet to be signed by the accused person's commanding officer; r. 56 of the Rules of Procedure provided that a finding by a court-martial should be valid although the charge sheet had not been signed by the commanding officer of the accused unless it appeared that injustice had been done to the accused; no injustice had been done in the present case; and, therefore, the point raised by the Directorate of Army Legal Services was immaterial and the first court-martial could have proceeded with the trial.

E (ii) by the Army Act, s. 54 (6), no finding by a court-martial was valid unless it was confirmed, and, accordingly, the finding of the first court-martial that the plea in bar of trial on the ground of condonation was good was of no effect.

F (iii) there was no express power to dissolve a court-martial except in so far as the Army Act, s. 53, provided for dissolution in the event of the death of the president or members of the court, or if the accused or any member could not attend, but, just as civilian criminal courts, though not so empowered by statute, have always assumed power, in case of irregularity, to discharge the jury and order a re-trial so, for the same reason, the convening authority had power to dissolve a court-martial.

G APPEAL against conviction by district court-martial.

H The appellant, Private John George Durkin, Army Catering Corps, formerly corporal (acting sergeant) in charge of the cook-house at the War Office Selection Board Camp at Barton Stacey, appealed by leave of the court against his conviction by district court-martial on two charges of stealing provisions and other government property from the cook-house, when he was sentenced to be reduced to the ranks.

Silkin for the appellant.

E. Garth Moore for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant appeals against conviction by a court-martial on two charges of stealing public property on grounds which, if successful, would not lead to the restoration of his character as a corporal, but raise highly complicated and technical points not dealt with in terms in the Army Act or in the **MANUAL OF MILITARY LAW**.

It was alleged that he stole the first part of the property mentioned in the charge on Dec. 1, 1952. At that time Major Drew-Wilkinson, the camp commandant at Barton Stacey, was about to hand over his command to another officer. On Dec. 10 Major Littledale arrived to take over the duties of camp commandant. On Dec. 18 there occurred a second theft, and the police were brought in to investigate it. They interviewed the appellant, and on Dec. 20 he was brought before two magistrates who ordered him to be handed over to a military escort so that he might be dealt with by his commanding officer, the proper procedure where a soldier is charged with committing an offence with regard to government property on government property. The appellant remained under close arrest until Dec. 22 when he was brought before Major Littledale, who at that time knew nothing about the case. That officer released him to open arrest (which meant that he was confined to camp) and ordered a summary of evidence to be taken. He told the appellant that he was to carry out his normal duties in the cook-house. On Jan. 9, 1953, the summary of evidence having been completed, the appellant was brought before Major Littledale and relieved of his duties, but he remained under open arrest, and on Jan. 19 he was remanded for trial on the charges. The charge sheet was signed by a brigadier and not by Major Littledale as the commanding officer. On Jan. 22 the court-martial was held. There was no objection by the appellant to the composition or jurisdiction of the court, and he took no point that the commanding officer had not signed the charge sheet. The only plea put forward on his behalf was a plea in bar under r. 36 of the Rules of Procedure, which provides:

"The accused at the time of his general plea of 'Guilty' or 'Not Guilty' to a charge for an offence, may offer a plea in bar of trial on the ground that . . . (ii) the offence has been pardoned or condoned by competent military authority."

He entered a plea that the offence had been condoned because he had been told by Major Littledale that, while he was in open arrest, he was to go on with his duties in the cook-house. The court-martial held that the offence had been condoned, but their finding was subject to confirmation, under r. 36 (D) of the Rules of Procedure, which provides:

"If the finding that a plea in bar is proved is not confirmed, the court may be re-assembled by the confirming authority, and proceed as if the plea had been found not proved."

The Directorate of Army Legal Services, before whom the matter came, observed that the charge sheet had been signed, not by the commanding officer, but by the brigadier, and, accordingly, a letter was written to the General Officer Commanding, Aldershot District, in which it was said:

"It became apparent during the first hearing of this case on Jan. 22 that the charge sheet before the court was not signed by the commanding officer of the accused, that is to say, it was not signed by the camp commandant who was the person who investigated the case and remanded the accused for trial, but by Brigadier Ray, the commandant. It is a matter for you whether you feel that this charge sheet is in order, but you may well feel that the court would not have jurisdiction to try the accused upon such a charge sheet, and the best course would now be to dissolve the court at present in being and convene a new court. It would also be

necessary for a new charge sheet to be made out and signed by the camp commandant who should remand the accused upon it."

This court cannot find, and our attention has not been called to, any provision of the Army Act or of the Rules of Procedure which requires the charge sheet to be signed by the commanding officer, except that in the form which is in the schedule to the Rules of Procedure there is a place for the signature of the commanding officer which appears to the court to indicate that the commanding officer has remanded the accused for trial. There is no special provision about this, and by r. 56 of the Rules of Procedure, it is provided:

"Whenever it appears that a court-martial had jurisdiction to try a person and make a finding and that there is legal evidence or a plea of Guilty to justify such finding, such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and if so confirmed shall be valid, notwithstanding any deviation from these rules or notwithstanding that the charge sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer, or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender; but nothing in this rule shall relieve an officer from any responsibility for any wilful or negligent disregard of any of these rules."

The point raised by the Directorate of Army Legal Services seems to be quite immaterial. If the court-martial had proceeded, r. 56 would have prevented any question arising with regard to the fact that the form had not been signed by the commanding officer because it is clear that no injustice had been done to the appellant. The court-martial could have proceeded with the trial in the ordinary way because, once the plea in bar was not confirmed, by reason of the provision to which I have referred the court-martial would have continued to deal with the case and the appellant would have been called on to plead Guilty or Not Guilty to the offence, but on account of this letter which the General Officer Commanding, Aldershot District, received, it was ordered that the court-martial should be dissolved and that a further hearing should take place before another court-martial. It is observable that the proceedings before the first court-martial resulted in no finding because the finding of a court-martial is of no validity until it has been confirmed, and so the finding that the plea in bar was good and the offence had been condoned was of no validity as it had not been confirmed. That finding, not having been confirmed, did not, of course, amount to an acquittal; it simply amounted to an expression of opinion that the court-martial was a nullity. If that first court-martial had not been dissolved, it would have been able to continue the hearing of the offence. There was no decision on anything except the decision of the confirming officer that the plea in bar was not proved. The Army Act, s. 54 (6), provides:

"Subject to the provisions of this Act with respect to the finding of acquittal, the finding and sentence of a court-martial shall not be valid except in so far as the same may be confirmed by an authority authorised to confirm the same."

It is clear, therefore, that the proceedings of a court-martial are not completed until the finding has been confirmed or not confirmed as the case may be.

A second court-martial, accordingly, was convened and they found the appellant guilty on both charges. So far as that finding is concerned, this court sees no ground whatever on which it can differ from the finding of fact that he was guilty, but it is argued that there was no power to dissolve the first court-martial before it reached a decision, and, a fortiori, no power to direct a trial before another court-martial. It is curious, no doubt, that there is no express power of dissolution given by the Army Act or the Rules of Procedure

except in so far as the matter is dealt with by s. 53 of the Army Act, which provides that a court-martial shall be dissolved in certain circumstances, that is, compendiously, if the president or members of the court die or cannot attend and the court is reduced below its legal minimum, or if, on account of the illness of the accused, it is impossible to continue the trial. In those circumstances, the court-martial shall be dissolved, but there is no other provision with regard to the dissolution of a court-martial. Rule 66 of the Rules of Procedure deals with the matter in this way:

“Where, in consequence of anything arising while the court is sitting, the court is unable by reason of dissolution (as specified in s. 53 of the Army Act, or otherwise), or of the absence of the president, to continue the trial, the president, or in his absence, the senior member present, will immediately report the facts to the convening authority.”

That rule does not apply to such a case as this because, if the convening authority has dissolved the court, there is no necessity to report to the authority that the authority has dissolved it, but counsel for the Crown has contended that on what he called the common law of the army there is always power to dissolve a court-martial. It might be said that there could not be such a power because that would enable the convening authority, if they thought the court-martial was not taking a view of the case which commended itself to them (the convening authority), to dissolve the court-martial and appoint another court, but we cannot, and do not, assume that a convening authority would ever act as improperly as that, and, no doubt, if they did, proper disciplinary action would be taken and the matter raised in Parliament. It is clear that, considering that a court-martial is to some extent like a bench of magistrates, both being judges of law and fact, it might be most prejudicial to soldiers if the convening authority had not power on a proper occasion to dissolve the court-martial and order proceedings before another court. For instance, if during the hearing of the case some matter highly prejudicial to the accused came out—if, for instance, evidence of the bad character of the accused was wrongly received—and that came to the knowledge of the convening authority, it would be highly prejudicial and wrong that that court-martial should proceed. The only course then would be to dissolve the court-martial and have the accused re-tried.

In fact, the position is exactly the same as exists in civilian courts where, during the course of a trial something occurs which, in the opinion of the presiding judge, is so prejudicial to the prisoner that the only proper course is to discharge the jury and begin the case over again. That has often been said by the Court of Criminal Appeal to be the right course to take in such circumstances. There is no statute which permits the court to do that, but it is a power which the court has always assumed, and it is a power which it is necessary in the interests of justice that the court should have. There is no question that the court has that power and constantly uses it. For the same reason, it is clear that the convening authority must have power to dissolve a court-martial if they consider that the proceedings are in some way irregular or that matters have arisen which are prejudicial to the prisoner. If we were to hold now that, though it has always been assumed to have this power, the convening authority had no such power and that once a court-martial was in existence, although it had come to no decision, it must continue to be in existence, it is obvious that very great prejudice might be caused to accused persons for which there would be no remedy.

We are, therefore, of opinion that it was within the power of the convening authority to dissolve this court-martial and order the trial before another one, although we think that the technical point that was taken by the Directorate of Army Legal Services had no substance in it. The fact that this document had not been signed by the commanding officer was not a defect which was in any way fatal and r. 56 of the Rules of Procedure would have afforded an

answer if any question had been raised. No objection was taken by the appellant to being tried by this court-martial, and, therefore, we think there was no necessity to dissolve it, but we cannot doubt that the convening authority had power to dissolve the court-martial if it seemed fit. Therefore, there is no valid objection here because the case was proceeded with after the plea in bar had been disallowed, and there is no valid objection because another court-martial was assembled to try the general issue. This power of dissolving the court-martial could not, I think, be exercised if the court-martial had once come to a decision, but where the court has come to no decision there can be no objection as far as this court can see.

[HIS LORDSHIP then examined the evidence and found as a fact that there was no evidence to justify the finding of condonation by the first court-martial, and continued:] Therefore, the decision of the confirming officer was right in refusing to confirm the finding. In these circumstances, the plea of condonation could not have been successfully raised at the second trial, and, as there is no other ground on which it is suggested that the proceedings were in any way wrong, this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[*Reported by T. J. KELLY, Esq., Barrister-at-Law.*]

BROWN v. DREW.

D [QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.),
 July 15, 1953.]

*Licensing—Licence—Occasional licence—Premises already fully licensed—
 Licensing (Consolidation) Act, 1910 (c. 24), s. 64 (1), (3).*

The respondent was the holder of a full and unrestricted licence for the sale of intoxicating liquor at his hotel. On Feb. 11, 1953, he applied to the licensing justices for an occasional licence to enable him to sell intoxicating liquor at another hotel in respect of which there was a licence restricting the supply of liquor to residents or for consumption with a meal. The justices granted the occasional licence. It was contended by the appellant that an occasional licence could not be granted under the Licensing (Consolidation) Act, 1910, s. 64, in respect of premises which were already licensed, since s. 64 (3) provided: “. . . the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises . . .”

HELD: the statutory fiction introduced by that sub-section operated only where the premises in respect of which the occasional licence was granted were unlicensed, and nothing in the sub-section prevented the grant of an occasional licence in respect of premises which were already licensed.

FOR THE LICENSING (CONSOLIDATION) ACT, 1910, s. 64, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 259.

CASE STATED by Cornwall justices.

H On Feb. 11, 1953, at a court of summary jurisdiction sitting at Liskeard, an application under the Licensing (Consolidation) Act, 1910, s. 64, was made by the respondent, Kenneth Bailey Drew, of the Looe Hotel, for an occasional licence between the hours of 8 p.m. and 11 p.m. on Feb. 14, 1953, in respect of the Hannafore Point Hotel, Looe, on the occasion of a Valentine Night ball. The application was opposed by the appellant, George Brown, a chief inspector of police. It was proved or admitted that the respondent was the holder of a justices' licence authorising him to sell by retail at the Looe Hotel any

intoxicating liquor for consumption either on or off the premises; that one R. C. Roberts was the holder of a justices' licence authorising him to sell by retail at the licensed premises known as the Hannaford Point Hotel any intoxicating liquor for consumption on the premises on condition that no intoxicating liquor be sold by retail for consumption on the premises unless such liquor was either (a) sold to any person or persons residing in the said hotel or (b) sold or served to any person or persons not residing in the said hotel at the same time as a meal and for consumption at such meal; and that the said Roberts was organising the ball in respect of which the application for the occasional licence was made.

For the appellant it was contended that the justices were not empowered to grant an occasional licence to take effect on premises which were already licensed; that under the Licensing (Consolidation) Act, 1910, s. 64 (3), premises in respect of which an occasional licence was granted were deemed to be licensed premises, and such premises could not be actual licensed premises; and that, if the application were granted, there would be two licences in force for the same premises with possibly different conditions, and it would be impossible for the police properly to supervise the premises. For the respondent it was contended that the word "deemed" appeared twice in s. 64 (3) and must bear the same meaning in each context, and that in the case of the words "a person taking out an occasional licence shall be deemed to be the holder of a justices' licence" the word "deemed" could not bear the meaning assigned to it by the appellant, as the only person authorised to apply for an occasional licence was one who was already the holder of a licence, i.e., a retailer's excise on-licence for the sale of spirits, beer or wine; and that whether the police could or could not properly supervise premises was a question for the justices to consider when exercising their discretion as to the granting of an occasional licence, but it did not affect their jurisdiction. The justices being of the opinion that they had power to grant the occasional licence, and that it was advisable so to do, in the exercise of their discretion granted to the respondent the occasional licence applied for. The appellant now appealed.

King Anningson for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This Case stated by justices for the county of Cornwall raises a curious point under the Licensing (Consolidation) Act, 1910, s. 64, which does not seem to have arisen before. [His LORDSHIP stated the facts and continued:] Section 64 provides:

"(1) An occasional licence shall not be granted except with the consent of a petty sessional court, and unless twenty-four hours at least before applying for that consent the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices . . .

(3) For the purpose of the provisions of this Act . . . and for the purpose of s. 12 of the Licensing Act, 1872, and any provisions for giving effect to those sections, a person taking out an occasional licence shall be deemed to be the holder of a justices' licence, and the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises, and to be the premises of the person taking out the occasional licence."

As counsel for the appellant has pointed out, although this part of the subsection provides that a person taking out an occasional licence shall be deemed to be the holder of a licence, only a person who already holds a licence can obtain an occasional licence. Counsel argues that the words in the section,

“ the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises ”, prohibit the grant of a licence in respect of premises which are already licensed. I cannot accept that argument. It is obvious that this statutory fiction as to licensed premises is intended to, and must, apply to premises which are not licensed. If they are not licensed, they are deemed to be licensed directly an occasional licence is granted in respect of them. The common case is the refreshment marquee at an agricultural or flower show. Those places are subject to an occasional licence and are, therefore, deemed to be licensed premises, but I do not think that that means that an occasional licence cannot be granted in respect of premises which are already licensed. I cannot find anything in s. 64 which so provides. It would have been open to the justices to have said, if they had seen fit, that this occasional licence was to apply only to the ballroom or some other part of the hotel. I can see that there are objections to such a course, but we have only to decide whether or not the justices have power to do that which they did. The question whether or not we should have approved of it if we had been the justices does not arise. For these reasons the appeal must be dismissed.

PARKER, J.: I agree.

DONOVAN, J.: Where any premises are unlicensed, the statutory fiction introduced by s. 64 (3) operates, but it is not necessary to invoke the fiction where premises are already licensed.

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *Stephens & Scown*, St. Austell (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CHANTREY MARTIN & CO. v. MARTIN.

[COURT OF APPEAL (Somervell and Jenkins, L.J.J.), July 3, 14, 1953.]

Discovery—Production of documents—Accountant's documents incidental to audit of client's accounts—Correspondence with Inland Revenue regarding client's liability to tax.

The plaintiffs, a firm of chartered accountants, claimed damages from the defendant, who was employed by them as senior audit clerk, for breach of his contract of service. The defendant counterclaimed for damages for wrongful dismissal and alleged that in the course of preparing an audit of the accounts of a limited company, the clients of the plaintiffs, for the year ending Aug. 31, 1951, he had discovered certain irregularities in the accounts for the year ending Aug. 31, 1950, audited by the plaintiffs, and that he, having refused to proceed with the audit until the irregularities were adjusted, was summarily dismissed by the plaintiffs. On discovery, the plaintiffs objected to producing all working papers and schedules relating to the audit of the company's books for the years ending Aug. 31, 1950, and Aug. 31, 1951; the draft accounts of the company for those years and notes and calculations relating thereto made by a member of the plaintiff firm; the final accounts of the company for the year ending Aug. 31, 1950; and correspondence between the plaintiffs and the Inland Revenue relating to the accounts for the year ending Aug. 31, 1950, and the tax computations thereon. The ground for the plaintiffs' objections was that all such documents were the property of the company and were in the plaintiffs' possession solely as accountants to the company and not otherwise.

HELD: (i) in the preparation of the audits the relationship of the plaintiffs to the company was that of professional man and client and not agent and principal; there being no question of legal professional

privilege, the fact that the documents embodied information which was the subject of professional confidence as between the plaintiffs and the company was insufficient ground for resisting production; and, therefore, the final accounts and the documents incidental to their preparation were the property of the plaintiffs and should be produced.

Leicestershire County Council v. Michael Faraday & Partners, Ltd. ([1941] 2 All E.R. 483), applied.

Ex p. Horsfall (1827) (7 B. & C. 528), explained.

(ii) the correspondence between the plaintiffs and the Inland Revenue, having been conducted by the plaintiffs as agents for the company, was the property of the company, and, therefore, the plaintiffs could not be ordered to produce it.

Dictum of MACKINNON, L.J., in *Leicestershire County Council v. Michael Faraday & Partners, Ltd.* ([1941] 2 All E.R. 487), applied.

AS TO PRODUCTION OF DOCUMENTS IN POSSESSION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 10, p. 399, para. 481; and FOR CASES, see DIGEST, Vol. 18, pp. 160, 161, Nos. 1110-1131.

Cases referred to:

- (1) *Kearsley v. Philips*, (1882), 10 Q.B.D. 36; 52 L.J.Q.B. 8; *affd.*, C.A., (1883), 10 Q.B.D. 465; 52 L.J.Q.B. 269; 48 L.T. 468; 18 Digest 159, 1109.
- (2) *Gibbon v. Pease*, [1905] 1 K.B. 810; 74 L.J.K.B. 502; 92 L.T. 433; 69 J.P. 209; 7 Digest 436, 417.
- (3) *Leicestershire County Council v. Michael Faraday & Partners, Ltd.*, [1941] 2 All E.R. 483; [1941] 2 K.B. 205; 110 L.J.K.B. 511; 105 J.P. 348; 2nd Digest Supp.
- (4) *London School Board v. Northcroft*, (1889), 2 Hudson's B.C. 4th ed., 147; 7 Digest 448, 471.
- (5) *Ex p. Horsfall*, (1827), 7 B. & C. 528; 108 E.R. 820; *sub nom. Re Horsfall*, 6 L.J.O.S.K.B. 48; 42 Digest 326, 3664.
- (6) *Kettlewell v. Barstow*, (1872), 7 Ch. App. 686; 41 L.J.Ch. 718; 27 L.T. 258; 18 Digest 69, 266.

APPEAL by the defendant from an order of BARRY, J., in chambers, dated June 4, 1953, allowing an appeal by the plaintiffs from a master's order dated May 22, 1953, which ordered the production of certain documents disclosed by the plaintiffs in their affidavit of documents. BARRY, J., held that the documents, being the working papers, drafts, notes, calculations and typed final accounts prepared by the plaintiffs, a firm of accountants, in the course of the auditing of a company's accounts, were the property of that company.

L. MacLaren for the plaintiffs.

Ashe Lincoln, Q.C., and *Lloyd-Davies* for the defendant.

Cur. adv. vult.

July 14. JENKINS, L.J., read the judgment of the court. This is an appeal by the defendant from an order of BARRY, J., dated June 4, 1953, allowing an appeal by the plaintiffs from a master's order dated May 22, 1953, which had ordered the production by the plaintiffs of certain documents disclosed in their affidavit of documents as relevant documents in their possession or power which they objected to produce on the grounds stated in such affidavit. The question in the appeal is whether the learned judge was right in holding that the grounds relied on by the plaintiffs were sufficient in law to entitle them to refuse production of all or any and if so which of these admittedly relevant documents.

The plaintiffs are a firm of chartered accountants and, according to the statement of claim indorsed on the writ, the defendant was in their employment from July 18, 1951, or thereabouts, down to Apr. 22, 1952, as a senior audit

clerk at a salary of £43 6s. 8d. per calendar month payable in advance on the first day of each such month. The statement of claim goes on to allege that on the last-mentioned date the defendant in breach of his contract of service with the plaintiffs absented himself from his duties without leave or notice thus terminating his employment without notice either given or received and without reasonable cause. Then there is an allegation, not material for the present purpose, to the effect that the plaintiffs had lent the defendant £7
A which he had failed to repay, followed by a claim for £93 13s. 4d. made up of one month's salary paid in advance for April, 1952, and one month's salary in lieu of notice, together with the loan of £7.

The defendant by his defence and counterclaim (so far as material for the present purpose) admitted his employment by the plaintiffs, with the qualification that his salary at the rate above-mentioned had commenced from Jan. 1,
B 1952, he having previously from July 18, 1951, been employed in the same capacity at a salary of £10 per week; alleged that he was impliedly entitled to reasonable notice (which he put at three calendar months) to terminate his employment; denied the breach of contract alleged against him; contended that on the contrary the plaintiffs on Apr. 18, 1952, had wrongfully dismissed the defendant from his employment; and counterclaimed for the sum of £130,
C being three months' salary in lieu of notice.

The circumstances on which the defendant's allegation of wrongful dismissal is based are set out in particulars contained in the defence and amplified in further and better particulars subsequently delivered pursuant to a request by the plaintiffs. The short effect of these particulars was that in March, 1952, the defendant in the course of his duties commenced an audit for the financial
D year ending Aug. 31, 1951, of the books of a certain limited company which was a client of the plaintiffs and to which I will refer as "the client company", the method being to take the figures for the financial year ending Aug. 31, 1950, and to build up the next year's figures with reference to the appropriate heading of the previous year; that in the course of such audit the defendant discovered certain irregularities in the audited accounts for the year ending Aug. 31, 1950,
E which the plaintiffs had audited; that prior to Apr. 18, 1952, he had discussed his draft accounts for the year ending Aug. 31, 1951, and the audited accounts for the previous year with the plaintiffs' senior partner, Mr. H. G. Martin, and had suggested adjustments to correct the irregularities he had detected; that Mr. Martin refused to allow these adjustments to be made and ordered the defendant to make tax computations on the basis of the unadjusted accounts;
F and that on Apr. 18, 1952, after a further discussion of the accounts in question, in which Mr. Martin maintained his former attitude, the defendant told Mr. Martin that he would not be a party to finalising the draft accounts or making the tax computations unless the suggested adjustments were made, whereupon Mr. Martin, acting for the plaintiffs, summarily dismissed him. The alleged irregularities in the accounts in question, as particularised by the defendant,
G included understatement of sales, understatement of gross profit, and understatement of administration expenses and salaries, and were (in effect) alleged by the defendant to be calculated to mislead the shareholders and to evade payment of the proper amount of tax on the profits of the client company. The plaintiffs in their reply denied the whole of the defendant's allegations of irregularities in the draft and audited accounts of the client company and also
H denied the alleged dismissal of the defendant.

Such being the nature of the case on the pleadings, it could not well be disputed that all documents in the plaintiffs' possession or power relating to the preparation of the client company's accounts for the years ending Aug. 31, 1950 and 1951, are documents relating to matters in question in the action, and, therefore, proper to be disclosed. As we have already mentioned, they were in fact duly included in the plaintiffs' affidavit of documents, but with an objection taken in the body of the affidavit to their production, the validity

of this objection being the subject of the present appeal. The objection was taken by the plaintiffs in their affidavit of documents in these terms:

"We object to produce any of the documents set forth in the second part of sched. I hereto on the grounds following: (a) As to certain of the documents mentioned in the said part of the said schedule, such documents are the property of 'the client company' . . . and are in the plaintiffs' custody possession or power solely as accountants to the said 'client company' and not otherwise."

The documents in question are those lettered (A) to (K) in the second part of sched. I to the affidavit, namely:

"(A) The file or files of all working papers and schedules relating to the audit for the year ended Aug. 31, 1950, of the books of 'the client company' clients of the plaintiffs. (B) The first draft accounts of 'the client company' for the year ended Aug. 31, 1950, as prepared by Mr. Fradd. (C) Partial re-draft of the accounts of 'the client company' for year ended Aug. 31, 1950. (D) The final typed accounts of 'the client company' for year ended Aug. 31, 1950. (E) The correspondence between plaintiffs and the Inland Revenue in regard to these accounts and the tax computations thereon. (F) The private ledger of 'the client company' containing entries for the year ended Aug. 31, 1950. (G) The file or files of all working papers and schedules relating to the audit for the year ended Aug. 31, 1951, of the books of 'the client company'. (H) The draft accounts of 'the client company' for year ended Aug. 31, 1951. (I) Notes and calculations relating to these draft accounts made by Mr. H. G. Martin during the course of his discussion with the defendant on these matters and attached to the said file of working papers. (J) The draft tax computation relating to the said draft account prepared by the defendant and his notes and comments written thereon. (K) The private ledgers of 'the client company' containing entries for the year ended Aug. 31, 1951."

It seems clear that "possession or power" for the purposes of an order for production under the Rules of the Supreme Court, Ord. 31, r. 14, as distinct from inclusion in an affidavit of documents under r. 12 of the same order, does not mean actual corporeal possession irrespective of legal ownership, but sole legal possession conferring on the party against whom production is sought a right and power to deal with the document in question. Thus, a party will not be ordered to produce a document which, though in his actual corporeal or physical possession, belongs wholly to a third party or to a third party jointly with himself: see *Kearsley v. Philips* (1) (10 Q.B.D. 36 and 465). It follows that no order for production could properly be made in respect of the private ledgers of the client company comprised in items (F) and (K) above, for these are clearly the property of the client company and not of the plaintiffs. This is recognised by the defendant, who makes no claim to production in respect of items (F) and (K).

We have no note of the learned judge's reasons for deciding that the remainder of the documents listed above should not be produced, but we were told by counsel that his decision was based on *Gibbon v. Pease* (2), where it was held that the plans prepared by an architect employed by a building owner to carry out alterations to certain houses were the property of the building owner. It would seem, therefore, that the learned judge took the view that the working papers, drafts, notes, calculations, and typed final accounts, brought into being by the plaintiffs in the course of, or as preliminaries to, the auditing of the client company's accounts and the ascertainment of its tax liability, were by parity of reasoning the property of the client company, and, accordingly, that on the principle above stated the plaintiffs should not be compelled to produce

them. The ratio decidendi in *Gibbon v. Pease* (2) is thus stated by SIR RICHARD HENN COLLINS, M.R. ([1905] 1 K.B. 813):

“In my opinion the contract in this case resulted in the making of plans the property in which passed to the building owner on payment of the remuneration provided under the contract. I find a difficulty in distinguishing this case from that of a contract to paint a picture or to design a coat of arms, as to which no question of ownership could arise.”

A There are, however, other cases, to which we understand the learned judge was not referred, in which a different conclusion was reached in circumstances bearing a closer resemblance to those of the present case. In *Leicestershire County Council v. Michael Faraday & Partners, Ltd.* (3) rating valuers were employed by a county council for five years to give advice and assistance in connection with the valuation of hereditaments in the council's area, and at the termination of the five years' agreement the council claimed to be entitled to all documents, books, maps and plans which had been prepared by or had come into the possession of the valuers in the course of, or for the purpose of, the performance of their duties. The Court of Appeal (affirming the decision of MACNAGHTEN, J.) rejected this claim, and held that the relationship between the county council and the valuers was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over. In an earlier case of *London School Board v. Northcroft* (4) (of which approval was expressed in the *Leicestershire County Council* case (3)), a similar conclusion was reached by A. L. SMITH, J., with respect to certain papers of calculations and memoranda prepared by quantity surveyors in the course of their employment by building owners on work which they had duly completed.

D Having regard to these two authorities we think the proper conclusion in the present case is that (apart from the correspondence with the Inland Revenue comprised in item (E), to which we will return) all the documents listed above, other than the client company's ledgers, are the property of the plaintiffs. This conclusion is not, we think, displaced by *Ex p. Horsfall* (5), to which we were also referred, where drafts and copies of deeds prepared by an attorney were held to be the property of the client. The case proceeded on the short ground (per LORD TENTERDEN, C.J. (7 B. & C. 528)) that: “He who pays for the drafts, etc., by law has a right to the possession of them”, and was, we think, rightly explained by counsel for the defendant as turning on the nature of the services rendered by an attorney or solicitor and the system on which he is remunerated for those services. Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connection with work done for clients.

E It was, however, contended for the plaintiffs that, even though these documents were the plaintiffs' own property, they should not be ordered to be produced, because they embodied information which was the subject of professional confidence as between the plaintiffs and the client company and their production, and the consequent disclosure of their contents would be a breach by the plaintiffs of their duty to the client company. Outside the area of legal professional privilege, which is not in question here, we do not think this is a sufficient ground for refusing an order for production. In *BRAY ON DISCOVERY* (1885), at p. 194, we find this general proposition :

H “It is no ground for resisting production that a person not before the court has an interest in the document: *Kettlewell v. Barstow* (6) (7 Ch. App. 693); unless it is an interest in the nature of property.”

In developing this proposition, at p. 206 the learned author says that

“the mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from a voluntary disclosure out of court.”

Applying this statement of the law to the present case we think that (apart from the correspondence with the Inland Revenue) all the documents above listed (other than the ledgers) should be produced, but we think the order should be made on an undertaking by the defendant and the defendant's solicitors not to divulge their contents to any person otherwise than for the purposes of the present litigation and not to use the information contained therein for any collateral purpose. As to the correspondence with the Inland Revenue, this presumably comprises letters received from the Inland Revenue and copies of letters written to the Inland Revenue. In conducting this correspondence the plaintiffs must, as it seems to us, have been acting as agents for the client company for the purpose of settling with the Inland Revenue the client company's tax liability. In the *Leicestershire County Council* case (3) *MACKINNON, L.J.*, distinguished that case from cases such as *Gibbon v. Pease* (2) in these words ([1941] 2 All E.R. 487):

“I think that those cases were radically different, in that they were cases concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents, and the principal can claim that the agent should hand them over.”

We are, accordingly, of the opinion that these letters (both the copies of those sent and the originals of those received) should be considered as the property of the client company with the result that on the principle above stated the plaintiffs should not be ordered to produce them. Accordingly, with the exception we have just stated, we would allow this appeal.

Appeal allowed.

Solicitors: *Nash, Field & Co.* (for the plaintiffs); *B. L. Harris & Co.* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re WOLFFE'S WILL TRUSTS. SHAPLEY v. WOLFFE AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), May 21, 22, 1953.]

Will—Condition—Condition or limitation—Alternative limitation—Performance of condition precedent sole object of bequest—Impossibility of condition—Gift of fund “on marriage to a person of the Jewish faith and the child of Jewish parents”—Failure of gift.

By her will dated Oct. 12, 1923, a testatrix, who died on Sept. 23, 1924, gave her residuary estate to her trustees on trust for sale and directed them to hold in trust the sum of £600 to be invested and to pay the income thereof to her daughter A.C. for life and on her death to pay the income to her grand-daughter R.C. during her spinsterhood and on her marriage “to a person of the Jewish faith and the child of Jewish parents to transfer to her” the investments representing the £600. Subject thereto, she gave her residuary estate to the trustees to divide the same equally between her three children, naming them, absolutely, “Provided always that if my grand-daughter [R.C.] shall marry a person not of the Jewish faith and not the son of parents of the Jewish faith then . . . my trustees . . . shall not transfer to her the investments . . . representing the said sum of £600 but shall transfer to her one-sixth of such investments . . . only . . .” The trustees were further directed in that event to sell the remaining five-sixths and divide the proceeds equally between two of the children of the testatrix. On Oct. 1, 1927, R.C. married a man neither of the Jewish faith nor of Jewish parentage, and in January, 1948, during the lifetime of A.C., and with her consent, the investments representing the £600 were transferred to R.C. absolutely. On a summons to determine whether that payment had been rightly made,

HELD: the gift of the capital of the fund to R.C. on “her marriage to a person of the Jewish faith and the child of Jewish parents” was a limitation which had not taken effect and did not constitute a condition, and the proviso was an alternative limitation which had taken effect; but even if the terms of the gift of the capital of the fund to R.C. constituted a condition precedent, the condition was void for uncertainty because it was impossible of performance, and as the performance of the condition was the sole motive of the bequest, and its impossibility was unknown to the testatrix, the invalidity of the condition caused the failure of the gift; and, therefore, whether the terms of the gift of capital to R.C. constituted a limitation or a condition precedent, the gift was not effective, and the fund passed under the proviso, and, accordingly, the payment had been made to R.C. in error, she being entitled only to one-sixth thereof.

Clayton v. Ramsden ([1943] 1 All E.R. 16), followed.

Re Wilkinson ([1926] Ch. 842), applied.

Principle stated in JARMAN ON WILLS, 4th ed., vol. 2, p. 12, applied.

AS TO GENERAL PRINCIPLES OF CONSTRUCTION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 187-197, paras. 240-251; and AS TO VOID CONDITIONS, see *ibid.*, pp. 105-109, paras. 141, 142; and FOR CASES, see DIGEST, Vol. 44, pp. 452-457, Nos. 2745-2804.

Cases referred to

- (1) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (2) *Re Wilkinson*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
- (3) *Re Piper*, [1946] 2 All E.R. 503; 175 L.T. 426; 2nd Digest Supp.
- (4) *Re Elliott*, [1952] 1 All E.R. 145; [1952] Ch. 217.

(5) *Re Moore*, (1888), 39 Ch.D. 116; 57 L.J.Ch. 936; 59 L.T. 681; 52 J.P. 596; 44 Digest 438, 2646.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix, Augusta Wolffe, and in the events which had happened, the legacy of £600 on the death of Annie Cohen, the daughter of the testatrix (i) became payable to the second defendant, Rosa Hill, formerly Rosa Cohen, the daughter of Annie Cohen, absolutely, or (ii) became payable as to one-sixth thereof only to the second defendant and as to the remainder became divisible between the plaintiff, Walter Thomas Shapley, as assignee of Jacob Wolffe, the son of the testatrix, and the testatrix's daughter, Ruth Merritt, or (iii) fell into the residuary estate of the testatrix and became divisible in thirds between the estate of the said Annie Cohen, Ruth Merritt and the plaintiff as assignee of the said Jacob Wolffe.

By her will dated Oct. 12, 1923, a testatrix, Augusta Wolffe, appointed one Moss Wolffe her executor and trustee, and, after making certain specific and pecuniary bequests, she gave, devised and bequeathed all her property, of whatsoever nature, to her trustees on the usual trusts for sale. After giving certain administrative directions, she directed her trustees

" . . . to hold in trust the sum of £600 to be invested . . . and to pay the income thereof to my . . . daughter Annie Cohen during her life . . . and upon her death to pay the said income to my grand-daughter Rosa Cohen [daughter of the said Annie Cohen] during her spinsterhood and upon the marriage of the said Rosa Cohen to a person of the Jewish faith and the child of Jewish parents to transfer to her the said investments and securities representing the said sum of £600 subject however to the proviso hereinafter set forth And subject as aforesaid I give devise and bequeath the residue of my estate . . . and after reserving the said sum of £600 . . . to my trustees to divide the same in equal proportions among my said three children Annie Cohen Ruth Merritt and Jacob Wolffe absolutely Provided always that if . . . Rosa Cohen shall marry a person not of the Jewish faith and not the son of parents of the Jewish faith then in that event my trustees . . . shall not transfer to her the investments or securities representing the said sum of £600 but shall transfer to her one-sixth of such investments or securities only and no more and shall sell the residue of the said investments or securities and divide the proceeds thereof between my said son Jacob Wolffe and my said daughter Ruth Merritt equally . . . "

The testatrix died on Sept. 23, 1924, and on Oct. 1, 1927, Rosa Cohen married Cecil Harold Hill who was not of the Jewish faith or a child of Jewish parents. By a deed dated Apr. 6, 1937, Jacob Wolffe assigned his interest in the £600 or the investments representing the same to the plaintiff, Walter Thomas Shapley. By a deed of release and indemnity dated Dec. 1, 1947, made between Rosa Hill, Moss Wolffe and Annie Cohen, Annie Cohen released her life interest in the investments representing the balance of the £600 and the investments were transferred to Rosa Hill in January, 1948. Annie Cohen died in September, 1949, and Moss Wolffe died on Oct. 30, 1950. On Mar. 8, 1951, letters of administration to his estate were granted to his widow, the first defendant, Florence May Wolffe.

M. Browne for the plaintiff, the assignee of the interest of Jacob Wolffe.

G. B. H. Dillon for the second defendant, Rosa Hill.

The first defendant, Florence May Wolffe, legal personal representative of Moss Wolffe, was not represented.

HARMAN, J. (having stated the facts): It will be observed that there is a gift to Rosa during spinsterhood. There is no further gift of income to her, but there is a gift to her of the capital of the fund on her marriage to a person of the Jewish faith and the child of Jewish parents. That is the only event

in which she is to have the capital. Of course, if she had remained a spinster, she would have continued to enjoy the income during the rest of her life, and the residuary bequest would then have operated on her death. The testatrix has, therefore, dealt with the fund if Rosa lives and dies a spinster, and with the case of Rosa marrying one of Jewish faith and parentage, but not further. By the proviso she proceeds to fill the gap, which, she conceives, can arise only if Rosa marries a person not of the Jewish faith and not the son of Jewish parents. In that case, Rosa is to have only £100 and the other £500 is to go to her aunt and uncle.

This case seems to be the first of its kind. There is no question here, as I see it, of a vested life interest in Rosa, cut down by a proviso in the form of a condition subsequent. If it be a condition at all, this is a condition precedent, and it seems to me that considerations entirely different from those in the case of conditions subsequent apply. It is now well known, since the decision of the House of Lords in *Clayton v. Ramsden* (1), that a condition of defeasance on an estate or interest by way of condition subsequent on marriage to a person not of the Jewish faith and not of Jewish parents is bad, since it is too uncertain, and, being too uncertain, the condition subsequent fails and the gift remains. The legatee can, therefore, take the benefit without complying with the condition. That principle does not apply to conditions precedent, for there the legatee must qualify for the gift, and she can qualify only by marrying a person of Jewish faith and parentage. It may be that that is something which, in the eye of the law, she cannot do. It is said, therefore, that this is a condition precedent which is impossible to fulfil and should, therefore, be rejected. I do not follow that argument. If one rejects the condition, there is no gift. There is no gift to her on her marriage, but only a gift to her on her marriage to a person of Jewish faith and parentage, and it seems to me that, on the true view, this is not a condition but a limitation which fails. I see, therefore, no limitation on Rosa's interest in the events which have happened. Moreover, I regard the proviso which follows the residuary gift as really an alternative limitation in these words: "If the condition I have imposed be not fulfilled, then, in the alternative, I give it over in another way". I think I have authority for construing the will in that way in *Re Wilkinson* (2) before TOMLIN, J. There the bequest was of a fund to be paid to the niece so long as she resided in a certain house, and then, if she ceased voluntarily to reside in the house, the fund was to go over. TOMLIN, J., held that there was nothing bad in those limitations on the face of them. In the event, having regard to the word "voluntarily", he concluded that the lady might not be bound if obliged by the duties of her husband to live elsewhere. That does not affect the way he construed the will. He says ([1926] Ch. 848):

"When I come to examine the language of this will, I am satisfied that I am not dealing with a case of a gift cut down by a condition subsequent, but that I am dealing with a case of limitation. The language of the gift is 'pay the income . . . to my niece . . . (in order to enable her to reside . . .) for and during the term of her natural life or until she shall voluntarily cease to make the . . . dwelling-house her permanent home'. If the clause had paused there, I feel great difficulty in appreciating what argument could have been addressed to me to suggest that that was other than a limitation similar to the ordinary limitation to a woman for life, or until she shall marry again. But it is said, and said truly, that in construing these words, I must read the clause as a whole. And it is contended that when I go on to find the direction that after her death the trustees shall hold the sum of £7,000 in trust as she shall appoint, and that in default of appointment this sum shall fall into residue followed by the proviso 'Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of £7,000 and the investments representing the

same shall fall into 'residue, I must in some way modify my view of the earlier language, and read it as though it were a gift to her for life, with a condition subsequent that her interest shall cease if at any time she voluntarily ceases to make the dwelling-house her permanent home. I am unable to follow that argument. The scheme of the clause seems to me to be reasonably plain. There is, first of all, a limitation of the income to her for life, or until the happening of the named event. The next branch of the clause, as I read it, deals with the alternative, of her death without having ceased to occupy the house, and then the proviso deals with the other alternative of her ceasing to reside in the house. The words 'provided however' seem to me to mean nothing more than 'but in the other alternative'."

A

Those words seem to me to fit very well the form of the will here, but, supposing I am wrong about that, it is not even suggested here that this can be read as a condition subsequent, and rightly, because there is no suggestion of a gift to the lady of the income for anything more than her spinsterhood. Suppose, then, that this be a condition precedent. It is a condition which, having regard to the state of the law, is impossible. It is not said to be contrary to the policy of the law, but it is argued that an impossible condition will not be insisted on having regard to the ecclesiastical law on the subject inherited by the Court of Chancery.

B

Both ROMER, J., and myself have recently given judgments independently on this subject, and I am glad to say that, although his case was not cited to me, our judgments seem to be congruous. The case before ROMER, J., was *Re Piper* (3), and the case before me was *Re Elliott* (4). We both cited a passage from the judgment of COTTON, L.J. (39 Ch.D. 128) in *Re Moore* (5), which he took from JARMAN ON WILLS, 4th ed., vol. 2, p. 12:

C

D

"The rule is thus stated by MR. JARMAN: 'But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void'."

E

F

If I apply that passage, as both ROMER, J., and I did in those decisions in *Re Piper* (3) and *Re Elliott* (4), I feel that the condition here exactly complies with the second sentence: the performance of the condition seems to me to have been the sole motive of the bequest. Furthermore, the impossibility of the performance of the condition must have been, as I see it, unknown to the testatrix; no testator would ever guess that one cannot marry a Jew in the eyes of the law, and it is only by reasoning from the peculiar doctrine which covers conditions subsequent that it is impossible to say whether a man is a Jew or of Jewish parentage. Those who select scholars for Jewish charitable scholarships have no difficulty at all. It is not to be supposed that the testatrix knew that it was an impossible condition, and, therefore, as she only posed one which, having regard to the highest authority, I must hold to be impossible, the condition goes and the gift goes with it. It is then argued in the interest of residue that if in law you cannot say that a man is a Jew, so you cannot say that a man is not. I find it very difficult to believe that if a man marries a woman of pure Zulu parents, anyone can say that she is a Jewess of Jewish parents; at some point

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H

there comes a limit on these things, and that is reached. When I come to the proviso, and I find this:

"If my grand-daughter . . . shall marry a person not of the Jewish faith and not the son of parents of the Jewish faith",

I cannot see any difficulty. She has married and nobody suggests that the person she married satisfied those conditions. In that event, the trustees were not to transfer to her more than one-sixth of the investments representing the £600. The result is that on her marriage the fund became payable as to one-sixth to Rosa Hill and the remainder became divisible between Jacob and Ruth Merritt in equal shares. *Order accordingly.*

Solicitors: *Gibson & Weldon*, agents for *Shapley, Barret & Co.*, Nairobi (for the plaintiff); *Sampson & Co.* (for the second defendant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

EVANS v. JONES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 16, 1953.]

Food and Drugs—Milk—Adulteration—Milk of good quality after addition of water.

The respondent was charged with selling to the prejudice of the purchaser milk which was not of the quality demanded, contrary to the Food and Drugs Act, 1938, s. 3 (1). Samples taken of the milk were found to contain added water, but there was no evidence to show who had added the water, and analysis showed a deficiency in milk-solids other than milk-fat under the Sale of Milk Regulations, 1939, reg. 2. The magistrates found that, even though water was present, the milk was still good milk in that the percentage of fat-solids exceeded the percentage prescribed by reg. 1 of the regulations of 1939 and that the offence was trivial, and they dismissed the informations.

HELD: offences of watering milk were not to be regarded as trivial; in the present case the offence had been proved; and, therefore, the magistrates had no power to dismiss the summons, but they must convict, and, if they thought the offence trivial, grant a conditional or an absolute discharge under the Criminal Justice Act, 1948, s. 7 (1).

Banks v. Wooler (1900) (81 L.T. 785), not applied.

AS TO SALE OF FOOD NOT OF THE NATURE DEMANDED, see HALSBURY, Hailsham Edn., Vol. 15, pp. 151-155, paras. 242-248.

Case referred to:

(1) *Banks v. Wooler*, (1900), 81 L.T. 785; 64 J.P. 245; 25 Digest 128, 497.

CASE STATED by Montgomery justices.

At a court of summary jurisdiction sitting at Machynlleth on Feb. 4, 1953, the appellant, Evan Walter Evans, an inspector of food and drugs for the county of Montgomery, preferred two informations against Alfred Lewis Jones, a dairy farmer, charging that on Dec. 10 and Dec. 12, 1952, he unlawfully sold to the prejudice of the purchaser, the Milk Marketing Board, milk which was not of the quality demanded by the purchaser, contrary to the Food and Drugs Act, 1938, s. 3 (1).

It was proved or admitted that on Dec. 10, 1952, the respondent supplied milk from his farm in pursuance, or purported pursuance, of a written contract between himself and the Milk Marketing Board and of a written direction made thereunder, to a milk retailer, Meirion Lewis, which was from the previous evening's milking and had been kept overnight at the farm. On the same day the appellant purchased a pint of the milk from the retailer for the purpose of analysing it. The retailer knew that a sample of the milk would be taken for

analysis and he did not tamper with it or add any water or other milk to it. The public analyst found in his certificate of analysis under s. 69 (3) of the Act that, calculated on the standard of 8.5 per cent. for solids not fat, the milk contained added water to the extent of nine per cent. of the bulk, and that it contained 7.7 per cent. solids not fat and 4.6 per cent. fat-solids. On Dec. 12, 1952, the appellant, together with the retailer, visited the respondent's farm and found there two churns of milk awaiting collection by the retailer. One of the churns contained milk from the previous evening's milking and the other contained milk from that morning's milking. The appellant took samples of approximately one pint from each churn for analysis. The public analyst found that the previous evening's milk, calculated on the standard of 8.5 per cent. for solids not fat, contained added water to the extent of four per cent. of the bulk, and that it contained 8.2 per cent. solids not fat and 4.4 per cent. fat-solids. The sample from the morning's milk was found to be pure and unadulterated, containing the prescribed quantities of non-fat and fat-solids. The respondent did not require the public analyst to be called as a witness nor did he call as witnesses his sister-in-law and a manservant who both handled milk which was left at the farm overnight. Apart from the fact that water was present in both the samples of the evening milk, it was good milk, notwithstanding that in each case the percentage of milk-solids other than milk-fat was below the percentage of 8.5 per cent. prescribed in the Sale of Milk Regulations, 1939 (S.R. & O., 1939, No. 1417), reg. 2. There was no evidence to show who had added the water to the milk. The appellant had known the respondent since 1937, had carried out previous tests on his milk from time to time, and had found no cause for complaint.

It was contended on behalf of the appellant that the milk in both cases, notwithstanding its good quality in that the percentage of fat-solids exceeded the prescribed percentages, was sold to the prejudice of the purchaser within the meaning of s. 3 (1) of the Act as it was not of the quality demanded by virtue of the addition of the water, and that the respondent had failed to rebut the presumption laid down in reg. 2 of the regulations of 1939 that the milk was not genuine since it contained less than 8.5 per cent. of milk-solids other than milk-fat. It was contended on behalf of the respondent that both samples of milk were of very good quality and that the purchaser was not prejudiced, notwithstanding the unexplained presence of a small quantity of water therein.

The justices dismissed the informations and the appellant appealed.

Ahern for the appellant.

The respondent did not appear.

PARKER, J.: This is a Case stated by justices for the county of Montgomery before whom the respondent was charged with two offences under s. 3 (1) of the Food and Drugs Act, 1938, in that he sold milk that was adulterated or was not genuine milk. [His LORDSHIP stated the facts and continued:] The magistrates held that, although no attempt had been made, by calling the sister-in-law or the manservant, to prove that the milk was in the same state as when it came from the cow, nevertheless it was, by reason, presumably, of the content of fat-solids, very good quality milk, and that the presence of water in the quantities proved did not make its sale prejudicial to the purchaser. There is ample authority for holding that where the purchaser does not get what he demands, which here was genuine milk, the sale is to his prejudice, but the magistrates, apparently, held that, as the milk was still good, the offence was trivial, and so they were entitled to dismiss it. They did that in reliance on the decision of *Banks v. Wooler* (1), decided under the Food and Drugs Act, 1875, s. 6, where *CHANNELL, J.*, said (81 L.T. 785):

"If the milk had been exceptionally good after adulteration, the justices might have considered the offence too trifling to convict. If the milk had

only been exceptionally good before adulteration, the offence was not trifling, and they should have convicted."

- That case, however, was decided before the Sale of Milk Regulations, 1939, and the Criminal Justice Act, 1948. The summons was dismissed under s. 16 of the Summary Jurisdiction Act, 1879, which empowered justices to dismiss a summons in the case of a trifling offence. Whatever was thought in 1900 as to the gravity or triviality of selling milk with an adulteration of ten per cent., it seems to me that, today, any adulteration of milk is far from being a trivial offence. Indeed, if one takes CHANNELL, J.'s words literally, they mean that the richer the milk the more you are entitled to adulterate it and treat the matter as a triviality.
- In my opinion, an offence was clearly proved here. By reason of the Criminal Justice Act, 1948, s. 7 (1), the magistrates might, if they considered the offence trivial, have granted either a conditional or an absolute discharge after finding the offence proved, but they have confused matters of defence with matters of mitigation and have failed to convict when an offence was clearly proved. Whether the matter is to be considered trivial or not is for the magistrates to decide, but because in 1900 an adulteration of ten per cent. of water was treated as trivial it does not follow that it is the same today. In my opinion, this case should go back with a direction to the magistrates to convict.

DONOVAN, J.: I agree. It should be remembered that a great deal of public money is spent on milk today under the provisions of the various welfare schemes. That would appear to me to underline the importance of not regarding adulteration by water as trivial.

- LORD GODDARD, C.J.: I agree. I only want once more to emphasise how careful magistrates should be not to confuse matters of defence with matters of mitigation. In *Banks v. Wooler* (1) the passage on which the magistrates relied only showed that in the days when s. 16 of the Summary Jurisdiction Act, 1879, was in force magistrates, if they thought a case trivial, were required to dismiss it. They are no longer required to dismiss a case which they consider trivial. They must convict, but they can grant an absolute discharge or a conditional discharge under the Criminal Justice Act, 1948, s. 7 (1). In spite of the fact that one of the judges who decided *Banks v. Wooler* (1) was CHANNELL, J., for whose judgments I always have the highest respect, I certainly cannot agree that, if I buy milk and am served with milk and water, that is a trivial offence. PARKER, J., has pointed out that it would mean the better the milk the greater the adulteration permitted. No adulteration is permitted today, and here there is clear evidence that there was adulteration. In my opinion, the magistrates cannot treat this as a trivial case. On the question of penalty, I think the magistrates must pay attention to what this court has said in giving judgment today, that these offences of watering milk are not to be regarded as trivial merely because the result of the adulterated milk will give the purchaser the butter-fat he is entitled to get.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. E. White*, clerk of the county council, Welshpool (for the appellant).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

POPE v. CLARKE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 16, 1953.]

Street Traffic—Notice of intended prosecution—Time of alleged offence wrongly stated—Road Traffic Act, 1930 (c. 43), s. 21 (c).

On Dec. 4, 1952, a collision took place between a motor car driven by the respondent and a lorry. A notice of an intention to prosecute him for dangerous driving was sent to him by registered post under s. 21 (c) of the Road Traffic Act, 1930. In the notice the intended charge and the date and place of the collision were correctly stated, but the time of the alleged offence was inserted incorrectly.

Held: the provision in s. 21 (c) that a notice of intended prosecution should be served on a defendant was mandatory, but the provision with regard to the specification of the time of the alleged offence was only directory; the purpose of the notice was to call the respondent's attention to the fact that he was to be prosecuted while the circumstances were still fresh in his mind; that purpose had been fulfilled; and, therefore, the incorrect statement as to the time of the collision did not invalidate the notice.

Dictum of LORD COLERIDGE, C.J., in *Woodward v. Sarsons* (1875) (L.R. 10 C.P. 746), applied.

AS TO NOTICE OF PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 31, p. 680, para. 1008; and FOR CASES, see DIGEST, Vol. 42, p. 871, Nos. 200-205.

FOR THE ROAD TRAFFIC ACT, 1930, s. 21, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 594.

Cases referred to:

- (1) *Venn v. Morgan*, [1949] 2 All E.R. 562; 113 J.P. 504; 2nd Digest Supp.
- (2) *R. v. Ingall*, (1876), 2 Q.B.D. 199; 46 L.J.M.C. 113; 35 L.T. 552; 41 J.P. 181; 42 Digest 713, 1312.
- (3) *Woodward v. Sarsons*, (1875), L.R. 10 C.P. 733; 44 L.J.C.P. 293; *sub nom. Woodward v. Sarsons & Sadler, Birmingham Municipal Election Petition Case*, 32 L.T. 867; 42 Digest 711, 1279.

CASE STATED by Essex justices.

At a court of summary jurisdiction sitting at Brentwood on Jan. 29, 1953, the appellant, Walter Steven Pope, a superintendent of police, preferred an information against the respondent, Harry William James Clarke, charging that, on Dec. 4, 1952, on a road at Great Warley, Essex, he unlawfully drove a motor vehicle in a manner dangerous to the public having regard to all the circumstances of the case, contrary to the Road Traffic Act, 1930, s. 11 (1).

It was proved or admitted that on Dec. 4, 1952, at about 11.15 a.m., a collision occurred on the road leading from Brook Street, Brentwood, to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill, between a motor car, driven by the respondent, and a motor lorry. The appellant alleged that the circumstances of the respondent's driving immediately before the collision constituted the offence to which the information related. The respondent was not warned at the time of the alleged offence that the question of prosecuting him for an offence of reckless, dangerous, or careless driving would be taken into consideration, and the summons for the alleged offence was not served on him within fourteen days of the commission of the alleged offence, but a notice of intended prosecution was sent to him by registered post in accordance with the Road Traffic Act, 1930, s. 21 (c).

It was contended on behalf of the respondent that the provisions of the Road Traffic Act, 1930, s. 21 (c), stipulated that the notice of intended prosecution must specify, *inter alia*, the time at which the offence was alleged to have been committed, that those provisions must be strictly complied with, that that

had not been done because the time of the alleged offence was proved to have been at or about 11.15 a.m. on Dec. 4, 1952, whereas the notice stated it as 1.15 p.m., and that, therefore, the notice was invalid and the information bad. It was contended on behalf of the appellant that the time was sufficiently specified in the notice by the statement of the date, namely, Dec. 4, 1952, the statement of the hour being unnecessary and superfluous. The purpose of the notice, being to call the respondent's attention to the time and circumstances in respect of which he might be charged, had been fulfilled, and the requirements of the Road Traffic Act, 1930, s. 21 (c), had been substantially and sufficiently complied with. Therefore, the notice was adequate and valid.

The justices dismissed the information and the appellant appealed.

Moules for the appellant.

Jellinek for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Essex, before whom the respondent was charged with the offence of driving a motor vehicle in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). [His LORDSHIP stated the facts and continued:] By some mistake the police put in the notice 1.15 p.m. instead of 11.15 a.m. The notice said:

" . . . I hereby give you notice that it is intended to institute proceedings against you in respect of an offence under s. 11 of the Road Traffic Act, 1930, the particulars being that, at or about 1.15 p.m. on Thursday, Dec. 4, 1952, whilst driving Austin motor car, Index No. KGH 521, on the road leading from Brook Street, Brentwood, to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill, you did drive the said motor car in a manner which was dangerous to the public, having regard to all the circumstances of the case."

As I said in *Venn v. Morgan* (1) ([1949] 2 All E.R. 563), in considering whether a notice purporting to be given under s. 21 is sufficient, we ought to use a modicum of common sense. OLIVER, J., in giving judgment in that case, pointed out that these notices are not formal documents like informations or indictments. He said (*ibid.*, 564):

" The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him . . . an opportunity, in good time while memories are still fresh, to prepare his defence."

In my opinion, the principle we have to bear in mind here is that there is a distinction between the construction to be placed on provisions of a statute which are mandatory and provisions which are merely directory. In that connection I may quote a passage from MAXWELL ON INTERPRETATION OF STATUTES, 10th ed., p. 376:

" It has been said that no rule can be laid down for determining whether the command [of the statute] is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (*R. v. Ingall* (2) 2 Q.B.D. 208, per LUSH, J.), and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be

regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

In *Woodward v. Sarsons* (3) LORD COLERIDGE, C.J., giving the judgment of the court, said (L.R. 10 C.P. 746):

"... the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

That was a case dealing with the marking by a presiding officer of ballot papers for illiterate voters under r. 26 of the Rules for Parliamentary Elections in sched. I to the Ballot Act, 1872, which, it was said, was absolute. The rules were held to be directory, and disregard of their provisions was held not to invalidate the votes provided that the object of the Act was obtained, that is to say, the effect of the voting was kept secret. Here, the object of the Act, as OLIVER, J., said in the passage I have read, is to bring to the defendant's mind, when the events are still fresh in his memory, the fact that he is going to be prosecuted. The respondent could have been under no conceivable doubt what he was to be prosecuted for. He was told the exact place where he was alleged to have committed the offence, and that was the place where the accident happened. Therefore, it is idle to say that his mind was not at once directed to the actual occurrence in respect of which he was going to be prosecuted. In my opinion, we should apply the passage I have quoted from *Woodward v. Sarsons* (3) and say that the mandatory part of s. 21 (c) is the serving of a notice of intended prosecution on the defendant specifying the nature of the offence in respect of which he is going to be prosecuted. Here that offence was dangerous driving at the place mentioned, and the mere fact that the actual hour was incorrectly stated in the circumstances makes no difference. If a person met with two accidents on the same day at or about the same place, possibly other considerations might apply, because he might then say he was misled. Here the respondent, on whom was the onus of showing he was misled, gave no evidence.

In my opinion, the justices came to a wrong decision. The case must go back to them with an expression of opinion that the notice was good, and they must proceed to hear the case.

PARKER, J.: I agree.

DONOVAN, J.: I also agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *Patersons, Snow & Co.*, agents for *Gepp & Sons*, Chelmsford (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re MERTON'S SETTLEMENT. PUBLIC TRUSTEE v. WILSON
AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), June 4, 1953.]

Power of Appointment—Fraudulent exercise—Purchase of appointee's interest by appointor—Appointor and appointee in relationship of parent and child.

A Where an appointor and appointee stand in the relationship of parent and child and the appointor who appoints in favour of the child then purchases the interest of that child there is no inflexible rule that the transaction is a fraud on the power. The court must, in each case, inquire what is the purpose and intention of the appointor, and if, and only if, it appears from the evidence that the appointor's object was to secure a benefit for himself or for a non-object of the power is the transaction to be held invalid.

B Dictum of LORD PARKER OF WADDINGTON in *Vatcher v. Paull* ([1915] A.C. 378) and dictum of SIR RAYMOND EVERSHERD, M.R., in *Re Dick* ([1953] 1 All E.R. 563), applied.

Smith v. Camelford (Lord), *Camelford* (Lord) v. *Smith* (1795) (2 Ves. 698) and *Noel v. Walsingham* (Lord) (1824) (2 Sim. & St. 99), considered.

C AS TO WHAT AMOUNTS TO A FRAUDULENT APPOINTMENT, see HALSBURY, *Hailsham Edn.*, Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 504-513, Nos. 972-1052.

Cases referred to:

(1) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.

D (2) *Re Dick*, [1953] 1 All E.R. 559; [1953] Ch. 343.

(3) *Smith v. Camelford* (Lord), *Camelford* (Lord) v. *Smith*, (1795), 2 Ves. 698; 30 E.R. 848; 37 Digest 495, 880.

(4) *Noel v. Walsingham* (Lord), (1824), 2 Sim. & St. 99; 3 L.J.O.S.Ch. 12; 57 E.R. 283; 40 Digest 609, 1447.

E ADJOURNED SUMMONS to determine, inter alia, (i) whether the defendant, Gladys Wilson, had under or by virtue of the joint effects of (a) her execution of a deed-poll of appointment dated June 16, 1952 (being an irrevocable appointment by her, subject to her own life interest therein, of all the trust funds subject to the trusts of a settlement dated May 5, 1908, to her daughters the second and third defendants, in equal shares), and (b) the subsequent purchase by herself on or before July 1, 1952, of the whole of the reversionary interest of each of her said daughters under the said settlement, become the sole and beneficial owner of the whole of the said trust fund; and (ii) whether and to what extent the power of appointment by the said settlement given to the said Gladys Wilson had been validly exercised by the said deed of appointment and whether and to what extent she had by virtue of the joint effect of the execution thereof and the said subsequent purchase acquired a beneficial title in possession to the said trust fund.

G By the terms of the settlement dated May 5, 1908, the trustees were directed, inter alia, to pay the income of the trust fund to the defendant Gladys Wilson for life and after her decease "and subject to the power of appointment in favour of any husband of hers thereafter contained" to hold the trust fund in trust

H "for such of the issue of Gladys Wilson . . . as she may at any time by any deed or deeds with or without power of revocation . . . appoint and in default of appointment in trust for all her children . . . in equal shares."

By the deed-poll of appointment dated June 16, 1952, after a recital that Gladys Wilson was desirous of making such irrevocable appointment in favour of her daughters, Rosemary Helen Blake Tyler and Diana Mary Erica Bridgeman,

the second and third defendants, the said Gladys Wilson appointed that the trust fund subject to the trusts of the settlement should (subject to her life interest therein) be held in trust for the second and third defendants in equal shares, free and discharged from the power in favour of any husband conferred on her by the trusts of the settlement. On or before July 1, 1952, Gladys Wilson purchased the reversionary interests of the second and third defendants respectively. The fourth defendant, Ralph Minto Wilson, the son of Gladys Wilson, who was under a disability and in whose favour she had made no appointment, was interested in one-third of the trust fund in default of appointment. It appeared from the evidence that Gladys Wilson had made generous provision for the fourth defendant, the aggregate amount of the capital sums so provided exceeding the amount provided for the second and third defendants.

H. A. Rose for the plaintiff, the Public Trustee.

Bathurst, Q.C., and *N. C. Armitage* for the first defendant.

W. F. Waite for the second and third defendants.

Tonge for the fourth defendant.

WYNN-PARRY, J.: This summons raises the short and, to my mind, simple question whether or not there is ground for saying that the appointment followed by the purchase constitute an invalid transaction. It can be held to be an invalid transaction, and even then only partially invalid, only if it can be shown that there is some inflexible rule established by the authorities that where the appointor and the appointee stand in the relationship of parent and child the appointor who appoints in favour of the child and then purchases the interest of the child cannot benefit thereby beyond the interest which the child would have in the fund had the appointment never been made.

Counsel for the fourth defendant, that is, the son under a disability, was constrained at the outset to say that he was unable successfully to challenge this transaction. He directed my attention to three modern authorities, to two of which I propose shortly to refer. The first was *Vatcher v. Paull* (1), in the course of his speech in which case LORD PARKER OF WADDINGTON said ([1915] A.C. 378):

"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power."

It appears to me that that is a clear direction to the court in each case to inquire what is the purpose and intention of the appointor, and if, and only if, it appears from the evidence that the object was to secure a benefit for himself or for some other person not an object of the power is the transaction to be held invalid. Those words of LORD PARKER direct that the courts shall embark on that inquiry, and they are, therefore, the reverse of words which are apt to establish or recognise the existence of any inflexible rule.

The other case to which I desire to refer is *Re Dick* (2), in the Court of Appeal. In that case, SIR RAYMOND EVERSHED, M.R., in the course of his judgment, quoted the words of LORD PARKER which I have just read, and continued ([1953] 1 All E.R. 563):

"I should not wish to be thought to lay it down that whenever there is any intention, however much secreted in the bosom of the appointor, that

some non-object will be in some measure benefited, therefore, the exercise of the power is bad. After all, although the phrase 'fraud on the power' does not carry the sense of deceit which the word 'fraud' bears in other contexts, still it indicates the doing of something which is not right, using those words in their broad sense—at least, a deliberate defeating of what the donor of the power has authorised and intended."

A Those words appear to me again to recognise the duty of the court to embark on the inquiry to which I have referred and are inconsistent with any inflexible rule that the mere circumstance that the appointor, standing in the relation of parent to the appointee, purchases the appointee's share thereby does something which vitiates to any extent the transaction. That is the state of the modern authorities.

B There are two old authorities to which my attention was directed. *Smith v. Lord Camelford*, *Lord Camelford v. Smith* (3) was the first. In the course of the judgment in that case this observation appears (2 Ves. 714):

"Even a well executed appointment could not take from her one moiety; for though he could entitle himself to all Lady Camelford could claim, it could be only to that she could claim absolutely against the other daughter.

C He could not make an appointment in truth beneficial to himself: but in truth he has not."

The sidenote against that passage is:

"A father having power to appoint among children and purchasing the share of one cannot by appointment entitle himself to more than the share of that child in default of appointment."

D That sidenote is only explained by the passage from the judgment to which I have referred and cannot be regarded as any authority for the proposition that there is any such inflexible rule as that to which I have referred. Even if there could be extracted from the context any such inflexible rule, then, in my view, such a rule would have to give way to the modern authorities and, particularly, to the overriding authority of the speech of LORD PARKER in the House of Lords ([1915] A.C. 378).

Finally, in *Noel v. Lord Walsingham* (4), the headnote is (2 Sim. & St. 99):

"A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her. Held, that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund."

G At the beginning of his judgment SIR JOHN LEACH, V.-C., said (*ibid.*, 110):

"Mr. Paul Cobb Methuen [the settlor] became the purchaser of the £3,000 which he had appointed to Lady Walsingham; and that sum not being more than her equal aliquot share of the £15,000, it might be difficult to question the validity of that appointment or purchase, if the interest of any party required it . . ."

H That passage appears to be the key to the rest of the judgment and it is couched in language which is quite inconsistent, on examination, with there being any such inflexible rule as that to which I have referred. It, therefore, appears to me that the two older authorities are not inconsistent with the modern authorities. In each case there must be the inquiry by the court, and the court is free as a result of that inquiry to come to such conclusion as appears to be right, being guided only by the principle stated by LORD PARKER ([1915] A.C. 378). The court has to ask itself what was the appointor's purpose and intention. Was

it to secure a benefit for himself or for some person not an object of the trust? If the answer is "Yes", there is vice, and if the answer is "No", there is no vice.

In this case I come, without hesitation, to the conclusion that, on the evidence and in the light of the instruction to be derived from these cases, the transaction was entirely valid. It was effective to pass the whole of the interest in the fund to the two daughters and it was effective by the subsequent step to vest the whole of the interest in the fund in the mother.

Order accordingly.

Solicitors: *Park Nelson & Co.* (for the Public Trustee); *Bischoff & Co.* (for the first, second, third and fourth defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

JOSEPH v. JOSEPH.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), July 15, 1953.]

Divorce—Desertion—Termination—Jewish bill of divorcement.

In 1937 the husband deserted the wife. Subsequently, she sought from the Beth Din, the Court of the Chief Rabbi in London, a Get, or Jewish bill of divorcement, given by the husband, and on Sept. 19, 1948, she received from the Beth Din a certificate stating that the Get had been allowed. On Jan. 8, 1952, she filed a petition for divorce on the ground of her husband's desertion.

HELD: although the Get had no effect in English law, either as a decree of divorce or as an agreement to separate, it had effect between persons of the Jewish faith, and, by obtaining it, the wife must be taken to have consented to her husband's continuing to live separate and apart from her, and, therefore, since she had thereby brought her husband's desertion to an end, the petition failed.

Papadopoulos v. Papadopoulos ([1936] P. 108), distinguished.

Cases referred to :

- (1) *Preger v. Preger*, (1926), 134 L.T. 670; 27 Digest, Replacement, 388, 3205.
- (2) *Papadopoulos v. Papadopoulos*, [1936] P. 108; 105 L.J.P. 21; 154 L.T. 242; Digest Supp.

APPEAL from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Mar. 25, 1952.

The parties who were of the Jewish race and faith were married in Shanghai in 1926 where the husband was then domiciled. In 1937 the husband deserted the wife, and thereafter he took no steps to make provision for her or for the child of the marriage, and shortly after his desertion he expressed his intention not to return to her. The wife, who was in England between 1938 and 1940, went back to China, where she remained until 1948, in which year she returned to England. She then applied to the Beth Din (the Court of the Chief Rabbi) in London, as she wished to obtain from her husband a Get, or Jewish bill of divorcement, and in September, 1948, she received a certificate that the Beth Din had allowed a Get on a date corresponding with Sept. 19, 1948, and she was free to marry again in accordance with Jewish religious law after ninety clear days from that date.

By a petition dated Jan. 8, 1952, the wife sought a decree of divorce on the ground of her husband's desertion. The husband, in his answer, denied desertion, and alleged that, if he had deserted the wife, the desertion had been terminated by the wife's consenting to their continued separation by obtaining the Get at the Beth Din. The learned commissioner dismissed the wife's petition, holding that by obtaining the Get the wife had consented to the

husband living apart and that his desertion had been terminated as from Sept. 19, 1948.

Quass, Q.C., and Millner for the wife.

Power for the husband.

A **SOMERVELL, L.J.**, stated the facts and continued: The petition is dated Jan. 8, 1952, and, therefore, under our law for the wife to succeed it had to be shown that the husband was in a state of desertion for three years previous to that date. On the facts, apart from the effect of the Get, the learned commissioner accepted in substance the wife's evidence that the husband was in desertion and I think he also accepted that the husband had intimated in the plainest possible way that in no circumstances was he prepared to return to her. The question remains whether the circumstances attending the issue of the Get and its effect prevent desertion running as from the date of issue.

B In her evidence the wife said that in 1940 she went to the Beth Din and told them the circumstances of her case. Her evidence continued:

C "Q.—What was it you were wanting at that time when you went to the Beth Din as far as your husband was concerned? A.—I wanted at that time either my husband to return to me—I wanted him back—or to let him give me a Jewish divorce."

D She was then asked about 1948 when she came back and lived in London with a Mr. and Mrs. Jacob, Mr. Jacob being her nephew. The learned commissioner accepted her evidence, which was supported by Mrs. Jacob, that they got into touch with her husband and asked him if he would come back and he again refused. She then approached the Beth Din, and she was asked what her motive was in pressing for the Jewish divorce. She replied that she wanted to return to China where the Get would regularise her position before the community by whom a Jewish divorce was regarded as a complete dissolution of the marriage. There was no evidence before the court as to the law in Shanghai, and, for the purpose of this judgment, I accept that she believed that this document was one which, if she returned to Shanghai, would be recognised as a divorce in that place. She said later, when asked about the position in this country as distinct from Shanghai:

E "I always did appreciate it, but, seeing I was going back to China, I did not bother much about it. Seeing, however, that I am residing here I found that legal divorce is a necessity, and so I started a civil divorce as soon as I got back here."

F Shortly after she received the Get circumstances in China made her change her mind about going back to Shanghai, and she is now in this country, seeking, in these proceedings, a divorce based on the desertion which started in 1937. **G** One has some sympathy with her if the step which she took in 1948 to obtain the Get has resulted in an obstacle to her relying on the desertion which started in 1937 and obtaining a divorce in this country.

The learned commissioner read the Get and said:

H "That, on the face of it, is a very final document, although it is quite clear that, according to English law, it has no effect as a divorce. I was informed, and I had some evidence before me, that such a divorce can only be applied for by the husband. Therefore, it has to be with his consent, and the wife has also to consent, but she cannot apply for such a divorce. I was informed that just mutual consent was not sufficient ground for the pronouncement of such a Jewish divorce, but it is quite clear, whatever the ground for such a divorce, that each of the parties has to consent. Undoubtedly, the wife was persisting, right from comparatively early days, in urging her husband to give her this Jewish divorce."

Whether that is right in all cases it is unnecessary to determine, and the evidence as to a Get was very tenuous. But it is clear that in this case, where the wife was plainly the aggrieved party, she herself suggested and initiated the Get, although, in form, it had to be demanded by the husband and he was the person to deliver it (if that be the right expression) to her. The learned commissioner then refers to two cases—*Preger v. Preger* (1) and *Papadopoulos v. Papadopoulos* (2), neither of which, in my view, is conclusive—but he summarises the matter in this way:

“The conclusion to which I am driven is that the wife, by obtaining this Get and insisting on it in the way in which she did, had consented to her husband living apart from her and that, from that moment, there was no desertion of the wife by the husband. That remains the position, unless it can be said that there has been any conduct of the wife or the husband to take the matter out of the category of a consensual living apart.”

I think that conclusion is inescapable. She asked for a divorce valid according to Jewish law. There is no suggestion that both parties did not realise that it had no legal effect in English law, and, indeed, the wife's evidence emphasises that point, in that she wanted it because, in her opinion, at any rate, it would be effective in Shanghai. She clearly asked the authorities to produce the document with her husband's consent, indicating that she and he should, in future, by consent live separate and no longer be man and wife according to the Jewish law. In those circumstances I do not see how one can avoid the conclusion that she was bringing her husband's desertion to an end. He was not in a position to return to her, and, if he had sought to return, she was in a position to say that she must abide by the decision of the Get. For the reasons which I have given I think the learned commissioner came to a right conclusion and that the appeal should be dismissed.

JENKINS, L.J.: I agree. Counsel for the wife invited us to ignore the Get given to the wife as a mere nullity having no effect in English law, either as a decree of divorce or as an agreement to separate. I agree with him that the Get has neither operation. It clearly does not effect a divorce, and it does not in itself constitute an agreement to separate under English law. Nevertheless, it must, in my judgment, have some efficacy within its own field, that is to say, the field of Jewish religious law. I cannot accept the position that where a Get, which purports to effect a divorce according to Jewish law, has been given by a husband to a wife with the approval of the Beth Din, both spouses being of the Jewish faith, it would be consistent with the religious obligations of those two persons to ignore the Get and live together again as man and wife. The result seems to me to be inescapable, that in the present case the wife cannot consistently with the Get, given at her own request, maintain that the husband is in desertion. I think her successful request for the Get indicated her unwillingness to receive the husband back and amounted to a consent on her part to his continuing to live separate and apart from her. With my Lord, I find it unnecessary to decide in what circumstances it may be possible for the wife hereafter to take fresh proceedings on the ground of the husband's desertion, but in the present proceedings it seems to me that the Get is an insurmountable obstacle. Accordingly, I agree that the commissioner came to a right conclusion and that this appeal should be dismissed.

HODSON, L.J., stated the facts and continued: Counsel for the wife has argued that the certificate given to the wife by the Beth Din that she had received the Get is of no effect and he supported his argument by referring to *Papadopoulos v. Papadopoulos* (2). The essential features of that case were that the husband left his wife in 1913 and in 1914 they came to an agreement which was subsequently held in the courts in this country to be invalid and illegal according to English law. In 1929 the wife, by proceedings in a court

of summary jurisdiction in this country, re-asserted her rights. In subsequent proceedings by the wife for judicial separation on the ground of desertion it was found that, at any rate as from that time (1929), the wife was entitled to complain that her husband had deserted her, and merely expressed a doubt whether she could not establish desertion during the period between the date of the agreement in 1914 and 1929, without coming to a final decision on that matter. That was the case of an invalid and illegal agreement, but this case has nothing invalid or illegal about it. The certificate is a valid document for what it purports to be, namely, a certificate of a Jewish bill of divorcement given according to Jewish religious law. It does not purport to be a decree of divorce dissolving the marriage according to the law of this country. The action of the husband and the wife before the Beth Din seems to me to involve a consensus between the parties that thereafter they should live apart. Up to that time there had been desertion by the husband of the wife. As the learned commissioner found, some years previously the wife had persisted in requesting her husband, if he would not rejoin her, to give her this bill of divorcement. He did so, acting on her request, and I think it is impossible for her to maintain thereafter, so long as that agreement exists, that they are not living apart by consent. In those circumstances the appeal fails.

Appeal dismissed.

Solicitors: *Harold Miller & Co.* (for the wife); *G. Houghton & Son* (for the husband).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

FISHER v. SANTOVIN, LTD. FISHER v. YARDLEY'S LONDON AND PROVINCIAL STORES, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 17, 1953.]

Food and Drugs—Proceedings against third party—Information against retailer still on file—Food and Drugs Act, 1938 (c. 56), s. 83 (3).

On Dec. 11, 1952, at the instance of the local authority, Y., Ltd., were charged under the Food and Drugs Act, 1938, s. 3 (1), with selling to the prejudice of the purchaser food, namely, a bottle of wine, which was not of the substance demanded by the purchaser. On Jan. 6, 1953, the authority, being reasonably satisfied that the offence of which complaint was made was due to the act or default of the respondents and that Y., Ltd., could establish a defence under s. 83 (1) of the Act, cause proceedings to be taken under s. 83 (3) against the respondents. The appellant, who prosecuted on behalf of the authority, did not ask the magistrate for leave to withdraw the information against Y., Ltd., and both informations remained on the file.

HELD: the rights of the authority to proceed under s. 3 (1) against the seller of the article and under s. 83 (3) against some other person responsible for the commission of the offence charged were alternative rights, and, therefore, the authority could take proceedings under s. 83 (3) against the respondents only if no proceedings were in existence against Y., Ltd., and the summonses should be dismissed.

FOR THE FOOD AND DRUGS ACT, 1938, s. 83, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 458.

CASES STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Clerkenwell the appellant, Stanley George Fisher, a sanitary inspector, on behalf of the mayor, aldermen and councillors of the metropolitan borough of Holborn, laid an information against Yardley's London and Provincial Stores, Ltd., the first respondents,

on Dec. 11, 1952, and against Santovin, Ltd., the second respondents, on Jan. 6, 1953. In the case of the first respondents the information charged that they at their branch at 56 Lamb's Conduit Street, Holborn, did sell to the prejudice of the purchaser a food which was not of the substance demanded by the purchaser in that they did sell to Lieut. D. M. Grant, R.A.M.C., instead of a bottle of sherry demanded by him a bottle containing 99.96 per cent. of water, contrary to the Food and Drugs Act, 1938, s. 3. In the case of the second respondents the information, which was in respect of the same sale of sherry (supplied by the second respondents to the first respondents), was laid under s. 83 (3) of the Act and stated that the food and drugs authority for the borough of Holborn were satisfied that the offence was due to the act or default of the second respondents and that the first respondents could establish a defence under the Food and Drugs Act, 1938, s. 83 (1).

On the hearing of the informations on Feb. 20, 1953, it was proved or admitted that on Dec. 22, 1952, the first respondents sent to the appellant a copy of a warranty given by the second respondents in respect of the bottle of sherry together with a notice which complied with s. 84 of the Act of 1938. On Jan. 6, 1953, the appellant laid an information against the second respondents who, on Jan. 15, 1953, informed the appellant that they also intended to rely on a warranty under s. 84 of the Act, given by their suppliers Geo. Jones and Co. (London), Ltd. On Jan. 24, 1953, the appellant laid an information against Geo. Jones & Co. (London), Ltd. in respect of the sale of the bottle of sherry stating that he was satisfied that the sale was due to the default of Geo. Jones & Co. and that the first and second respondents could both establish defences under s. 83 (1) of the Act. On the hearing of the informations against both respondents and Geo. Jones & Co., it was contended on behalf of both respondents that in making use of s. 83 (3) against prior parties in the chain the appellant withdrew or abandoned the summonses against the respondents, and that in so doing the appellant had acknowledged that in law the respondents were not guilty of an offence and that the summons should be dismissed. In addition it was contended on behalf of the second respondents that s. 83 (1) entitled the defendant and not the prosecution to have any person to whose act or default he alleged that the contravention in question was due, brought before the court in the proceedings and that the scheme of s. 83 contemplated that the prosecution should elect against which one of the parties he would cause proceedings to be taken. On the part of the appellant it was contended that a chain of distributors and vendors having been established, they could all be brought before the court as defendants and at the same time; that it was not for the appellant to usurp the privileges of the court by discontinuing proceedings which had been properly brought; and that the appellant was reasonably satisfied that the respondents had a defence because of their pleas of a warranty, but could not be completely satisfied until this defence had been proved to the satisfaction of the court and all the conditions imposed by s. 84 had been complied with.

The learned magistrate dismissed the informations.

Paul Wrightson for the appellant.

J. C. G. Burge for the first respondents.

J. N. Hutchinson for the second respondents.

LORD GODDARD, C.J.: These are Cases stated by a metropolitan magistrate sitting at Clerkenwell Police Court, who dismissed two summonses issued under the Food and Drugs Act, 1938. The point that has arisen is under s. 83 of that Act.

Yardley's London and Provincial Stores, Ltd. (to whom I refer hereafter as "Yardleys") sold a bottle of so-called wine. The bottle contained nothing but coloured water. Yardley's had purchased it from a firm known as Santovin, Ltd., and we were told that Santovin, Ltd., obtained it from one, Jones, but he is not before the court. The food and drugs inspector of the Holborn

Borough Council quite properly thought that proceedings should be taken, and he took proceedings against Yardley's.

A The Food and Drugs Act, 1938, s. 83, was designed largely to save costs and also to give a complete defence in some cases where there was not a warranty. By s. 83 (1), if a shopkeeper has sold to a purchaser goods which turn out to be adulterated and is summoned for a breach of the Act, he has the right of bringing in as a defendant the person by whom he was supplied with those goods, i.e., his wholesaler, and, moreover, the wholesaler can also make use of the goods, so it has been held, and bring in the person who supplied him, e.g., the shipper, but for the purposes of this case we confine ourselves to the retailer and wholesaler. Section 83 provides by sub-s. (1):

B "A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence."

C That is a very valuable sub-section. It allows the shopkeeper to bring in the wholesaler, but it also provides that, unless the shopkeeper shows that he has taken reasonable steps, he also can be convicted. Then it is provided by sub-s. (2) that where a defendant is brought in under sub-s. (1):

D " (a) the prosecution, as well as the person whom the defendant charges with the offence, shall have the right to cross-examine him, if he gives evidence, and any witness called by him in support of his pleas, and to call rebutting evidence; (b) the court may make such order as it thinks fit for the payment of costs by any party to the proceedings to any other party thereto."

E It may be that one or both of the defendants are responsible, but it frequently happens that the food and drugs inspector knows quite well that the shopkeeper who is selling some proprietary article has no reason to suppose that the proprietary article is other than it is represented to be, yet when it is bought and analysed it is found that it is adulterated. The fault there clearly lies with the supplier. If the retailer has sold packet goods in the same condition as he had bought them, justice requires that the person who is really responsible, i.e., the supplier—it may be the manufacturer or the wholesaler—should be brought before the court and dealt with and not the shopkeeper, and so the Act provides by sub-s. (3):

F "Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person [the shopkeeper] and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person [the manufacturer] and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person. In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged."

H The wording of that sub-section and the use of the word "may" seem to indicate

that proceedings will not be taken against the first person if proceedings are to be taken against the "other person" under s. 83 (3).

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A summons was issued against Yardley's. Yardley's might have used s. 83 (1), which they would have to do not less than three days before the hearing, or they might have availed themselves of the provisions of s. 84, which deal with relying on a warranty. Before this case came on, however, a further summons was issued against Santovin, Ltd., and it was therein recited that Yardley's had been charged with selling to the prejudice of the purchaser and that the council of the metropolitan borough of Holborn were reasonably satisfied that the offence was due to the act or default of Santovin, Ltd., and that Yardley's could establish a defence under s. 83 (1). Leave of the magistrate to withdraw the information against Yardley's was not sought. It is absurd that Yardley's are being prosecuted while Santovin, Ltd., are being prosecuted on the ground that the prosecutors are satisfied that the offence was that of Santovin, Ltd., and that Yardley's have a good defence.

It seems to the court that s. 83 (3) is only applicable where no proceedings are taken against the retailer. These two proceedings cannot be carried on concurrently because it is an abuse to ask a court to hear a case and convict a man whom the prosecutor, being a public authority, is satisfied or reasonably satisfied has committed no offence and has a perfectly good defence. I am not saying by any means, speaking for myself, that if the proceedings had been taken against Yardley's and then the local authority had come to the conclusion, rightly or wrongly, that Santovin, Ltd., were really liable, they might not have asked for the leave of the court to withdraw the proceedings and then have taken proceedings under sub-s. (3), but I think that it is quite clear that proceedings under sub-s. (3) cannot go on contemporaneously with proceedings against the retailer. The retailer might in this case three days before the summons was heard have served notice that he was going to bring in Santovin, Ltd., but one cannot expect him to do that when Santovin, Ltd., have been brought in by the local authority. At any rate, we think these proceedings were misconceived, and, therefore, the magistrate was quite right in dismissing these two proceedings which have been left on the file because, as counsel for Santovin, Ltd., has properly pointed out, if the proceedings had been taken by Yardley's under s. 83 (1), s. 83 (2) gives him certain rights which he has not got under s. 83 (3). For these reasons, I think the magistrate came to a right conclusion in point of law and the appeals should be dismissed.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

Appeal dismissed.

Solicitors: *C. F. S. Chapple* (for the appellant); *J. E. Lickfold & Sons* (for the first respondents); *W. T. Ricketts & Son* (for the second respondents).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

R. v. METROPOLITAN POLICE COMMISSIONER. *Ex parte*
PARKER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.),
July 16, 17, 1953.]

Certiorari—Cab licence—Decision of Commissioner of Metropolitan Police to revoke—Reference of matter by commissioner to licensing committee for further investigation—London Cab Order, 1934 (S.R. & O., 1934, No. 1346), para. 30 (1).

On Oct. 20, 1952, the Commissioner of Metropolitan Police, as licensing authority, having become satisfied that the applicant, a licensed cab driver, was not a fit person to hold such a licence, decided to revoke it in the exercise of his powers under the London Cab Order, 1934, para. 30 (1). The commissioner, however, directed that the applicant should appear before the licensing committee to be confronted with two police constables who had made complaints about him, and he also gave instructions that the applicant's licence was to be revoked unless anything transpired before the committee which, in their opinion, might lead him to alter his decision. At the sitting of the committee the applicant denied the allegations made by the constables and wished to call a witness in support of his denials, but he was not allowed to do so. The committee reported to the commissioner that nothing had transpired which, in their opinion, should influence him to alter his decision, and the applicant's licence was revoked. On a motion for certiorari to quash the order of revocation,

HELD: in exercising his power to revoke a licence under para. 30 (1) the Commissioner of Police was exercising an administrative, and not a judicial or quasi-judicial, function; as the decision to revoke had already been reached and the function of the committee was merely to confront the applicant with the police officers, the committee was not exercising a judicial or quasi-judicial function; and, therefore, certiorari would not lie.

SEMBLE: if the commissioner had set up an inquiry, charging it to hear evidence and report its finding to him so that he might decide whether to revoke the licence or not, such a committee would be acting judicially and would have to observe the rules of natural justice.

AS TO APPLICATION OF CERTIORARI TO ADMINISTRATIVE ACTS, see HALSBURY, Hailsham Edn., Vol. 9, p. 855, para. 1449; and FOR CASES, see DIGEST, Vol. 16, pp. 412-417, Nos. 2709-2762.

Cases referred to:

- (1) *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.
- (2) *R. v. Metropolitan Police Comr. Ex p. Holloway*, [1911] 2 K.B. 1131; 81 L.J.K.B. 205; 105 L.T. 532; 75 J.P. 490; 42 Digest 857, 108.
- (3) *R. v. Manchester Legal Aid Committee. Ex p. Brand (R.A.) & Co., Ltd.*, [1952] 1 All E.R. 480; [1952] 2 Q.B. 413; 3rd Digest Supp.

MOTION for order of certiorari.

On Oct. 20, 1952, the Commissioner of Metropolitan Police became satisfied that, by reason of circumstances coming to his notice, the applicant, Albert Arthur Parker, a licensed cab driver, was not a fit person to hold such a licence. The commissioner, however, assented in writing to a proposal by Assistant-Commissioner Henry Dalton that the applicant should be brought before the licensing committee and be confronted with Police-constables Key and Scarborough who had made complaints about the applicant. The commissioner also orally informed Assistant-Commissioner Dalton that the applicant's licence should be revoked unless anything transpired before the committee which, in their opinion, might lead him to re-consider his decision to revoke

the licence. At the sitting of the committee on Oct. 23, 1952, Police-constables Key and Scarborough read statements to the effect that on Oct. 4, 1952, between 11 p.m. and midnight, they had kept observation on the applicant's taxicab and had seen the applicant take into his cab prostitutes and men and that at midnight the flag of the cab was in the "For hire" position and no money was charged on the meter. The applicant denied this, and said that at about 11 p.m. he had taken a Mr. Gray from the Regent Palace Hotel to the Benelux Restaurant and between 11 p.m. and midnight was waiting, on Mr. Gray's instructions, for him to come out of the restaurant. He also denied that his flag was in the "For hire" position, and said that when he had taken Mr. Gray back to the Regent Palace Hotel 8s. 3d. showed on the meter. The applicant asked to be permitted to call Mr. Gray as a witness to support his contentions, but he was not allowed to do so. In the opinion of the committee, nothing had transpired which might lead the commissioner to re-consider his decision to revoke the applicant's licence, and, accordingly, the assistant commissioner informed the applicant that his cab licence was revoked.

On a motion for an order of certiorari to bring up and quash the order for revocation of the licence, it was contended on behalf of the applicant that the inquiry before the committee was in the nature of a judicial proceeding, and in view of the refusal of the committee to allow the defendant to call Mr. Gray as a witness there had been a denial of natural justice.

Paul Wrightson for the applicant.

Buzzard for the Commissioner of Metropolitan Police.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of certiorari to bring into this court for the purpose of being quashed an order made against Albert Arthur Parker dated Oct. 23, 1952, by the Commissioner of Police for the metropolis revoking his hackney carriage driver's licence, pursuant to the London Cab Order, 1934, para. 30 (1). Briefly stated the grounds are that an inquiry was held by the Commissioner of Police and at that inquiry the applicant desired to call a witness, but the persons holding the inquiry declined to hear the witness. Therefore, it is said, the rules of natural justice were violated.

The applicant was licensed some years ago, and his career as a taxicab driver has not been without blemish. He has been warned and convicted of offences against various Acts of Parliament in relation to the use of his cab. According to a letter which is exhibited in these proceedings, that was with regard not only to traffic offences, but also to other breaches of the law. The letter says:

"He was repeatedly warned of the possible consequences if he continued to offend. Despite these warnings he continued to incur convictions and as a result his cab-driver's licence was suspended for one month in 1947, and again for three months in 1950."

At the material times in this case it was brought to the attention of the commissioner that the applicant was alleged by the police to have been allowing his cab to be used by prostitutes for the carrying on of their trade and to have been permitting men to enter the cab for the purpose of sexual intercourse. The result was that the commissioner resolved to withdraw his licence.

It is necessary to remember that we are here asked to grant certiorari, and when the application was made for leave to move for certiorari both PARKER, J., and I expressed considerable doubt whether or not certiorari would lie. The argument which has taken place today has confirmed me in the opinion I then expressed that certiorari will not lie. Certiorari is a remedy of a very special nature. For the purpose of quashing an order it lay originally only to a court. In *SHORT AND MELLOR, THE PRACTICE OF THE CROWN OFFICE*, and other works, the function of the writ of certiorari is discussed. The writ called on an inferior court to return to this court the order which the inferior court had made and which it was sought to challenge, or the record of the court if it was a court of record.

It was then for this court to examine the record or order and see whether or not the order was made in accordance with law. One of the most common cases in which it was moved was to ascertain whether there had been an excess of jurisdiction. There have been many cases recently of certiorari, but in all of them it was sought to challenge an order of a tribunal of some description. Formerly, no doubt, the writ did not lie to anybody except what could be called a court, but in recent years, with the development of what may be called administrative law under which government departments are given wide powers of holding inquiries and making orders affecting the property of various persons, the remedy of certiorari has been considerably extended. The principles on which it will be granted are to be found most clearly stated in the well-known judgment of ATKIN, L.J., in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1).

One matter which counsel for the applicant specially emphasised when he applied for leave to move was that mandamus would lie to the Commissioner of Police in respect of hackney carriage licences, and he sought to argue that, as mandamus would lie, certiorari would lie. There is an essential fallacy in his argument on that point. Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act. If that person refrains from doing the act or refrains from wrong motives from exercising a power which it is his duty to exercise, this court will by order of mandamus direct him to do what he should do. Mandamus may go to individuals. It may go to corporations, and it goes quite independently of whether the individual or body to which it is addressed is or is not a court.

The position of the Commissioner of Police in respect of hackney carriage licences ought, I think, to be stated. We need not go back further than the Metropolitan Public Carriage Act, 1869. By s. 6 of that Act, the duty of licensing cabs and drivers was placed on the Secretary of State, and by s. 11 the Secretary of State was empowered to delegate his powers—and he has delegated them—to the Commissioner of Police. So far as the granting of licences is concerned, it was provided in an order made by the Secretary of State, dated Dec. 30, 1907, that

“ . . . (A) a licence shall not be granted to any person under the age of twenty-one years, and any licence so granted shall be void.”

In that case, there is no discretion at all; if an applicant is under twenty-one years of age, he cannot have a licence. Then:

“(b) The commissioner may at his discretion refuse a licence to any person who has been convicted of a felony, misdemeanour, or of cruelty to animals, or who, having previously held a licence for a cab or a stage carriage, has had such previous licence revoked or suspended.”

It was decided by the Court of Appeal in *R. v. Metropolitan Police Comr. Ex p. Holloway* (2), that that provision limited the discretion of the commissioner in that he could only refuse an application on the grounds which are set out in the regulation—in other words, he had not an unfettered discretion. If any person of twenty-one years of age applies to the commissioner for a licence, unless one of the exceptional circumstances which are dealt with in the order apply to him, he is entitled to have one granted to him subject to the right of the commissioner to revoke the licence.

The present position with regard to the revocation of a licence is to be found in para. 30 of the London Cab Order, 1934, which was made under the Metropolitan Public Carriage Act, 1869, and that paragraph shows clearly, as one would expect, that a licence may be revoked or suspended. Indeed, leaving out of account irrevocable licences granted under seal and possibly licences coupled with an interest, the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. A licence is

nothing but a permission, and, if a man is given permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission. Unless he has given a licence for a definite period, thereby giving some contractual right, he can withdraw it. Paragraph 30 (1) of the order is in these terms:

"A cab-driver's licence shall be liable to revocation or suspension by the Commissioner of Police if he is satisfied, by reason of any circumstances arising or coming to his knowledge after the licence was granted, that the licensee is not a fit person to hold such a licence."

In the present case, facts having come to the commissioner's knowledge with regard to the alleged repeated use of the applicant's cab by disorderly women, the commissioner decided to withdraw the licence. Counsel for the applicant, in my opinion, very properly conceded that, if the commissioner had simply said: "I withdraw your licence", he could not argue that the commissioner was bound to hold an inquiry or hear evidence or anything else. The wording of the paragraph seems to me to make it clear that it is not intended that there should be held anything in the nature of a judicial inquiry or that the commissioner should be put in the position of a judge or quasi-judge. The commissioner can withdraw the licence or suspend it by reason of any circumstance which comes to his knowledge. In other words, he can act on hearsay if he likes, and I suppose in many cases he acts on a complaint, though in most cases, I expect, he would satisfy himself as far as he can that the information that comes to his knowledge is accurate. In this case the commissioner in his affidavit, which the court sees no reason to doubt, says:

"On Oct. 20, 1952, I became satisfied by reason of circumstances arising after the said licence was granted that the said Albert Arthur Parker was not a fit person to hold such a licence. I thereupon assented in writing to a proposal by Henry Dalton, Assistant-Commissioner 'B' Department, Metropolitan Police, that the said Albert Arthur Parker should be brought before the licensing committee and that he should be confronted with Police-constables Robert Key and Carl Scarborough. The said committee is a departmental committee set up by me to assist me in such matters. I further instructed the said assistant-commissioner orally that the said Albert Arthur Parker's said licence should be revoked unless anything transpired before the said committee which in their opinion might lead me to re-consider my decision to revoke the said licence."

It is argued that the commissioner, if he chose, having been satisfied that the applicant was not a fit person to hold a licence, could have said: "I withdraw your licence", and that would have been perfectly valid and his decision could not be challenged, but that, having made up his mind to that effect, he took the view that there might be some room for mistake, and he, therefore, decided on the course which was adopted. As I have said, it is impossible to find on the wording of para. 30 (1) under which the commissioner acted that he was in the position of either a judge or a quasi-judge. Exactly what a quasi-judge is nobody has ever attempted to define, but I suppose he is a person who has to hear evidence and come to a conclusion on facts. One would expect, where an order of certiorari is sought, that a judge or quasi-judge would have made an order or something in the nature of an order, because otherwise what is to be brought up to be quashed in this court? The motion is to bring up an order of the commissioner. There is nothing here to show that there ever was an order. It was simply a decision of the commissioner that, by reason of facts coming to his knowledge, he was satisfied that the licensee was not a fit person to hold the licence. In all the cases which have been cited to us (and I do not propose to go through them because all the cases on the subject were considered by the court in *R. v. Manchester Legal*

Aid Committee. Ex p. R. A. Brand & Co., Ltd. (3)) a department of State has either passed a resolution or made an order consequent on a resolution which can be quashed or to which some objection can be taken. Here, there is nothing, and, in my opinion, it is impossible to say that the commissioner—in fact, it is not said—if he acted alone was in a judicial or quasi-judicial position. He was exercising what I may call a disciplinary authority, and where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has. In this case the applicant was given a chance, by cross-examination of or confrontation with the police officers, of extracting some fact which, if it was brought to the notice of the commissioner, might have influenced him before his decision was actually promulgated through the mouth of the assistant-commissioner.

For these reasons, in my opinion, there is no ground for saying that the withdrawal of the licence granted by the Commissioner of Police to the applicant was a judicial act, nor that it was done by a judicial or quasi-judicial person, and consequently, certiorari will not lie and this application fails.

- C **PARKER, J.:** I agree that this motion fails, and I can give my reasons very shortly. Under the London Cab Order, 1934, para. 30, the commissioner is given very wide powers, and it is clear that he may revoke a licence if he is satisfied by reason of any circumstances arising or coming to his knowledge after the licence is granted that the licensee is not a fit person to hold it. Accordingly, he is in no way bound to hear evidence or hold an inquiry or cause any inquiry to be held.
- D Should he revoke a licence on the report, for instance, of a police constable alone, this court could not interfere whether by certiorari or otherwise. Indeed, as I understand it, counsel for the applicant conceded that that was the position. In the present case, as my Lord has said, the commissioner, having decided to revoke the licence, gave the applicant an opportunity of appearing before a departmental committee and being confronted with the police constables. Can
- E it make any difference that he said: "I am satisfied, but will you, the committee, confront the applicant with the police constables and report back to me if you think there is anything more I ought to consider". In my view, if he is not bound to hear any evidence from the applicant himself or on his behalf, the committee cannot be bound to do so. A different position might arise—I only say might arise—if the commissioner were to say, in effect: "I have not the necessary
- F evidence on which to decide this, and I will cause an inquiry to be held so that I can have a report on the facts". The position might then be different, but that is far from the facts of this case where the commissioner has come to his decision that the licence should be revoked and is merely giving the applicant an opportunity of, in effect, cross-examining the constables concerned. In these circumstances, I find it quite unnecessary to consider all the cases that have been
- G cited as to when certiorari will lie. It is clear that it does not lie in this case. I should add that counsel for the applicant further argued that the remedy of certiorari should lie in this case in that the decision here was not the decision of the commissioner, but was the decision of the assistant-commissioner or of the committee. In my opinion, there is nothing in this contention because it seems to me perfectly clear, on the facts, that the decision here was, and would
- H in any event be, whatever the committee did, the decision of the commissioner himself, and the fact that that decision is communicated orally by the assistant-commissioner or somebody else cannot in any way invalidate the decision of the commissioner. I agree that this motion fails.

DONOVAN, J.: I agree. Had the commissioner himself immediately acted on the view he had formed that the applicant was not fit to hold a licence and at once revoked it, it is admitted on behalf of the applicant here that the writ would not

lie, such revocation being purely an administrative act. Having regard to the language of the London Cab Order, 1934, para. 30, I think that admission is right. Instead of doing that, however, the commissioner referred the matter to a committee, giving instructions that the applicant and the two police officers should be there and that the licence should be revoked unless something transpired which, in the committee's view, might lead to a re-consideration by the commissioner of his decision. I agree that that involved hearing the applicant and the two police officers and coming to a view as to whether the latter's allegations had in any way been shaken.

The question here is whether, in discharging their duty, the committee were performing a judicial or quasi-judicial act. It can, of course, with some degree of plausibility, be argued that they were. They were in a sense hearing two sides to a dispute, viz., whether the applicant had allowed his cab to be used for improper purposes, and so it is said that, although the act of revoking the licence may be an administrative one, yet, if the commissioner causes an inquiry to be held at which evidence is taken and weighed, the rules of natural justice must be observed, and each side must be allowed to call witnesses, particularly the man whose livelihood is at stake. That argument has some force, and if the commissioner had set up an inquiry, as PARKER, J., has just said, charging it to hear evidence and report its finding to him so that he might decide whether to revoke the licence or not, then, in my view, such a committee would be acting judicially, and would have to observe the rules of natural justice. Suppose, on the other hand, the commissioner, having already taken a decision to revoke the licence, called in two or three members of his staff and said: "I have decided to revoke this licence, but before I implement that decision, just see Parker and the two policemen and hear what each has to say, and then, if you think I ought not to revoke, let me know", would the ensuing inquiry be a judicial or quasi-judicial one? If so, one is very near the position when every policeman who is taking notes of the statements made by each party to a street collision or some other untoward happening which might lead to a prosecution would be said to be acting in a judicial or quasi-judicial role. On the contrary, as it seems to me, he is performing an administrative act simply for the purpose of reporting to his superiors, and none the less so because it involves hearing, noting, and reporting allegation and counter-allegation.

If that be right, the question here is whether the licensing committee were really doing anything more. In the circumstances of this case, I think they were not. They were to see the policemen and Parker. They were to hear their allegations and counter-allegations and to report if they thought the result would or might change the commissioner's decision to revoke. In doing that they were, in my opinion, simply taking a share in the administrative acts culminating in the revocation of the licence, and that share did not involve that they were taking part in judicial or quasi-judicial proceedings. Had it been otherwise, I think the applicant should have been allowed to call the witness Gray, whose evidence might have been that the taxi-meter showed 8s. 3d. at midnight and thus might have conflicted with the evidence of the officers that it showed nothing. This was a material issue, since, if Gray convinced the committee that he was right, the reliability of the two police officers as witnesses would have been at least to some degree affected. That point, of course, does not arise once the conclusion is reached that this is not a proper case for the issue of the writ.

I would add, on the alternative argument that the commissioner wrongfully delegated his power of revocation to the assistant-commissioner or the licensing committee, that on the facts as disclosed by the commissioner's affidavit, the commissioner took the decision to revoke and simply communicated it through the assistant-commissioner, and in this I see no delegation of authority.

I agree that the application must be dismissed. *Motion dismissed.*

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant); *Solicitor, Metropolitan Police* (for the respondent).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re LIVESEY'S SETTLEMENT TRUSTS. LIVESEY v. LIVESEY
AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), July 16, 17, 1953.]

Satisfaction—Portions—Sums of money given for “advancement or preferment” to be taken pro tanto for portion—Testamentary gift of mortgages.

A By a settlement dated Jan. 30, 1904, a settlor created a term in the usual form to secure portions for his younger children. It was further provided, by cl. 9 of the settlement, that, if the settlor should give any child or children for whom a portion was thereby intended to be provided any sum or sums of money “on his, her or their marriage or for the payment of his, her or their debts or otherwise his, her or their advancement or preferment in the world”, then, unless the settlor should in writing otherwise direct, such sum or sums of money should be taken pro tanto for the portion or respective portions for the child or children so advanced. By his will dated May 4, 1948, the settlor, who died on Dec. 31, 1951, gave, inter alia, substantial mortgage investments to each of his two younger sons.

B HELD: the mortgage investments were “money” within the meaning of cl. 9, which would extend to “advancement or preferment in the world” afforded by a testamentary gift, but the testamentary gifts to the two younger sons were (especially as they were accompanied by other gifts which were not claimed to be caught by cl. 9) mere bounty to which the words “advancement or preferment” did not extend, and, therefore, they had not to be brought into account against the portions of the younger sons.

C *Lowther v. Bentinck* (1874) (L.R. 19 Eq. 166), applied.

D . *Onslow v. Michell* (1812) (18 Ves. 490), considered.

AS TO SATISFACTION OF PORTION BY LEGACY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 163-165, paras. 148-150; and FOR CASES, see DIGEST, Vol. 20, pp. 453, 454, 465, 466, Nos. 1769-1773, 1913-1928.

Cases referred to:

- E (1) *Onslow v. Michell*, (1812), 18 Ves. 490; 34 E.R. 403; 20 Digest 452, 1763.
(2) *Cooper v. Cooper*, (1873), 8 Ch. App. 813; 43 L.J.Ch. 158; 29 L.T. 321; 20 Digest 452, 1766.
(3) *Lowther v. Bentinck*, (1874), L.R. 19 Eq. 166; 44 L.J.Ch. 197; 31 L.T. 719; 43 Digest 789, 2280.

F ADJOURNED SUMMONS to determine (inter alia) whether gifts under the will of the settlor of mortgage investments and a mortgage for £30,000 charged on settled estates to his younger children were for “their advancement or preferment in the world” within cl. 9 of a settlement dated Jan. 30, 1904, so as to be sums of money to be taken into substitution for their respective portions under the settlement.

G By a deed of settlement dated Jan. 30, 1904, made in contemplation of marriage (which was shortly afterwards solemnised) between Algernon Montague Livesey, the settlor, of the first part, the intended spouse, of the second part, and the original trustees, of the third part, the settlor assured real property to trustees to the use of the settlor and his assigns during his life and on his death, in the events which happened, to the use of the trustees for one thousand years from the death of the settlor, and subject thereto to the use of the first and every other son of the settlor successively in remainder according to their respective seniorities
H and their heirs male with remainders over. By cl. 1 it was declared that the settled estates were limited to the use of the trustees for one thousand years to raise portions for the younger children of the marriage of the amount therein specified, being, if there should be two such younger children, £10,000 to be payable, in default of appointment to the contrary, to the younger children in equal shares. By cl. 9, it was provided:

“If the [settlor] shall give or secure to or with any child or children for

whom a portion or portions is or are intended to be hereby provided as aforesaid any sum or sums of money on his, her or their marriage or for the payment of his, her or their debts or otherwise his, her or their advancement or preferment in the world, then, unless the [settlor] shall in writing otherwise direct, such sum or sums of money shall be taken into substitution [sic] pro tanto and according to the amount thereof for the portion or respective portions intended to be provided for the child or respective children severally so advanced as aforesaid and such amount only (if any) shall be appropriated for the portion of any child so advanced by the [settlor] as aforesaid as together with the amount of such advancement will make up and complete the portion hereby or by appointment as aforesaid provided for such children and the remainder or balance of such portion or the whole of such portion if the amount of the advancement shall equal or exceed the amount of the portion shall sink into the estate for the benefit of the inheritance unless the [settlor] shall in writing declare his intention to purchase the same for his own benefit in which case the same shall form part of his personal estate ”.

There were three sons of the marriage, the plaintiff, the eldest son, and the two defendants, who were also the present trustees of the settlement. On Dec. 31, 1951, the settlor died, and by his will dated May 4, 1948, he gave to the defendant, Amyatt Edmund Livesey, his freehold and leasehold properties in the city of Sheffield and such of the mortgage investments which

“ I inherited from my late uncle . . . as shall be in existence at the time of my death ”,

and to the defendant, Evelyn Montague Livesey, he gave

“ My four private farms in the county of Lincoln and the mortgage for £30,000 charged on the settled estates at Stourton and elsewhere and of which I am now the life tenant under my marriage settlement . . . ”.

The plaintiff contended that the defendants should bring into account the mortgage investments and the mortgage respectively against their portions under cl. 9 of the settlement.

Cross, Q.C., and *R. Gwyn Rees* for the plaintiff, the eldest son.

Sir Lynn Ungood-Thomas, Q.C., and *T. A. C. Burgess* for the defendants, the two younger sons and the present trustees of the settlement.

ROXBURGH, J.: By a settlement made on Jan. 30, 1904, between Algernon Montague Livesey, of the first part, the Honourable Evelyn Livesey, of the second part, and Arthur Norman Charles John Coleman and Philip Witham, trustees, of the third part, the settlor, Algernon Montague Livesey, created a term in the usual form to secure portions for his younger children, of whom there were two. The plaintiff in this summons is his eldest son, and the defendants are the two younger children. Clause 9 of the settlement provides that:

“ If the said Algernon Montague Livesey shall give or secure to or with any child or children for whom a portion or portions is or are intended to be hereby provided as aforesaid [the two defendants are such children] any sum or sums of money on his, her or their marriage or for the payment of his, her or their debts or otherwise his, her or their advancement or preferment in the world, then, unless the said Algernon Montague Livesey shall in writing otherwise direct, such sum or sums of money shall be taken into substitution [sic] pro tanto and according to the amount thereof for the portion or respective portions intended to be provided for the child or respective children severally so advanced as aforesaid and such amount only (if any) shall be appropriated for the portion of any child so advanced by the said Algernon Montague Livesey as aforesaid as together with the amount of such advancement will make up and complete the portion hereby

or by appointment as aforesaid provided for such children and the remainder or balance of such portion or the whole of such portion if the amount of the advancement shall equal or exceed the amount of the portion shall sink into the estate for the benefit of the inheritance unless the said Algernon Montague Livesey shall in writing declare his intention to purchase the same for his own benefit in which case the same shall form part of his personal estate."

A On Dec. 31, 1951, the settlor died, and by his will he gave to his son Amyatt, who is the first defendant to this application, his freehold and leasehold properties situate in the city of Sheffield and such of the mortgage investments which "I inherited from my late uncle Arnold Philip Marshall as shall be in existence at the time of my death". To his son Evelyn, the second defendant, he gave

B "My four private farms in the county of Lincoln and the mortgage for £30,000 charged on the settled estates at Stourton and elsewhere and of which I am now the life tenant under my marriage settlement dated Jan. 30, 1904."

C Counsel for the plaintiff has submitted, with much force, that the mortgage investments which the settlor inherited from his late uncle have to be brought into account against the first defendant's portion, and the mortgage for £30,000 has to be brought into account against the second defendant's portion. I must confess that the case has caused me much difficulty. Counsel contends that these mortgage investments in the first case or this mortgage in the second case is a sum or sums of money which have been given. On the whole, I think he is right so far, though I have doubt even about that. I have no idea what the words "secure to or with" in cl. 9 mean, but counsel contends that the word "give" applies to these two mortgages, and I am prepared to accept that submission.

D I should have hesitated, but for authority, to believe that a clause in the form of cl. 9 of the settlement had any application to a testamentary disposition, but I think the course of authority, such as it is, is sufficiently strong to compel me to hold that such a clause does apply to a testamentary disposition.

E Then remains the final question. The words in the will are "I give" in each case, and these mortgages are in each case coupled with other gifts, which counsel for the plaintiff does not contend have to be set against the portion. In those circumstances I feel compelled to hold that, so far as I know from the documents, these gifts are mere bounty. I cannot see any reason for thinking, for instance, that the gift of the mortgage investments differs from the gift of the freehold and leasehold properties, situate in the city of Sheffield, in any manner whatsoever. I regard them both as mere testamentary bounty.

F Counsel for the plaintiff has put his case in two alternative ways. First, he says that the words of the settlement require nothing beyond mere bounty. Then he says that, if he is wrong about that, where the sum is substantial it must be presumed to be an advancement in the absence of any evidence. Certainly the amount given by the will is substantial in this case. Counsel disclaimed the idea that his doctrine could be applied to a small sum, say, of £100.

G Counsel's first authority is *Onslow v. Michell* (1), which at first sight is helpful to him, and which has, I think, throughout been his chief anchor. When counsel referred me to this case, I wondered when we should come to the modern authorities, but in very truth there is none, and this is really the beginning and the end of authority, with one single exception. In *Onslow v. Michell* (1) the relevant clause was (18 Ves. 490):

H "If the said parents, or either of them, should in their or either of their life-time settle, give, or advance, unto, for or upon any child or children of the marriage, entitled to portions under the appointment therein before contained, any sum or sums of money, lands, tenements, goods or chattels, for or towards his, her, or their advancement or preferment in marriage or otherwise, then such sum or sums of money, and the value of such lands, tenements, goods or chattels, so to be received by, or advanced or given to,

or settled upon, such child or children respectively, should be accounted, deemed and taken, as part, if less, and if as much or more, for the whole of the portion or portions thereby provided for them, as aforesaid, unless the said parents, or the survivor of them, should, by writing, signify or declare the contrary."

Then the parent made a disposition by will in favour of the child in question, and the real contest was whether, having regard to the words "in their life-time"—which do not occur in the present case—the clause was applicable to a testamentary disposition. As far as I can see, that was the only point which was dealt with, and SIR WILLIAM GRANT, M.R., decided that it did apply to a will. I must confess that that decision on that particular settlement surprises me.

I might have been shy at making observations about so great a judge as SIR WILLIAM GRANT, if it were not for the fact that in *Cooper v. Cooper* (2) LORD SELBORNE, L.C., when dealing with the cases, of which *Onslow v. Michell* (1) was one, said (8 Ch. App. 825):

"... when examined, these cases are found to present a most remarkable example of the extraordinary manner in which the use of precedents has, sometimes, caused the courts of this country, first to slide into manifest error, and afterwards to follow that error under the notion that they are bound to do so."

The point with which I am concerned is not discussed in *Onslow v. Michell* (1), and did not arise, or at any rate did not arise in any acute form, in any of the later cases, because they are concerned with clauses which contain the much wider word "benefit". At first sight, I thought *Onslow v. Michell* (1) was very strongly in the plaintiff's favour, but I am not at all sure how SIR WILLIAM GRANT, M.R., construed the settlement in that case. He certainly has not told posterity how he did it, and, bearing in mind that the word "give" occurs in the settlement in *Onslow v. Michell* (1), he may have treated the words "or otherwise" as not limited by "for their advancement or preferment in marriage". In other words, he may not have treated the words as meaning their advancement or preferment in marriage, or their advancement or preferment otherwise, which is what at first I thought they meant. He may have thought, having regard to the word "give", that the words "or otherwise" were quite general.

SIR WILLIAM GRANT, M.R., did not have the advantage, which I have, of the decision in *Lowther v. Bentinck* (3). That decision shows plainly that words relating to advancement or preferment are much narrower than mere bounty. I think that there is no escape from that. There may be doubt as to what exactly the phrase "advancement or preferment in the world" means, but it is, I think, settled by authority that it is something more restricted than mere bounty. Therefore, in my judgment, whatever these words mean, they would not cover a payment which was mere bounty.

If that be my view, then counsel for the plaintiff argues: "Well, this was a large sum. What can it have been for? It must have been an advancement or preferment in the world." That is not an acceptable argument. Certainly there is no existing authority for any such argument, and it seems to me that it is a question of fact. The settlor has thought fit to limit the categories of sums of money which have to be brought into account. He has made the purpose of the payments the test in every case except marriage, with which we are not concerned. It is for the payment of his or her or their debts or otherwise for his, her or their advancement or preferment in the world.

The plaintiff in this action claims against the two defendants that they must bring these sums into account. In my judgment, he must prove that these moneys were for the purpose, or one of the purposes, specified. If he is unable to obtain any evidence at all, then he fails to prove his case. I have no doubt that these testamentary gifts were, on the construction of the will, mere bounty,

but I can well believe that the facts were different from the inference which I draw from the will per se. They may well have been, but, in my judgment, the burden is on the plaintiff to prove it, and there is no presumption of law that because a payment is substantial it is to be presumed to be an advancement or preferment in the world unless the contrary is proved. Accordingly, in my judgment, the plaintiff fails.

Order accordingly.

- A Solicitors: *Royds, Rawstorne & Co.* (for the plaintiff); *Waterhouse & Co.*, agents for *Watson, Esam, Barber & Brayshaw*, Sheffield (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

B

NOTE.

KRUGER TOWNWEAR, LTD. v. NORTHERN ASSURANCE CO., LTD.

- C [QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 21, 1953.]

Arbitration—Practice—Order that arbitration clause should cease to have effect—Application to Divisional Court—Arbitration Act, 1950 (c. 27), s. 24 (2).

- D MOTION by the claimants under a policy of insurance for an order that a clause in the policy by which the parties agreed to submit disputes to arbitration and a provision in the policy that an award under the agreement should be a condition precedent to the bringing of an action against the insurers should cease to have effect, and that the stay of all further proceedings in an action by the claimants for indemnity under the policy be removed.

- E The policy was in respect of damage by fire, and, in addition to the arbitration clause, it contained, inter alia, a clause that, if any claim thereunder were in any respect fraudulent, or if fraudulent means or devices were used by the insured or anyone acting on his behalf to obtain any benefit under the policy, all benefit thereunder should be forfeited. On Feb. 9, 1953, the insurers repudiated a claim by the claimants for indemnity under the policy on the ground that fraudulent means or devices had been used by the claimants within the meaning of the policy, and the claimants thereupon commenced an action against the insurers in respect of their claim. On May 21, 1953, on an application by the insurers, Master BAKER made an order under the Arbitration Act, 1950, s. 4 (1), staying the proceedings in the action. On June 12, 1953, BARRY, J., dismissed an appeal from the order of the master without prejudice to the claimants' right to apply for an order, under s. 24 (2) of the Act of 1950, that the arbitration clause contained in the policy should cease to have effect. As doubts had arisen whether an application for an order under s. 24 (2) could be heard by a single judge, the motion was set down in the Divisional Court List.

Share for the claimants.

J. H. Barrington for the insurers.

- H LORD GODDARD, C.J., said that the Divisional Court was the appropriate court to which to apply for an order under the Arbitration Act, 1950, s. 24 (2), and the court would make the order which was sought. If it was desired to make such an application when the Divisional Court List was not being taken, it could be made on any day on which ex parte motions were heard.

Solicitors: *Beach & Beach* (for the claimants); *William Charles Crocker* (for the insurers). F.G.

BULSTRODE v. LAMBERT.

[CHANCERY DIVISION (Upjohn, J.), July 14, 15, 1953.]

Easement—Right of way—Right to “pass and re-pass” over yard “with or without vehicles”—No such user at time of reservation—Implied right to halt vehicles in yard for purpose of unloading and loading—Failure to exercise right for some years.

The plaintiff and his father were estate agents and auctioneers. In 1921 the father became the owner in fee simple of two semi-detached houses, known as No. 11 and No. 13 S. Road, and of premises behind them which he and the plaintiff used as an auction mart. On the west side of No. 13 was a yard, sixteen feet wide, leading to the main door of the mart, and on the east side of No. 11 was a smaller yard, some eleven feet wide, which led to a small door in the mart. In the yard, near this door, was a garage, and the immediate approach to the mart on this side was only some seven to eight feet wide. In 1944 the plaintiff's father sold No. 11, together with the yard and garage to the east of the house, to the defendant's predecessors in title. The conveyance, dated Oct. 10, 1944, contained a reservation in the following terms: “except and reserving unto the vendor his tenants and workmen and others authorised by him the right to pass and re-pass with or without vehicles over and along [the yard] for the purpose of obtaining access to the building at the rear of the . . . premises and known as the auction mart”. At the time of the conveyance it was impossible for large furniture vans to enter the yard of No. 11, as inside the entrance was a double gate, six feet wide, with a small gate adjoining it on one side and a fence on the other. In 1950 the plaintiff's father died and the plaintiff became the owner of No. 13 and the auction mart. In 1951 the defendant purchased No. 11, and he then removed the double gate and improved the yard. Before he did so, pedestrians leaving the mart might, occasionally, have crossed the yard, but furniture had never been carried to or from the mart across the yard. The plaintiff now claimed that he was entitled, under the reservation in the conveyance, to bring furniture vans into the yard, to allow them to remain in the yard for half an hour or an hour for the purpose of unloading and loading, and to allow his men to carry the furniture through the narrow part of the yard to the auction mart.

HELD: (i) on the true construction of the reservation in the conveyance, the plaintiff had a right of way over the whole yard for the purposes of his business, including the right to enter with goods vehicles of any size appropriate to pass down the yard, and that right was not affected by the fact that there was a double gate, only six feet wide, at the entrance to the yard at the time of the conveyance; the failure to exercise the right under the grant for several years did not prejudice the plaintiff's right to exercise it when he found it convenient to do so: dictum of VISCOUNT DUNEDIN in *Keewatin Power Co., Ltd. v. Lake of the Woods Milling Co., Ltd.* ([1930] A.C. 657), applied; and, therefore, the plaintiff was entitled to bring furniture vans and other heavy vehicles on to the yard as far as they could go, and to transport the furniture and other chattels from the vehicles by hand past the garage into the auction mart.

Dictum of SIR GEORGE JESSEL, M.R., in *Cannon v. Villars* (1878) (8 Ch.D. 421), applied.

(ii) the plaintiff was entitled to keep his vehicles in the yard for such time as was necessary to unload and load them, this being an incident of the easement and ancillary thereto.

Dictum of LORD PARKER of WADDINGTON in *Puillbach Colliery Co., Ltd. v. Woodman* ([1915] A.C. 646), applied.

AS TO RIGHT OF WAY UNDER EXPRESS GRANT AND IMPLIED RIGHTS OF WAY,

see HALSBURY, Hailsham Edn., Vol. 11, pp. 324-329, paras. 575-582; and FOR CASES, see DIGEST, Vol. 19, pp. 107-109, Nos. 683-688.

Cases referred to:

- (1) *Callard v. Beeney*, [1930] 1 K.B. 353; 99 L.J.K.B. 133; 142 L.T. 45; Digest Supp.
- (2) *Waterpark (Lord) v. Fennell*, (1859), 7 H.L. Cas. 650; 33 L.T.O.S. 374; 23 J.P. 643; 11 E.R. 259; 31 Digest, Replacement, 27, 1853.
- (3) *Keewatin Power Co., Ltd. v. Lake of the Woods Milling Co., Ltd.*, [1930] A.C. 640; 100 L.J.P.C. 1; 143 L.T. 633; Digest Supp.
- (4) *Cannon v. Villars*, (1878), 8 Ch.D. 415; 47 L.J.Ch. 597; 38 L.T. 939; 42 J.P. 516; 19 Digest 108, 685.
- (5) *Pwllbach Colliery Co., Ltd. v. Woodman*, [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 36 Digest 199, 386.

ACTION AND COUNTERCLAIM.

The plaintiff claimed (i) a declaration that he was entitled to a right of way from Stour Road, Christchurch, in the county of Hants, over and along a certain part of the defendant's premises, known as 11 Stour Road, to the plaintiff's auction mart at the rear of the premises, and back over the said way, for himself, his servants and licensees on foot and with vehicles at all times and for all purposes; (ii) a declaration that he was entitled in the proper exercise of the said right of way to halt vehicles outside the entrance to the auction mart as often and so long as might be necessary for the purpose of unloading and loading goods for delivery to or removal from the auction mart and for the purpose of depositing or taking on board persons proceeding to or from the auction mart; and (iii) an injunction restraining the defendant from obstructing the said right of way.

In 1919 the plaintiff's father purchased the leasehold interest in No. 11 and No. 13 Stour Road and the premises behind them, which latter premises became known as the auction mart, and from that time he and the plaintiff carried on there the business of estate agents and auctioneers, holding an auction in the mart, on alternate Thursdays, of freehold properties and furniture and other chattels. The houses, No. 11 and No. 13 Stour Road, were semi-detached. On the west side of No. 13 was a yard, some sixteen feet wide, leading to the mart, the entrance to which, on this side, was by large sliding doors. On the east side of No. 11 was a smaller yard, some eleven feet wide at the entrance and then becoming wider, which also led to the mart. The entrance to the mart, on this side, was by a small door, some three feet six inches wide. The immediate approach to this door through the yard was only some seven to eight feet wide, as at this end of the yard was a shed, which was later used as a garage. In 1921 the plaintiff's father acquired the freehold reversion of all the above-mentioned properties. In 1944 he sold to the defendant's predecessors in title the premises known as No. 11 Stour Road, including the yard and garage to the east of the house and a yard immediately to the north, but reserving a right of way over the yard to the mart. The deed of conveyance, which was dated Oct. 10, 1944, was made by the father, as vendor, of the one part, and Mr. and Mrs. F. Flewker, as purchasers, of the other part, and, in consideration of the sum of £1,500 paid to him by the purchasers, the vendor, as beneficial owner, conveyed No. 11 Stour Road to the purchasers

"except and reserving unto the vendor his tenants and workmen and others authorised by him the right to pass and re-pass with or without vehicles over and along the land coloured brown on [the plan attached to the conveyance] for the purpose of obtaining access to the building at the rear of the said premises and known as the auction mart."

The land coloured brown on the plan was the yard of No. 11. At the time of the conveyance there was a double gate situated some six feet within the entrance of this yard. Each part of the gate was three feet wide and was hinged on

a substantial beam which was fixed to the ground. To the west of the double gate was a small gate, and to the east a fence. Some six to eight feet above the double gate was a permanently fixed beam.

In 1950 the plaintiff's father died and the plaintiff became the owner of the auction mart and No. 13 Stour Road. In 1951 the defendant purchased No. 11, and since then he had carried on, on the premises, the business of a guest house and restaurant proprietor and of a car-hire proprietor. The guests in the guest house normally used a door which gave access to the yard, and the defendant kept the car which he drove for hire in the garage in the yard. After purchasing the premises, the defendant removed the double gate near the entrance as it was in a bad condition, and during 1951 and 1952 he greatly improved the yard. Until then the plaintiff had never used the defendant's yard for carrying furniture to or from the mart, but pedestrians leaving the mart might, occasionally, have crossed the yard. After the gate had been removed and the yard improved, the plaintiff claimed that he was entitled to bring into the yard large vans carrying furniture to be auctioned in the mart, to unload the vans in the yard, and to let his men carry the furniture through the narrow part of the yard into the mart. By his counterclaim the defendant claimed that the reservation in the deed of conveyance was limited to a user of the yard for persons or passenger vehicles, and that it did not include the right to halt a vehicle in the yard except for a brief space to put down a passenger.

H. E. Francis for the plaintiff.

I. G. H. Campbell for the defendant.

UPJOHN, J., stated the facts, and said: The plaintiff claims that, to bring furniture for sale to the auction mart, he is entitled to bring large vans into the defendant's yard, to unload them there, and to let his men carry the furniture through the narrow part of the yard by the door into the auction mart. Not unnaturally, the defendant finds that a cause of great inconvenience. While furniture is being unloaded, a van may be in the yard for half an hour or an hour, and, while it is there it obstructs the light into the kitchen, makes it difficult to use the door giving access from the guests' rooms on to the yard, which is the normal method of ingress and egress, and, also, makes it difficult, if not impossible, to get to the coal shed, the boiler house, the outside water closet, the store room and the refuse bins. It is also a source of further grave inconvenience to the defendant if a van is unloading when he wants to get his car out of his garage in response to some call for hire, as he has to wait until the back parts of the van are locked up and the van is moved into the road, all of which takes time. Therefore, the defendant is, naturally, greatly concerned at this user by the plaintiff, but that fact cannot affect the rights of the parties, whatever they may be, under the conveyance. The plaintiff claims to use the defendant's yard only when he is extremely busy and when the yard to the west of No. 13 is not available by reason of it being blocked up by vans already there. I gathered that the user of the defendant's yard was not frequent, but that, again, cannot affect the parties' rights, whatever they may be.

To construe the deed of conveyance, I must know the facts at the time of the grant. As is stated in *GALE ON EASEMENTS*, 12th ed., p. 315:

"In the case of a grant the language of the instrument can be referred to. It is for the court to construe that language, and, in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against a grantor must be applied. In particular, in construing a grant the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used."

In *Callard v. Beeney* (1) *WRIGHT, J.*, said ([1930] 1 K.B. 360):

"As *LORD WENSLEYDALE* said in *Lord Waterpark v. Fennell* (2) (7 H.L.

Cas. 684): 'The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor'."

A The physical situation at the time of the grant in 1944 was very different from that which obtains today. [His LORDSHIP reviewed the evidence, and continued:] I am satisfied that until the defendant removed the gates and generally improved the state of his property in the yard, the plaintiff never used the yard for carrying furniture into the auction mart, although it may have been used occasionally by pedestrians who came away from the mart by that route. That fact, however, cannot affect the rights of the parties where their rights depend, not on user, but, as in this case, on an express grant. In *Keewatin Power Co., Ltd. v. Lake of the Woods Milling Co., Ltd.* (3) VISCOUNT DUNEDIN, delivering the judgment of the Privy Council, said ([1930] A.C. 657):

B "When you are dealing with grant, the grantee may always, if he chooses, not exercise his right under the grant to the full without in any way prejudicing his full right if he finds it convenient to use it."

C That is all that has happened here. Therefore, the failure to exercise the right under the grant for several years, in the absence of any claim of abandonment—which would, obviously, be impossible to suggest in this case—is again irrelevant.

I turn to the construction of the deed in the light of the facts. It was submitted by the defendant that the deed must be construed against the grantor. I am not satisfied that that is correct. That rule, which applies to exceptions, does not, I think, apply to a reservation, but I need not say anything more on that point. D Counsel for the defendant contended that, if one looked at all the circumstances, the nature of the locus in quo, the nature of the terminus ad quem, and the purpose for which the yard was used, one found that it was an easement for the passage of persons only and not for the passage of goods. He pointed out that the main means of access to the auction mart was, not the defendant's yard, but the yard to No. 13, that the door to the mart from the defendant's yard was only some three feet six inches wide, and that the reservation in the deed was for the purpose of obtaining access, not to business premises, but merely to the business described as an auction mart. He further contended that the easement must be confined to hand vehicles or personnel vehicles because only personnel vehicles could have passed through the double gate which was inside the entrance to the yard in 1944 and was only some six feet wide. He pointed out that lorries, and especially large pantechnicons used in the furnishing trade, varied in width up to seven feet six inches, and, therefore, he submitted that, on the true construction of the reservation, it was intended that the yard should be used only for the passage of persons in ordinary private cars to the back door of the auction mart and not for the carriage of goods.

E I am unable to accept that submission. The reservation is for "the vendor his tenants and workmen"—I think that those words are important—"to pass and re-pass with or without vehicles"—there is no limitation whatever on the vehicles—"over and along the land coloured brown" on the plan. In my judgment, the true effect of those words, viz., that there is a right of way over and along the land coloured brown, cannot be affected by the circumstance that at the date of the grant there was the gate and bar across the entrance to the yard. The words of the grant are plain and unambiguous, and, in my judgment, the plaintiff has a right over the whole of the yard, and not merely a right to enter through the double gate some six feet in width. Not only that: he has a right to enter it "with . . . vehicles". That must mean vehicles of any size appropriate to go down the yard, and, as the yard is at no stage, until the garage is reached, less than eleven feet wide, there seems to be no reason why a pantechnicon should not use the yard. Furthermore, the object of the reservation is made perfectly plain. It is

"for the purpose of obtaining access to the building at the rear of the said premises and known as the auction mart."

The vendor and his workmen and others authorised by him are entitled to use that way for that purpose, and it seems to me clear that the whole object and purpose of the reservation was to give to the plaintiff an alternative means of getting to his business premises, and that includes, in the case of an auction mart, bringing goods for sale on those premises.

Counsel for the plaintiff cited a passage from the well-known judgment of SIR GEORGE JESSEL, M.R., in *Cannon v. Villars* (4), which, I think, is helpful on this point, although it is clear, as counsel for the defendant pointed out, that the Master of the Rolls was dealing there, not with a particular grant of a right of way, but with a grant of a right of way per se. SIR GEORGE JESSEL, M.R., said (8 Ch.D. 421):

"Again, if the road is not to a dwelling-house but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a grant of right of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and waggons at reasonable times for the purpose of the business."

It seems to me that that is exactly what the parties had in mind when the reservation in the conveyance of 1944 was made, and I am quite satisfied that on its true construction the plaintiff is entitled to bring on this yard pantechicons and other heavy vehicles and to transport from those vehicles the furniture and other chattels, by the door at the end of the yard, into the auction mart.

It was said, however, that, as it was impossible for a large van to get to the door, there was no right in the plaintiff to stop his vans short of the garage and to carry furniture and chattels from that point to the door by hand. I am unable to accept that submission. The way may be used partly with a vehicle and partly on foot. If, owing to the existence of the garage, it is impossible to get a van to the door, I see nothing to prevent the plaintiff from bringing a van as far along the yard as it can be brought and then transporting the furniture by hand, past the garage, into the mart. There is, however, this to be said. There is, no doubt, great inconvenience to the defendant, and the plaintiff is under a duty to minimise that. It is his duty, for instance, so to back in his vehicles, or to see that customers bringing the furniture so back in their vehicles, as to leave ample space for the defendant and his licensees to use the means of egress from the door of the defendant's house into the side of the yard, either for the purpose of going out on to the road or for the purpose of going to the boiler house, the coal cellar, the water closet, or the store house. There is ample room for them to do that, and if the plaintiff's customers' vehicles do not give that amount of room, then, in my judgment, the defendant will have a just cause of complaint. It is also the plaintiff's duty to move any vehicles out if at any time the defendant desires to get his car out from the garage.

So far, therefore, I have no doubt that the plaintiff is entitled to succeed, but a more difficult question is: Is he entitled to halt on the yard while the vans, his own or his customers', are unloading, an operation which takes half an hour to an hour? If the right which the plaintiff has under the deed of conveyance does not include that right, then the right of way is virtually useless to him. That, again, is, perhaps, an immaterial consideration. The whole question is: What is the true construction of the reservation in the deed of conveyance? Counsel for the defendant contended, with much force, that it was merely a right "to pass and re-pass . . . over and along" the right of way, and that a right to pass and re-pass was something which connoted motion. "To pass" is defined in the OXFORD DICTIONARY as: "To go, proceed, move onward". Therefore, said counsel for the defendant, the right to pass did not include a right to halt.

He conceded that, in the case of the ordinary putting down of a passenger, there must be a halt for a brief moment, but that was a matter de minimis, and he submitted that it was for the vendor to insert appropriate words in the reservation if he wished to exercise the right to halt for an hour or more while unloading.

- Curiously enough the point seems to be without authority. I have to look at the words of the reservation to see what is intended. The yard is a cul-de-sac and, therefore, every vehicle that goes in must, at some time, come out, and it must halt in that process. The plaintiff concedes that a vehicle may halt only for so long as is necessary to load or unload the furniture, and that there is no other right to halt in the yard. The whole object of the reservation is for the purpose of the vendor, his workmen and others obtaining access to the auction room. What is the object of that? It is to get access to business premises, with or without vehicles. Therefore, as I have already held, the plaintiff can, in my judgment, bring goods in the vehicles to his auction room. If he is entitled to do that, then he must, of necessity, in my judgment, be entitled to unload them. And if he is entitled to unload them, he must, per contra, be entitled to load them. In my judgment, therefore, the plaintiff must be entitled to remain in the yard for such time as is necessary to enable him to enjoy his easement of bringing vehicles into the yard, that is, for such time as it takes to load or unload lorries.
- C This right is only an incident of easement and may be described as ancillary to the easement, because without the right he cannot substantially enjoy that which has been reserved to him.

The principle is well stated by LORD PARKER OF WADDINGTON in *Pullbach Colliery Co., Ltd. v. Woodman* (5), where he said ([1915] A.C. 646):

- D “My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted.”

- E It seems to me that the right of coming on the defendant's yard to get to the auction mart is virtually useless to the plaintiff unless he can unload his vehicles there, and, therefore, he must have the right to keep his vehicles there while he unloads and loads them, and I think that the principle which I have just read is applicable here. Accordingly, the plaintiff succeeds in this action, and I must make declarations accordingly.

Judgment for the plaintiff.

Solicitors: *Gillhams*, agents for *G. T. Richards & Morgan*, Bournemouth (for the plaintiff); *Lovell, Son & Pitfield*, agents for *R. E. Druitt & Allfree*, Christchurch (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. TWICKENHAM RENT TRIBUNAL. *Ex parte* DUNN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 21, 22, 1953.]

Rent Control—Reasonable rent—Application by deserted wife in occupation of matrimonial home—Husband the tenant—No authority to act as husband's agent—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1).

The applicant was the wife of the tenant of a dwelling-house which was subject to the provisions of the Rent Control Acts. The husband had deserted the wife who remained in possession of the house, which was the matrimonial home. The wife, claiming to be entitled to act as the husband's agent, but without any authority from him, applied to a rent control tribunal under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to determine what rent was reasonable for the house, but the tribunal refused to entertain the application on the ground that she was not the tenant of the house. On a motion by her for mandamus directing the tribunal to hear and determine the application,

HELD: the only person who could apply to the tribunal to fix a reasonable rent was the tenant; the wife was not the tenant, nor had she the authority of the tenant to make the application on his behalf; and, therefore, she was not entitled to make the application and no order for mandamus would be granted.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1094.

Cases referred to:

- (1) *Old Gate Estates, Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 2nd Digest Supp.
- (2) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 31 Digest, Replacement, 698, 7894.
- (3) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.

MOTION for mandamus.

Willis, Q.C., and *Laughton-Scott* for the applicant.

R. M. N. Band for the landlord.

J. P. Ashworth for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the applicant, Barbara Louise Dunn, move for an order of mandamus directing the Twickenham Rent Tribunal to hear and determine an application made by the applicant

"as agent for and on behalf of her husband Douglas William Dunn, pursuant to s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to determine the reasonable rent of Flat 2, Royston Court, 1 Spencer Road, Chiswick, in the county of Middlesex, whereof the said Douglas William Dunn is the tenant and one A. Stokes the landlord."

The house, to which the Rent Control Acts apply, was demised by Mr. Stokes to Mr. Dunn at a certain rent. Mr. Dunn and Mrs. Dunn have parted, and I assume that the husband deserted the wife, although I do not know that that point has been decided by any court. Mrs. Dunn, having been granted maintenance by the High Court to the amount of £500 a year, and finding that the rent reserved imposed a strain on her, applied to the tribunal to reduce the rent. She first of all applied in her own name, and that application was rejected by the tribunal—in my opinion, rightly—because she was not the tenant of the house, so she sought to avoid the consequences of that decision by applying on behalf of her husband as his agent. Such a case has never arisen before and is illustrative of the inconveniences and difficulties which arise where one has to apply a statute which interferes with the freedom of contract.

This house is subject to the Rent Restrictions Acts and so the husband cannot sue his wife for ejectment, for a series of decisions, more particularly, *Old Gate Estates, Ltd. v. Alexander* (1), *Middleton v. Baldock* (2) and *Bendall v. McWhirter* (3), have established that, if a wife is deserted by her husband, she has a right to remain in the matrimonial home and, so long as she pays the rent and performs the covenants, if that matrimonial home is subject to the Rent Restrictions Acts, she cannot be dispossessed. As I understand the ratio of the

- A decisions in the Court of Appeal she becomes a licensee of a very special character. The mere fact that she is the wife gives her an implied authority from the husband to remain in possession of the premises, and she can remain in possession so long as she pays the rent and performs the covenants. The husband has given notice in the present case, as husbands have done in other cases which have been the subject of decisions in the Court of Appeal, that he does not want to remain in the house. It has not yet, so far as I know, been decided whether in those circumstances the husband who is willing to give up the house to his landlord, but cannot give the landlord vacant possession because the wife is there, remains liable for the rent, but I will assume for the moment that he does. He does not pay it, but the wife does, and so long as the wife pays the landlord the rent, the landlord cannot, by reason of the Rent Restrictions Acts, recover possession of the house.

- C That, however, does not seem to me to make the wife the husband's agent. The husband may have given the wife authority to remain in the house, but, so far as I can see, he has not given her authority to act as his agent. It is a very special and anomalous character with which, by the law as laid down by the Court of Appeal, the wife has been clothed. Her licence to remain in possession cannot be revoked by the husband and her possession cannot be assailed by the landlord so long as he receives the rent, but I cannot see that these cases in the Court of Appeal have clothed her with any further positive rights. The only passage which, I think, can be prayed in aid is a passage in the judgment of DENNING, L.J., in *Bendall v. McWhirter* (3), in which he said ([1952] 1 All E.R. 1311):

- E "The authority [to remain in the house] is, of course, purely personal to her. She alone can exercise it. She cannot assign it. It does not give her any legal interest in the land. She may, perhaps, sub-let some of the rooms so as to help keep herself, but even then, she does so, not out of any legal interest of her own in the land, but on the presumed authority of her husband."

- F No other judgment of any lord justice has gone as far as that, and it should be observed that that is only dictum. The learned lord justice does not purport to decide that the wife can sub-let some of the rooms; he only says that, perhaps, she may sub-let some of the rooms. I think that point is left open, and, so far as the position of the wife as agent for the husband is concerned, I know of no doctrine of the common law which confers an authority on the wife other than an authority to pledge her husband's credit for necessities. That, I think, is the extent of the authority which a wife has as agent for her husband. She can, for instance, taking a case which is not complicated by the Rent Restrictions Acts, if she is deserted by her husband, take rooms, or lodgings, or, possibly, a house on the credit of her husband if she can find anybody who will let premises to her on the terms that he might have to recover the rent from the husband on the ground that the wife had authority to pledge his credit.

- H Speaking for myself, I am not prepared to extend the privileges or the position of the wife to the extent that she can exercise a right which her husband as tenant could have exercised, because she is not the tenant of the house. The only person who can apply to have the rent reduced is the tenant. The cases, at any rate, decide one thing, and that is that the wife is not the tenant of the house, and, if she is not the tenant of the house, I do not see myself how she can get the right to go to the tribunal and ask for a reduction. I do not think that it is

desirable to confer that right on her. After all, if a person takes a house and agrees to pay the rent, many people would consider that he ought to pay the rent he has agreed to pay. The husband in this case has never complained about the rent he agreed to pay. He has not asked, and does not want to ask, the tribunal to say that the landlord is charging an excessive rent. Why should the wife be entitled, because she chooses to remain in the house, to say to the tribunal: "The rent which my husband agreed to pay and did pay and has always been willing to pay as long as he lived in the house is excessive"? Why should she be entitled to ask the tribunal to break a contract which the husband made with the landlord and has never sought to repudiate? I can find nothing in the cases in the Court of Appeal which oblige, or, indeed, entitle, me to hold that the wife is the agent for the husband to exercise any right which the husband might exercise. The only agency there is in a wife is to pledge the husband's credit in a case where the husband has not provided for her. This wife has been provided by the husband with £500 a year and £100 for the child of the marriage. That is by an order of the court, so she cannot say that she has not got provision made for her by her husband. I do not think that she has shown any decision which would oblige me to hold that she has any authority from her husband, either express or implied, merely because she is clothed with this particular special position as a licensee, entitling her to apply to the tribunal. In my opinion, the tribunal were justified in refusing to entertain her application, and this motion must fail.

PARKER, J.: I agree so entirely with what my Lord has said that I do not think I can usefully add anything.

DONOVAN, J.: Section 1 of the Act of 1949 allows a tenant to make an application to the tribunal for reduction of rent. The applicant before us is not the tenant. The Landlord and Tenant (Rent Control) Regulations, 1949 (S.I., 1949, No. 1096), reg. 7, made under the Act contemplates that at the hearing of an application the tenant may be represented by his agent. The applicant before us is not her husband's agent. We are asked to say that she should be treated as the agent of her husband for the purposes both of making the application and prosecuting it although the husband repudiates any such agency, and it is said that we should be justified in so doing because of the decisions which lay down that a wife who has been deserted by her husband has a right to "live" or "stay" in the matrimonial home on the terms of her husband's tenancy. It is merely a logical extension of this right, it is argued, to allow her to exercise her husband's statutory right to go to the rent tribunal. The decisions in question are directed to preserving a deserted wife's right to remain in the matrimonial home, and it is not necessary to the preservation of that right that the wife should have a further right to apply for reduction of rent. If that were granted to her, it would, in my view, not be a logical extension of her rights as a licensee under a presumed irrevocable licence from her husband, but it would be a new departure altogether and a bridging of a void which has been left, wittingly or unwittingly, by Parliament. In my view, Parliament alone can give the right which is sought here, and I, therefore, agree with the judgments already delivered.

Motion dismissed.

Solicitors: *Willis & Willis* (for the applicant); *Arthur Robson* (for the landlord); *Solicitor, Ministry of Health* (for the rent tribunal).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

HAWES v. EVENDEN.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), July 22, 1953.]

Rent Restriction—Death of tenant—Claim by tenant's mistress to remain in possession—Parties and children living as a family—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

The defendant had lived with the tenant of a dwelling-house within the Rent Restrictions Acts as his mistress for some twelve years prior to his death. There were two children, one of whom had been adopted by foster parents, while the second child was living with her parents at the date of the tenant's death and thereafter had continued to live with the defendant at the house. After the tenant's death the landlord claimed possession of the house from the defendant who contended that she was entitled to protection under s. 12 (1) (g) of the Act, as a member of the deceased tenant's family.

HELD: since the evidence justified a finding that the tenant, the defendant, and their children all lived together as a family, the defendant was a member of the deceased tenant's family within s. 12 (1) (g), and was, therefore, entitled to the protection of the sub-section.

Principle stated by COHEN, L.J., in *Brock v. Wollams* ([1949] 1 All E.R. 718), applied.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 999.

Cases referred to:

- (1) *Gammans v. Ekins*, [1950] 2 All E.R. 140; [1950] 2 K.B. 328; 31 Digest, Replacement, 664, 7643.
- (2) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388; 31 Digest, Replacement, 664, 7641.

APPEAL by the landlord from an order of His Honour JUDGE DONE at Clerkenwell County Court, dated Apr. 27, 1953.

The defendant, Miss Evenden, had lived with a Mr. Randall, the tenant of a dwelling-house to which the Rent Restrictions Acts applied, as his mistress for some twelve or thirteen years prior to his death. Two children had been born of the union, one of whom had been adopted by foster parents, while the younger, who was some eight years old at the date of the proceedings, was living at the house in question with her parents when her father died and thereafter continued to live there with her mother. After the tenant's death the landlord claimed possession of the premises, but the defendant claimed the protection of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a member of the deceased tenant's family. The county court judge held that the defendant was protected by the section and refused an order for possession.

R. B. Willis for the landlord.

Miss S. F. Norwood for the defendant.

SOMERVELL, L.J., stated the facts and continued: The only question before the court is whether the defendant had the right to stay on in the house under the provisions of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides:

"... the expression 'tenant' includes the widow of a tenant . . . who was residing with him at the time of his death or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

In *Gammans v. Ekins* (1) a man and a woman had been living together for some years in a house. They were not married, the man had taken the woman's name,

and they were regarded in the neighbourhood as man and wife. The woman, who was the tenant, died, and the man claimed the protection of s. 12 (1) (g). It was held that he could not be a member of the deceased tenant's family, but the question whether the result would or might have been different if there had been children was left open. We are here dealing with a case where there are children and where the claim is put forward by their mother. As was pointed out by ASQUITH, L.J., in *Gammans v. Ekins* (1) ([1950] 2 All E.R. 141), a husband has been held to be a member of his wife's family, and an adopted child a member of the family of the adopting parent. **A**

The basic principle which has been referred to a number of times as the test which should be applied to these matters was laid down by COHEN, L.J., in *Brock v. Wollams* (2), where he said ([1949] 1 All E.R. 718):

"... the question the learned county court judge should have asked himself was: Would an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not, have answered 'Yes' or 'No'?" **B**

The learned county court judge after summarising the facts and the evidence in the present case, said:

"They all lived together as a family. He treated and acknowledged the children as his own and they used his surname. She did not take his name. She said it would have made no difference as all the neighbours knew they were not married. Parents and children continued to live together in this way up to Randall's death." **C**

In her evidence the defendant said that the original suggestion was that she should go to the house as a housekeeper and in one part of her evidence she referred to wages. It seems to me, however, perfectly plain from her evidence as a whole that she went as the tenant's mistress, and that she received from him small sums from time to time for the general housekeeping expenses. There is nothing in the evidence to challenge the learned judge's findings that they all lived together as a family. Later in his judgment he followed the language which JENKINS, L.J., used in *Gammans v. Ekins* (1) ([1950] 2 All E.R. 142), when he said: **D**

"There was here in fact 'the equivalent of a marriage with the natural consequences of a marriage'." **E**

He then held that on the facts of the case not only the children, but also their mother, were members of the tenant's family. From that decision the landlord appeals and the question left open in *Gammans v. Ekins* (1) falls to be decided. **F**

In my view the learned judge was right and he put the right question to himself. The mere fact that someone living in a house, possibly as one of a number of domestic servants, has had a child by the tenant and the tenant makes provision for the child would not in itself, I think, constitute the father and the mother of the child a family within the meaning of the section, but here the evidence justifies a finding that they all lived together as a family, and so, applying the test indicated by COHEN, L.J., I think that the defendant is a member of the family within s. 12 (1) (g). In those circumstances I would dismiss the appeal. **G**

JENKINS, L.J.: I agree. **H**

HODSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Clarke, Lewthwaite & Co.* (for the landlord); *Peter Kingshill* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

FREDERICK E. ROSE (LONDON), LTD. v. WM. H. PIM, JUNR.
& CO., LTD.

[COURT OF APPEAL (Singleton, Denning and Morris, L.JJ.), June 29, 30, July 16, 1953.]

Contract—Rectification—Mistake—Written contract correctly stating terms agreed orally—Mutual error as to meaning of expression used.

A

Having received an inquiry for a supply of "horsebeans described here as feveroles", and not knowing that feveroles were a special medium size variety of horsebeans, buyers asked sellers what they were and were informed that feveroles and horsebeans were the same thing. The two parties being under this misapprehension, the buyers entered into an oral agreement for the purchase from the sellers of five hundred tons of Tunisian horsebeans, the agreement being incorporated in a written contract. The buyers subsequently brought an action for the rectification of the written contract by the addition of the word "feveroles" after the words "Tunisian horsebeans".

B

C

HELD: the oral agreement was for the sale of horsebeans, and, notwithstanding the mutual mistake as to the meaning of "feveroles" and "horsebeans", as the written contract correctly expressed that oral agreement, it could not be rectified.

D

Per DENNING, L.J.: A previous continuing common intention is not sufficient to justify rectification unless it has found expression in outward agreement (disapproving a dictum of SIMONDS, J., in *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 664).

AS TO RECTIFICATION OF A WRITTEN INSTRUMENT, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 140-143, paras. 197-199.

Cases referred to:

E

(1) *Crane v. Hegeman-Harris Co. Inc.*, [1939] 1 All E.R. 662; *affd.* C.A., [1939] 4 All E.R. 68; Digest Supp.

(2) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; Digest Supp.

(3) *Ryder v. Woodley*, (1862), 10 W.R. 294; 17 Digest 45, 504.

(4) *Harrison & Jones, Ltd. v. Buntens & Lancaster, Ltd.*, [1953] 1 All E.R. 903; [1953] 1 Q.B. 646.

F

(5) *McRae v. Commonwealth Commission*, (1951), 84 C.L.R. 377.

(6) *Couturier v. Hastie*, (1856), 5 H.L. Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 10 E.R. 1065; 35 Digest 103, 95.

(7) *Solle v. Butcher*, [1949] 2 All E.R. 1107; [1950] 1 K.B. 671; 31 Digest, Replacement, 674, 7699.

(8) *Leaf v. International Galleries*, [1950] 1 All E.R. 693; [1950] 2 K.B. 86; 2nd Digest Supp.

G

(9) *Shipley Urban District Council v. Bradford Corpn.*, [1936] Ch. 375, 399; 105 L.J.Ch. 225, 232; 154 L.T. 444; Digest Supp.

(10) *Lovell & Christmas, Ltd. v. Wall*, (1911), 104 L.T. 85; 17 Digest 46, 519.

(11) *Smith v. Jeffryes*, (1846), 15 M. & W. 561; 15 L.J.Ex. 325; 7 L.T.O.S. 231; 153 E.R. 972; 35 Digest 100, 79.

H

APPEAL by the defendants (the sellers) from an order of PILCHER, J., dated Jan. 23, 1953, granting rectification of two written contracts of sale by the insertion of the word "feveroles" after the words "Tunisian horsebeans" and "Algerian horsebeans" in the specifications of the goods sold appearing respectively in the two contracts.

The sellers contended that there was no ground for rectification in law since the written contracts correctly stated the terms agreed orally between the parties.

T. G. Roche for the sellers.

Diplock, Q.C., Eustace Roskill, Q.C., and Bateson for the buyers.

Cur. adv. vult.

July 16. The following judgments were read.

SINGLETON, L.J.: This dispute arises out of two contracts for the sale of North African horsebeans. The buyers and the sellers carry on business in the city of London. The representative of the former in these transactions was Mr. Hampson. The sellers have a considerable business in North African products. The buyers have an associated company in Egypt, which is conveniently referred to as Rose (Middle East). On Oct. 26, 1950, Rose (Middle East) sent a cable to the buyers in these terms:

"Have inquiry Egypt up to five hundred tons Moroccan horsebeans described here as *feveroles*. Please offer c.i.f. Port Said single and double bags indicating admixture."

Mr. Hampson was ignorant of the meaning of the French word "*feveroles*", and he, accordingly, communicated with Mr. Brooks, who was well known to him, and who was the representative of the sellers. As at the trial the judge accepted the evidence of Mr. Hampson, I think it desirable that I should refer to it. Mr. Hampson was asked: "Why did you pick on [the sellers] and Mr. Brooks?", and he answered:

"I chose [the sellers] because I have known for many years past that they have a very important connection in North Africa and I had always understood that the shippers in North Africa whom they represent are easily the biggest firm in North Africa. I also chose them because I have known Mr. Brooks for a matter of twenty-five years or more and, as I was in some little difficulty in dealing with something I had never handled before, I felt I could rely on Mr. Brooks as an old friend to help me to get the right thing. Q.—Had you ever come across the word '*feverole*' before? A.—No. I had never seen it in my life. Q.—When you rang up Mr. Brooks what did you do? A.—I am quite certain that I quoted to him that part of the telegram which says 'five hundred tons Moroccan horsebeans described here as *feveroles*'. I am about ninety-nine per cent. certain that I read the whole telegram. (PILCHER, J.): The descriptive words? A.—Yes. (Counsel for the buyers): Did you refer to Egypt? A.—Yes. Q.—That is one of your one hundred per cent. certainties? A.—Yes, because I needed to buy them for shipment to Egypt. Q.—Having read out the telegram, did you ask him what '*feveroles*' meant? A.—Yes. Q.—What did he reply? A.—Mr. Brooks said he did not know, but he would find out."

A few days later there was another conversation, of which Mr. Hampson said:

"I heard from Mr. Brooks that '*feveroles*' just means horsebeans, and that the commodity that I needed to buy was Algerian/Tunisian/Moroccan horsebeans."

Thereafter there were offers and counter-offers which are shown in the documents, of which copies are before the court. It is important to bear in mind that both the buyers and sellers were middlemen. If there came about a contract between them, the sellers were buying from North Africa, and the buyers were to sell through Rose (Middle East) to Egypt. The matter came to a head on Nov. 2, 1950, and there was another conversation between Mr. Hampson and Mr. Brooks, of which Mr. Hampson's account is given in the transcript of the evidence, and I read it as far as is material. Mr Hampson said:

"On the 2nd [the sellers] came back and said they were unable to accept the bid of £30 10s., but they again made me a firm offer—all this was quite early in the morning—for reply back again in London at five

A o'clock on the same day, of Tunisian horsebeans, which they said were the best of the three countries concerned, Algeria, Tunisia and Morocco, and they offered these to me at £32. I also heard—it is difficult to say whether from [the sellers] or on the market—that there was a possibility of all these kinds of beans being freed from control in this country and I knew that the United Kingdom was short of them and I felt that, as soon as that news was known, the price was sure to go up, so I added a comment in my telegram giving that news. That was telephoned to the cable company at 10.50 in the morning. The reply had to be back in [the sellers'] hands by five o'clock on that day."

On that Mr. Hampson cabled to Rose (Middle East) a document:

B "Horsebeans firm here five today Tunisian which best quality thirty-two stop Believe about sellers' lowest paragraph very confidentially rumoured our government will restore to private trade within few days when rush buyers expected."

C He received a reply which reads: "Yours today booked five hundred horsebeans." Thereupon he accepted the sellers' offer, and there came into existence a string of contracts, three in number. They are all dated Nov. 2. The first is the sale by an Algerian company to the sellers of five hundred tons Tunisian horsebeans, fair average quality, at £32 a ton less 1½ per cent. The second records the sale by the sellers to the buyers of the like quantity and quality of Tunisian horsebeans at £32 a ton, and the third records the sale by the buyers to Noujaim of Port Said of the same quantity of horsebeans at £33 a ton, in each case c.i.f. Port Said. There was an arbitration clause in each of the contracts, which were on Form 62 of the London Corn Trade Association, and there was attached to each a slip containing provisions as to payment, and also providing:

E "Certificate: Certificate of cargo superintendents at shipment to be final as to weight, quality, condition and admixture. Cost of such certificate to be for sellers' account. Admixture: Any admixture of dirt and other foreign substance over four per cent. to be allowed for by sellers on certificate of cargo superintendents."

F Some four days later Mr. Brooks told Mr. Hampson that they could work a further two hundred tons of the same commodity, and there came into existence the contract of Nov. 7, 1950, between the buyers and the sellers for the sale of two hundred tons Algerian horsebeans, and corresponding contracts between the sellers and their sellers, and the buyers and their buyer, who in this case was one Bassionini of Alexandria, to which port shipment had to be arranged. As in the case of the earlier contract there was a slip attached in the same terms as before. It appears that the two hundred tons of Algerian horsebeans arrived first, and a complaint was made as to them. This is shown by the letter from the buyers, dated Dec. 11, to which the sellers replied. On Dec. 18 the buyers wrote to Rose (Middle East) a letter which relates to the five hundred tons of horsebeans which had been shipped in the s.s. Sylva. The buyers write:

H "We had arranged to assign the credit from Noujaim to [the sellers], but in view of the dispute over the Gunda [the ship on which the two hundred tons had been shipped] the writer went along to the Bank this morning and inspected the certificate issued by cargo superintendents. A note of the salient points on the certificate (which is a printed form) is enclosed herewith. On seeing the goods described as 'Feves de Tunisie' we immediately objected and said that we would not accept 'feves' as equivalent to horsebeans. The bank thereupon refused to make a payment to [the sellers] and we understand this evening from [the sellers] that they are arranging to put the matter right, having telephoned to Paris on the subject. Exactly what steps their shipper is taking is not yet clear but we are

watching the position very closely. We have been making a few inquiries on the Baltic from various people to check up on these matters, particularly as regards the nomenclature of the beans. One man tells us that there is only one sort of bean shipped from North Africa and that they are all horsebeans. Another man contradicts that and says that broad beans are also shipped and that they are known as 'feveroles' which is what you originally asked for in your cable of Oct. 26. We may mention here that we used the word 'feveroles' when first speaking to [the sellers] and that they assured us that the translation of 'feveroles' was 'horsebeans'. It seems to be agreed that there are both f.a.q. horsebeans and 'small horsebeans' to be had, but they are all 'horsebeans' and one has to specify 'small' if one wants that sub-division. Another comment is that whatever one may call them in English all the beans which are shipped from North Africa are called in 'French' 'feves'. In spite of this we shall not accept this word on the cargo superintendents' certificate as being sufficient. It would be very interesting if you could let us know from your end, where it is much easier to get English/French translations accurately, what you consider is the exact equivalent of 'horsebeans' and 'broad beans' and also what 'favettes' or 'fevettes' are."

This shows the complete uncertainty as to what was understood by the word "feveroles", and it brings in the question of "feves", also "favettes" and "fevettes". That is after inquiries had been made in the market by the buyers. That uncertainty has not been cleared up, though it appears that both are horsebeans, and that "feves" are larger than "feveroles", although that does not appear from the letter which I have read, but rather the contrary. In the correspondence there is a copy of a letter from the buyers to the sellers dated Dec. 18, 1950, which reads:

"Our purchase of Algerian and Tunisian horsebeans. In view of the difficulties which seem to be arising in connection with our two contracts with you, we should like to remind you of the circumstances leading up to our transaction. We received on Oct. 27, from our Alexandria associates, the following telegram which we believe we read out in full to your Mr. Brooks: 'Have inquiry Egypt up to five hundred tons Moroccan horsebeans described here as feveroles. Please offer c.i.f. Port Said single and double bags indicating admixture.' We are quite certain that we told you that our inquiry was for feveroles, because we ourselves were not sure at that time of the exact translation. Mr. Brooks consulted others in the firm and told us that 'feveroles' meant 'horsebeans' and that f.a.q. Algerian/Tunisian/Moroccan was the commodity intended. In telegraphing backwards and forwards to Alexandria we used the word 'horsebeans' all through, and your contract to us was also on this basis and our contract to our buyers the same. On examining the cargo superintendents' certificate today for the shipment per Sylva we found that the description of quality was 'Feves de Tunisie'. We feel quite sure that you will agree that 'feve' is a word which can only be translated as 'bean' and that it covers quite a variety of different types. Clearly 'feve' is not the same as 'horsebean', and therefore we instructed the bank that we could not agree to their accepting this certificate. We are pleased to note that you are arranging to put this right. The above circumstances naturally tend somewhat to make us feel that the buyer of the shipment per Gunda has right on his side in claiming that the beans shipped were not 'horsebeans'. However, we are purely intermediaries in the matter and have no desire to do other than clear it up as quickly and as satisfactorily as possible."

The five hundred tons of Tunisian beans had been shipped in the s.s. Sylva, and when the documents were presented it was seen that the cargo superintendents' certificate showed, not horsebeans, but "feves de Tunisie"; and

it is interesting to notice that the confirmation of sale between the sellers and the Algerian sellers showed the description as "feves" (horsebeans). The cargo superintendents' certificate was altered so as to put the documents in order. No point is made of this, as the alteration was made with the approval of both the buyers and the sellers. None the less, it appears somewhat odd, in view of the importance of the cargo superintendents' certificate.

- Disputes arose between the buyers and the sellers and were referred to
- A arbitration. The award of the arbitrators in regard to the five hundred tons was given on Mar. 2, 1951, and it was in favour of the sellers, and an award to the like effect was made on July 18, 1951, in respect of the second contract. Appeals were entered, but stand adjourned. Proceedings were taken in the courts of Egypt by the buyers of the two hundred tons. After an incursion into the Chancery Court the buyers commenced this action against the sellers. By their
- B statement of claim they claimed rectification of both contracts by the addition of the word "feveroles" after the words "Tunisian horsebeans" and "Algerian horsebeans" respectively, and also damages for breach of warranty. The latter claim was based on an allegation in the statement of claim that Mr. Brooks had warranted that goods described as Algerian/Tunisian/Moroccan horsebeans were goods commonly known in Egypt as "feveroles" and could be re-sold
- C in fulfilment of a requirement for "feveroles", and that in consideration of such warranties the buyers accepted the sellers' offers.

- During the hearing before PILCHER, J., the buyers abandoned their claim to damages for breach of warranty. It appears from the judgment that the reason given was that the sellers had pleaded s. 4 of the Sale of Goods Act, 1893, as a defence to the claim. That could not provide an answer, in view of the fact that
- D the goods had been delivered and payment had been made. It is unnecessary to consider the merits of the claim except to say that, though it might have been difficult to establish in law, it is something which cannot be overlooked, as the pleader seems to have thought at one time.

- The action was heard before PILCHER, J., on Jan. 21 and 22, 1953, and he gave his judgment on Jan. 23. He held that the buyers' claim must succeed, and that
- E they were entitled to have the two forms of contract rectified by the addition of the word "feveroles" after the word "horsebeans". The sellers appeal against that judgment.

- Apart from any question of law, one sees at once the difficulty caused by the uncertainty as to the meaning of "feveroles". The first cable of Oct. 26, 1950, mentioned horsebeans *described in Egypt as "feveroles"*, and that cable led to
- F discussions between Mr. Hampson and Mr. Brooks. I cannot say that it is clear from the evidence that the word "feveroles" has the same meaning everywhere, though it seems fairly clear that they are a type of horsebean. I have not thought it necessary to refer to the evidence of Mr. Brooks, as PILCHER, J., preferred the evidence of Mr. Hampson. It is, perhaps, not surprising that he did so. Some of Mr. Brooks's answers were not convincing. They appear to me
- G to show that he had very little knowledge of horsebeans, or of "feveroles", whatever impression he may have endeavoured to create. None the less, the judge said he had come to the conclusion that, at the time of the conversations, Mr. Brooks honestly believed that "North African horsebeans described in Egypt as 'feveroles'" were in fact the same commodity as "North African horsebeans, fair average quality." The judge said, further:

- H "As I have already indicated, Mr. Hampson knew what was wanted. Mr. Brooks knew what was wanted by Rose (Middle East). But Mr. Hampson had no idea what it was and Mr. Brooks honestly thought that what was required was just North African horsebeans. He was wrong. He innocently, in my view, misled Mr. Hampson, with the result that the sellers bought from the Compagnie Algerienne horsebeans which were broad beans or feves and which were not feveroles. They then passed this

commodity on to the buyers, who in their turn sold it to their buyer. It is quite true that, from the moment people started putting pen or pencil to paper, the commodity was always described as Tunisian or Algerian horsebeans. That was solely because of the mutual mistake which had originated with Mr. Brooks and which had been accepted, as it were, by Mr. Hampson. In the result I find that both the buyers and the sellers, through their respective market agents, made an oral agreement in which they intended to deal in horsebeans of the feverole type. All the documents thereafter, owing to a mutual mistake, were made out as though the deal were an order for horsebeans or feves."

Innocent misrepresentation may give rise to a right of rejection. That right was not exercised in this case. And it might have been possible to establish a breach of a collateral warranty. Neither of these questions arises. The sole question is whether the buyers are entitled to rectification of the contracts. This depends, not on intention, but on proof that the written contract is not the contract into which the parties entered, and the terms of the contract into which they had entered must be clearly proved. In *Crane v. Hegeman-Harris Co. Inc.* (1) SIMONDS, J., said ([1939] 1 All E.R. 665):

"I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is in the light of those principles that I must examine the facts of this somewhat complicated case."

When that case was before the Court of Appeal SIR WILFRID GREENE, M.R. ([1939] 4 All E.R. 71) spoke of the

"high degree of conviction which unquestionably is to be insisted upon in rectification cases."

I accept without hesitation the finding of PILCHER, J., that both Mr. Hampson and Mr. Brooks were under a mistaken view as to what "feveroles" or beans described in Egypt as "feveroles" were, and that that mistake came about as the result of what Mr. Brooks said. Still, it is necessary to ascertain what the contract was. That is shown by Mr. Hampson's evidence as to the conversation on Nov. 2. It is really all contained in the passage to which I come again:

"On the 2nd [the sellers] came back and said they were unable to accept the bid of £30 10s., but they again made me a firm offer—all this was quite early in the morning—for reply back again in London at five o'clock on the same day, of Tunisian horsebeans, which they said were the best of the three countries concerned, Algeria, Tunisia and Morocco, and they offered these to me at £32."

I need not read further.

The offer clearly was Tunisian horsebeans. It was so treated by the buyers in their cable to Rose (Middle East), who accepted it the same day. On acceptance by the buyers, a slip was made out in the sellers' office, and that formed the groundwork of the contract, as Mr. Turner, the director, said. The oral contract between the buyers and the sellers was in fact for five hundred tons of Tunisian horsebeans, and the written contract is in the same terms. In those circumstances, a claim to rectify the written contract by adding the word "feveroles" could not succeed. The written contract is in the same terms as the oral contract. Whatever remedies the buyers might have, or might have had, rectification is not one of them.

Counsel for the sellers submitted that either there was a contract for horsebeans or there was no contract at all. That seems to me to be right. I cannot accept

the submission of counsel for the buyers that, because of the conversation some days before Nov. 2 to the effect that "feveroles" meant "horsebeans", the oral contract was a contract for the sale of "feveroles". We know that the sellers passed on to the buyers an offer for the sale of horsebeans. If it had been sought to introduce the word "feveroles" into the contract, it is almost certain that inquiries would have been made in North Africa, and some information might have been forthcoming as to the varieties of horsebeans, in which event Mr. Hampson and Mr. Brooks might not have agreed on terms, or they might have agreed on terms other than those at which they arrived. The same considerations apply to the second contract as to the first. I do not regard this as a case in which rectification can be granted. I am in favour of allowing the appeal.

DENNING, L.J.: The parties in this case have got involved over the meaning of some French words for some kinds of beans. The position is not altogether clear even now, but, so far as I understand it, it is this. In certain countries in North Africa, notably Morocco, Algeria and Tunisia, the people grow beans which are known in those countries as "feves", and in English as horsebeans. There is a special kind of them known as "feveroles", a word which has no exact equivalent in English, but which denotes horsebeans of medium size. There is another special kind called "fevettes", which denotes the very small horsebeans. The medium size and small size are more valuable than the large ones. The trouble in this case has all arisen because the English word "horsebeans" covers all the three varieties, "feves", "feveroles" and "fevettes", and the English business men did not realise that there were those three different varieties.

On Oct. 26, 1950, an English firm in Alexandria telegraphed to its London house in these words:

"Have inquiry Egypt up to five hundred tons Moroccan horsebeans described here as feveroles. Please offer c.i.f. Port Said."

The London house of the buyers did not know what "feveroles" were. So their market clerk, Mr. Hampson, got into touch with Mr. Brooks, of the sellers, who had much knowledge of the North African trade. Mr. Hampson read the telegram to Mr. Brooks and told him that the buyers wanted to make an offer in accordance with it. They wanted to supply "horsebeans described in Egypt as feveroles", but did not know what "feveroles" were. Mr. Brooks made inquiries of his colleagues, and, as a result, told Mr. Hampson: "What you want is horsebeans. 'Feveroles' just mean horsebeans. We can supply you with them, and I will get an offer for you." A few days later Mr. Brooks rang up Mr. Hampson and said that the sellers could supply five hundred tons of horsebeans at £33 a ton, whereupon the buyers, on Oct. 31, 1950, telegraphed to their Alexandria house a firm offer to supply "horsebeans" stating in the telegram: "Understand horsebeans exact translation feveroles." That was, of course, based on what Mr. Brooks had told Mr. Hampson. In all the negotiations thereafter the word "horsebeans" was used and not "feveroles", because it was an English word and the parties thought that it meant the same thing as "feveroles". Eventually, on Nov. 2, 1950, three written contracts were signed whereby: (1) the sellers agreed to buy from an Algerian company five hundred tons of Tunisian horsebeans at £32 per ton less 1½ per cent.; (2) the sellers agreed to sell to the buyers of London five hundred tons of Tunisian horsebeans at £32 per ton; and (3) the buyers of London agreed to sell to Messrs. Noujaim of Port Said five hundred tons of Tunisian horsebeans at £33 per ton. Payment was to be made by net cash against shipping documents by confirmed irrevocable letters of credit to be opened by buyers with a London bank.

In pursuance of these contracts, on Dec. 11, 1950, five hundred tons of horsebeans were shipped at Tunis for despatch to Egypt. The certificate of

the cargo superintendents at Tunis at first described them as "Feves de Tunisie", whereupon the buyers told the bank not to honour the credit, because they could not accept "feves" as equivalent to horsebeans (they still thought that "feveroles" were horsebeans and that horsebeans were "feveroles"), whereupon the cargo superintendents altered the certificate so as to describe the goods as horsebeans, which they in fact were. Thereupon the conditions of the credit were fulfilled and the bank paid the price in exchange for the shipping documents. When the Egyptian buyer took delivery of the goods the mistake was discovered. He found that they were not "feveroles", but only "feves". He complained at once, but as he had already paid for the goods by means of the irrevocable credit, he did not reject them, but accepted them and claimed damages. It is quite plain that neither the Egyptian buyer nor the buyers could claim damages under the written contracts, because those contracts were contracts for horsebeans and the goods delivered were in fact horsebeans, and that has been so found by arbitrators in London. In those circumstances the buyers seek in this action to have their contract with the sellers rectified so as to make it refer to "feveroles" instead of horsebeans. If they get the contract rectified, they will claim damages for failure to deliver "feveroles". Their object in so doing is, of course, to cover themselves against a claim by their Egyptian buyers. We were told that the courts in Egypt have, on a similar parcel of two hundred tons, already held the buyers liable for not supplying "feveroles". Hence the desire of the buyers to be able to claim over against the sellers.

The facts which I have stated raise nice questions on the law of mistake. It is quite clear on the evidence that the parties to the second and third contracts (though not to the first) were under a common mistake. The sellers, the buyers and Noujaim all thought that "feveroles" meant horsebeans, and that horsebeans meant "feveroles". They thought that if they got horsebeans they would get the "feveroles" which they wanted. It was under the influence of that mistake that they entered into those contracts for horsebeans. The sellers were, of course, the cause of all the trouble. Thinking that "feveroles" just meant horsebeans, they asked their Algerian supplier to supply horsebeans, and he did so. They ought to have asked him to supply "feveroles", and then there would have been no trouble. The Algerian supplier, no doubt, knew the difference between horsebeans ("feves") and "feveroles". If he had been asked for "feveroles", he would have quoted for "feveroles" and supplied "feveroles", but being asked only for horsebeans, he supplied horsebeans.

What is the effect in law of this common mistake on the contract between the buyers and the sellers? Counsel for the sellers quoted *Bell v. Lever Bros., Ltd.* (2), and suggested that the contract was a nullity and void from the beginning, though he shuddered at the thought of the consequences of so holding. I am clearly of opinion that the contract was not a nullity. It is true that both parties were under a mistake, and that the mistake was of a fundamental character with regard to the subject-matter. The goods contracted for—horsebeans—were essentially different from what they were believed to be—"feveroles". Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning, though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity. In *Ryder v. Woodley* (3), where a buyer contracted to buy a commodity described "St. Gilles Marais wheat", believing that it was wheat when it was not, the contract was held to be binding on him and not a nullity. In *Harrison & Jones, Ltd. v. Bunten & Lancaster, Ltd.* (4), where parties contracted for the supply of "Calcutta Kapok 'Sree' brand", both believing it to be pure kapok containing no cotton, whereas it in fact contained ten to twelve

per cent. of cotton, PILCHER, J., held that their mistake, although fundamental, did not make the contract a nullity. In *McRae v. Commonwealth Commission* (5), where sellers contracted to sell a stranded oil tanker, described as lying at a specified point off Samarai, believing that there was a tanker at such a place when there was in fact no such tanker there, or anywhere in the locality, the High Court of Australia held that the mistake, although fundamental, did not make the contract a nullity, and that the buyers were entitled to damages.

A The court showed convincingly that *Couturier v. Hastie* (6) was a case of construction only. It was not a case where the contract was void for mistake. The other old cases at common law can likewise be explained.

At the present day, since the fusion of law and equity, the position appears to be that, when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning. Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground:

B
C have been set aside? I think it could, if the parties had acted in time. This contract was made under a common mistake as to the meaning of "feveroles" and "horsebeans". This mistake was induced by the innocent misrepresentation of the sellers, made to the buyers and passed on to the sub-buyers. As soon as the buyers and sub-buyers discovered the mistake they could, I think, have rejected the goods and asked for their money back. The fact that the contract
D was executed would not be a bar to rescission. But once the buyers and sub-buyers accepted the goods, and treated themselves as the owners of them, they could no longer claim rescission: see *Leaf v. International Galleries* (8).

The buyers now, after accepting the goods, seek to rectify the contract. Instead of its being a contract for "horsebeans" simpliciter, they seek to make it a contract for "horsebeans described in Egypt as feveroles" or, in short, a contract for "feveroles". The judge has granted their request. He has found that there was "a mutual and fundamental mistake" and that the sellers and the buyers, through their respective market clerks, "intended to deal in horsebeans of the feverole type". And he has held that, because that was their intention—their continuing common intention—the court could rectify their contract to give effect to it. In this I think he was wrong. Recti-

F fication is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract.

G You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice. It is not necessary that all the formalities of the contract should have been executed so as to

H make it enforceable at law: see *Shipley Urban District Council v. Bradford Corpn.* (9); but, formalities apart, there must have been a concluded contract. There is a passage in *Crane v. Hegeman-Harris Co. Inc.* (1) ([1939] 1 All E.R. 664, at "C"), which suggests that a continuing common intention alone will suffice, but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into

a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they *agreed something different*: see *Lovell & Christmas, Ltd. v. Wall* (10), 104 L.T. 88, per LORD COZENS-HARDY, M.R., and *ibid.*, 93, per BUCKLEY, L.J.; but not that they *intended* something different.

The present case is a good illustration of the distinction. The parties, no doubt, intended that the goods should satisfy the inquiry of the Egyptian buyers, namely, "horsebeans described in Egypt as feveroles." They assumed that they would do so, but they made no contract to that effect. Their agreement, as outwardly expressed, both orally and in writing, was for "horsebeans". That is all that the sellers ever committed themselves to supply, and all they should be bound to. There was, no doubt, an erroneous assumption underlying the contract—an assumption for which it might have been set aside on the ground of misrepresentation or mistake—but that is very different from an erroneous expression of the contract, such as to give rise to rectification. The matter can best be tested by asking what would have been the position if the contract between the sellers and the buyers had been for "feveroles". Surely, then, the sellers on their side would have stipulated with their Algerian suppliers for the delivery of "feveroles", and the buyers on their side would have agreed with their sub-buyers to deliver "feveroles". It would not be fair to rectify one of the contracts without rectifying all three, a thing which is obviously impossible.

There is one other matter I must mention. In the statement of claim the buyers originally claimed damages for breach of a collateral warranty—a warranty that the horsebeans would be a compliance with a demand for "feveroles"—but that claim was formally abandoned at the trial. I do not myself quite see why it was abandoned. Section 4 of the Sale of Goods Act, 1893, was no bar to it. Nor was such a warranty in any way in contradiction of the written contract. (*Smith v. Jeffries* (11) was not an action on a collateral warranty.) The only difficulty might be whether it was a contractual warranty or merely an innocent misrepresentation. I should myself have thought that it had a better chance of success than the claim for rectification. It was put forward by the buyers very forcibly in their letter on Mar. 12, 1951, but its abandonment at the trial makes it impossible for us to consider it. We have only to consider the question of rectification, and on that I think that the buyers fail. I agree that the appeal should be allowed and judgment entered for the sellers.

MORRIS, L.J.: When the buyers received from their associated company in Alexandria an inquiry for "horsebeans described here as feveroles" Mr. Hampson, being puzzled, sought the advice of Mr. Brooks. When it was ultimately given that advice was that "horsebeans" and "feveroles" were interchangeable terms. With liberal opportunity of assessing the actions and bearing of Mr. Brooks, the learned judge was "certain" that he was an honest witness. Mr. Brooks knew precisely what was the inquiry received by the buyers. As "an honest man" he

"honestly believed at the time that the commodity 'North African horsebeans, f.a.q.' was identical with 'North African horsebeans, described in Egypt as feveroles'."

So it came about that the parties proceeded on that basis. On Nov. 2, 1950, Mr. Brooks offered to Mr. Hampson five hundred tons of Tunisian horsebeans, and Mr. Hampson agreed to buy. It was understood between them that there would be a written contract on the appropriate corn trade form. When it was prepared and signed it related to Tunisian horsebeans. A later contract, dated Nov. 7, which (as in the case of the earlier contract) was on Form 62 of the London Corn Trade Association, related to two hundred tons of

Algerian horsebeans. Both buyers and sellers are merchants engaged in the grain trade and dealing on the Baltic Exchange, and there can be no doubt that the buyers would appreciate that the sellers did business for forward shipment. The buyers would appreciate that the sellers bought and sold simultaneously and would buy from a shipper in order to sell to the buyers. The sellers knew that the buyers were buying in order to re-sell. These circumstances do not, however, govern the determination of the issue of rectification

A now raised between the parties.

It seems to me clear beyond doubt that both parties proceeded on the basis that "feveroles" and "horsebeans" were the same. Mr. Hampson expressed the matter succinctly when he said:

"I had agreed to buy because feveroles were horsebeans and horsebeans were feveroles."

B In that belief the parties came to agreement, and the formal written contracts were prepared and signed. The parties had throughout a clear common intention and purpose of buying and selling horsebeans, and their written agreements faithfully embodied and exactly recorded what they had agreed. In these circumstances it seems to me that no claim for rectification can succeed. Both parties thought that the result of what they clearly understood and clearly

C expressed would be that the buyers as buyers would be able to satisfy the inquiry which, as the sellers knew, had been received. In that they were mistaken as a result of the advice honestly given by Mr. Brooks. But the fact that they were under a mistaken impression as to what their agreement would achieve does not disturb the clarity and the fixity of the agreement which they in fact made. The sellers intended to offer horsebeans and the

D buyers intended to accept horsebeans. The written agreements correctly reflected and incorporated what they had agreed.

The learned judge, in the course of his judgment, said that

"Both the buyers and the sellers through their respective market agents made an oral agreement in which they intended to deal in horsebeans of the feverole type."

E With respect, that was not quite the position. There was no question of contracting in reference to a "type" of horsebeans. There was a joint understanding that they should contract in reference to "horsebeans" simpliciter which they thought were the same as "feveroles". If, as now appears to be the case, they were wrong, it appears probable that they would not have acted

F as they did had they been enlightened. But this does not enable one party to convert the contract into something different from what it was. On the assumption that "feveroles" are different from "horsebeans", it cannot be said that the parties agreed on the sale of a commodity of the separate existence of which they had no knowledge. The sellers were selling "horsebeans", and in order to sell they would have to acquire "horsebeans". If "feveroles"

G are different, then the sellers, and equally the buyers, never even gave their minds at all to the question of a sale of some products which are different from "horsebeans". I consider that the appeal should be allowed.

Appeal allowed.

Solicitors: *Richards, Butler & Co.* (for the sellers); *Thomas Cooper & Co.* (for the buyers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. CHAIRMAN, COUNTY OF LONDON QUARTER SESSIONS.

Ex parte DOWNES.[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.),
July 23, 24, 1953.]*Criminal Law—Indictment—Indictment quashed on ground that evidence in depositions insufficient to support conviction—Mandamus to hear and determine.*

A
A court of trial has no power to quash an indictment on the ground that the depositions disclose no evidence sufficient to support a conviction of the offence charged.

Where a chairman of quarter sessions had quashed an indictment on this ground,

B
HELD: mandamus would go directing him to hear and determine the indictment.

Cases referred to:

(1) *Defiant Cycle Co., Ltd. v. Newell*, [1953] 2 All E.R. 38.(2) *R. v. Norfolk Quarter Sessions. Ex p. Brunson*, [1953] 1 All E.R. 346.

MOTIONS for certiorari and mandamus.

C
In January, 1953, indictments were preferred by Alec Downes, a higher executive officer of the Ministry of Supply, at the County of London Quarter Sessions against the respondents charging them with unlawfully selling, on divers dates between June and October, 1951, steel of a class mentioned in the schedule to the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended, at a price which was in excess of the maximum price, contrary to art. 1 of the order, as amended, and to reg. 55AB of the Defence (General) Regulations, 1939. The cases D
came up for hearing on May 7, 1953, when counsel for the respondents moved, before the arraignment of the respondents, to quash the indictments on the ground that the depositions disclosed insufficient evidence to support a conviction. Notice had been given that additional evidence would be adduced by the prosecution. The chairman, having examined the depositions, quashed the indictments on the ground that, having regard to the decision in *Defiant Cycle Co., Ltd. v. Newell* (1), the prosecution would not be able to obtain a conviction since there was insufficient evidence to show that the schedules to the Iron and Steel Prices Order, 1951, as amended, had been published or brought to the respondents' knowledge. The applicant applied for an order of certiorari to bring up and quash the chairman's order quashing the indictments, and for an order of mandamus directing the chairman to hear and determine the indictments. E
F

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), J.P. Ashworth and Edward Clarke for the applicant.

Levy, Q.C., and Faulks for the respondents, W. R. Howard & Partners, Ltd., and Helical Bar Engineering Co., Ltd.

Sebag Shaw for the respondent, P. J. C. Daniels.

G
F. H. Lawton for the respondents, J. H. Sully and North London Metals, Ltd.

Ruttle for the respondents, Harwin Shipping Agency, Ltd.

Durand for the respondent, R. E. L. Everett.

The respondent, Sigmund Rappaport, appeared in person.

The respondents, Industrial & International Agencies, Ltd., were not represented. H

July 24. LORD GODDARD, C.J., read the following judgment. In these cases counsel for the applicant moves for orders of certiorari and mandamus directed to the County of London Quarter Sessions to bring up and quash an order whereby the court purported to quash indictments preferred against the several individuals and companies named therein, and commanding the sessions to hear and determine the indictments according to law.

[His LORDSHIP stated the facts and continued:] The questions that arise are (i) whether the court had any power to act in this manner, and (ii) if not, what steps, if any, this court can take to compel the sessions to try the case. No member of this court has ever known, or heard, of a court quashing an indictment in such circumstances, nor can authority be found to support it. It is said, however, that the court must have power at common law to quash an indictment if satisfied, from a perusal of the depositions, that there must be an acquittal in the end. This seems to ignore entirely the method by which an indictment comes before a court of trial. At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all. Depositions, as at present understood, are entirely the creation of the Indictable Offences Act, 1848, s. 17, though before that Act, no doubt, justices took statements from witnesses in the absence of the accused and also examined him and returned the examinations to the court of trial. A grand jury acted on any evidence they saw fit to admit, and could, and constantly did, act on their own knowledge. The sonorous and stately oath (which, unfortunately, is no longer heard after the opening of the commission at the assizes) was diligently to inquire and true presentment make of all such offences, matters and things which were given them in charge or might otherwise come to their knowledge. If anyone takes the trouble to read the old sessions papers published by various individuals from time to time (and very good reading they are), he will find that they are full of cases down to the reign of Queen Victoria of grand juries presenting all manner of things to the court of quarter sessions, which in those days was really the source of local government for the county in such matters as roads which were known to be out of repair, bridges that were in danger, public nuisances, disorderly houses, gaming houses, and the like, all out of their own knowledge. Once a presentment was made, so that the bill became an indictment, the court had to try it unless the alleged offence was unknown to the law, or was imperfectly set out so that it would have been bad on error, or unless matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried. Objection to the matter or form of the indictment could be taken by motion to quash, or, less usually, by demurrer. The only question then was whether the indictment was good in substance and form, and not whether the evidence which had been before the grand jury would support it. Indeed, the grand jury's oath obliged them to keep all their proceedings secret: "The King's counsel, your own, and your fellows', you shall well and keep secret." As, however, the liberty of any individual to present a bill was liable to abuse, the Vexatious Indictments Act, 1859, limited the right of the private prosecutor to prefer a bill for certain specified alleged offences.

When grand juries were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 1 (1), committal for trial was substituted for presentment, although provision is made in s. 2 (2) of that Act for enabling any person to prefer a bill by leave of the judge. The signing of the bill by the proper officer of the court is equivalent to presentment, and if the accused has been formally committed for trial the officer must sign it, though, if he is in doubt whether the committal was regular, the matter must be decided by the presiding judge. If he decides it is irregular, no doubt his ruling would have the same effect as the ignoring of a bill by the grand jury. Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular court has no jurisdiction to try, for example, an indictment at quarter sessions for an offence punishable with imprisonment for life in the first instance.

I know of no power in the court to quash because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions or examination taken before a justice in the presence of the accused disclosed that offence. Accordingly, the course taken by the sessions in this case was not warranted by law. It amounts to saying that the court has satisfied itself, not on evidence given before the court, but on depositions taken elsewhere, that the accused has a defence. Moreover, if this course were permissible, it would enable a court, the members of which disapproved of, or disliked, a statute the breach of which formed the subject of the indictment, simply to quash it and decline to try it. It is, of course, well known to every practitioner that, if the prosecution is satisfied that there is a good defence to the charge, or that for some reason it is inadvisable to proceed, it is permissible, with the leave of the court after issue joined, to offer no evidence, when a verdict of acquittal will be directed. Again, if there is more than one indictment against a prisoner it is quite common practice, after the trial of one indictment, to direct that the other indictment or indictments are to remain on the file and not to be prosecuted without leave. I would also add that it often happens (and, indeed, we were told it was so in this case) that the prosecution intend to call evidence in addition to that given before the court of committal. This they are entitled to do, and, though modern practice requires at least, if it involves the calling of additional witnesses, that notice of the fresh evidence should be given, there is no statutory requirement to this effect.

The question then arises what, if anything, this court can do to correct the error into which the sessions have fallen. I feel no doubt that an order of mandamus to hear and determine the indictment can issue. The sessions, in effect, have refused to try the case. No one suggests that the indictments do not disclose an offence, or that they are not good in form, or that the sessions had no jurisdiction to try them. They cannot quash because they are of opinion that the respondents have a defence. They must try the case. This court has on several occasions sent an order of mandamus to quarter sessions where they have declined to proceed. A recent instance is *R. v. Norfolk Quarter Sessions. Ex p. Brunson* (2), where the court declined to proceed because some inadmissible evidence had been given before the committing justices, and the court, by order of mandamus, directed the sessions to hear and determine. With regard to certiorari, the question is by no means so clear, and I may refer to a recent learned note by Mr. D. M. GORDON in the *LAW QUARTERLY REVIEW*, vol. 69, p. 175. It seems that when quarter sessions are sitting as a court of oyer and terminer to try prisoners on indictment, certiorari will not lie to bring up a judgment either of acquittal or conviction. The quashing of an indictment is not a judgment of acquittal, nor, a fortiori, of conviction. It is true that in the *Norfolk* case (2), where this point was not taken, this court did order certiorari to issue both for the order quashing the indictment and for the order as to costs. It may be that, had the point been taken, the court would have confined the certiorari to the order for costs, but, in truth, I do not think any certiorari is necessary, so that we need not consider the cases and learning on this subject. The court, by its order of mandamus, will direct the sessions to try the indictments, so it would be eminently futile to take the objection that they have made an order quashing them. It is just because they have made that order that the court directs them to try the case, thus, in effect, directing them to ignore the order they have made. The order of mandamus will go, and the defendants will pay the costs of the application.

PARKER, J.: I entirely agree.

DONOVAN, J.: I agree.

Order of mandamus.

Solicitors: *Treasury Solicitor*; *Capel Cure, Glynn Barton & Co.* (for the respondents, W. R. Howard & Partners, Ltd., and Helical Bar Engineering Co., Ltd.); *Lewis Lloyd & Co.* (for the respondent, P. J. C. Daniels); *Wontner & Sons* (for the respondents, J. H. Sully and North London Metals, Ltd.); *Mellows & Mellows* (for the respondents, Harwin Shipping Agency, Ltd.); *Hart-Levertton & Co.* (for the respondent, R. E. L. Everett).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

ORMROD AND ANOTHER v. CROSVILLE MOTOR SERVICES,
LTD. AND ANOTHER (MURPHIE, Third Party).

[COURT OF APPEAL (Singleton, Denning and Morris, L.JJ.), July 8, 9, 13, 14, 1953.]

Negligence—Driving of motor vehicle—Liability of owner—Car driven by friend of owner partly for owner's purposes.

While the owner of a motor car was attending the Monte Carlo motor car rally, a friend of his, under an arrangement made between them, was to drive the owner's car from Birkenhead to Monte Carlo. He was to carry a suitcase belonging to the owner of the car, was to make the journey in his own time and manner, was to visit friends in Bayeux (for which purpose he left Birkenhead earlier than he otherwise need have done), and was to arrive in Monte Carlo before the end of the rally. Thereafter he and the owner of the car were to go on holiday with the car in Switzerland. While on the direct route from Birkenhead to the coast to cross to France, owing partly to the negligence of the friend, the car collided with a motor omnibus which was damaged.

HELD: at the time of the accident the car was being used wholly or partly for the car owner's purposes, and, therefore, the friend, while driving it, was the agent of the owner, and, in so far as the friend was guilty of negligence, the owner was vicariously liable therefor.

Decision of DEVLIN, J. ([1953] 1 All E.R. 711), affirmed.

AS TO THE RELATION OF AGENCY, see HALSBURY, Simonds Edn., Vol. 1, p. 145, para. 350; and FOR CASES, see DIGEST, Vol. 1, pp. 267-272, Nos. 1-35.

Case referred to:

(1) *Hewitt v. Bonvin*, [1940] 1 K.B. 188; 109 L.J.K.B. 223; 161 L.T. 360; 2nd Digest Supp.

APPEALS by plaintiffs and third party against an order of DEVLIN, J., at Chester Assizes, dated Feb. 6, 1953, and reported [1953] 1 All E.R. 711.

Under an arrangement made between the male plaintiff and the third party, while the third party with another person was driving a Standard Vanguard car from Glasgow as a competitor in the Monte Carlo motor car rally, the plaintiffs, Mr. and Mrs. Ormrod, were to drive the third party's Healey car from Birkenhead to Monte Carlo. They were to carry a suitcase belonging to the third party with them, were to make the journey in their own time and manner, and were to visit friends at Bayeux on the way. It was intended that the plaintiffs should arrive at Monte Carlo before the end of the rally, and then the plaintiffs and the third party were to go for a holiday together in Switzerland, using the third party's Healey car. On Jan. 20, 1952, the plaintiffs having started earlier than would have been otherwise necessary owing to their visit to Bayeux, soon after they left Birkenhead and while they were on the direct road to the coast to cross to France, the Healey car driven by the male plaintiff came into collision with the first defendants' motor omnibus, driven by the second defendant, their employee, in the course of his employment, and both plaintiffs sustained personal injuries and both vehicles were damaged.

The plaintiffs brought actions (which were consolidated) for damages against the defendants, alleging that the injuries were caused by the negligent driving of the first defendants' servant or agent, the second defendant. The first defendants counterclaimed in respect of damage to their omnibus, alleging negligent driving of the car by the male plaintiff, and they took third-party proceedings against the owner of the car on the ground that he was vicariously liable for the male plaintiff's negligence. **DEVLIN, J.**, found that the accident was caused by the negligence of the male plaintiff, who, he held, was acting as the third party's agent when driving the car, and that the third party, therefore, was liable for his negligence. On appeals by the plaintiffs and the third party the Court of Appeal, after hearing fresh evidence, varied the finding of **DEVLIN, J.**, as to the liability of the male plaintiff, holding that the accident was attributable equally to the negligence of the male plaintiff and to that of the second defendant, for which the first defendants were liable. They gave an interim judgment on the liability of the third party, and the case is reported on that point.

Miss Rose Heilbron, Q.C., and *Hooson* for the plaintiffs.

C. N. Shawcross, Q.C., *Mars-Jones* and *Esyr ap Gwilm Lewis* for the defendants.

S. Scholefield Allen, Q.C., and *Clover* for the third party.

July 9. SINGLETON, L.J.: In my view, the appeal of the third party fails. The male plaintiff was driving the third party's car from Cheshire to Monte Carlo for the purpose of the third party or for the joint purpose of both. An arrangement had been made that the car should be at Monte Carlo before the end of the rally, which the third party was attending with another car. When the rally was over the purpose of the plaintiffs and the third party was that they should go for a holiday in the car to Switzerland. In pursuance of that arrangement the male plaintiff set out, and he was driving towards Chester on the journey to Dover when the accident happened. Evidence was given to show that the male plaintiff had left his home earlier than he needed to have done, because he proposed to make a call at Bayeux, in Normandy, and I take it that that evidence was accepted by the judge. But at the time that the accident happened the male plaintiff was taking the direct route from his home, as arranged, to the coast in order that the car might be taken across to France. The learned judge concluded that in those circumstances the male plaintiff at that time was the agent of the third party.

It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be used for the joint purposes of the male plaintiff and the third party when it reached Monte Carlo. In those circumstances it appears to me that the judgment of **DEVLIN, J.**, that at the time of the accident the male plaintiff was the agent of the third party was right, and the third party's appeal on that head should be dismissed.

DENNING, L.J.: It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. In the present case the driver was, by mutual arrangement, driving the car partly for his own purposes and partly for the owner's purposes. The owner wanted the car driven to Monte Carlo; the driver wanted to go with his wife to Monte Carlo, and he intended to visit friends in Normandy on the way. On this account he started two or three days earlier than he would have done if he had been

going solely for the owner's purposes. Counsel for the third party says that this should exempt the owner from liability for the driver's negligence, because the accident might never have happened if he had started later. He says that the owner would not have been liable for any negligence of the driver on the trip from Calais to Normandy, and he should not be liable for negligence due to the early start. I do not think that this argument is correct. The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt v. Bonvin* (1). That is not this case. The trip to Monte Carlo must be considered as a whole, including the proposed excursion to Normandy, and as such it was undertaken with the owner's consent for the purposes of both of them, and the owner is liable for any negligence of the driver in the course of it. I agree that the appeal should be dismissed.

MORRIS, L.J.: I entirely agree.

Third party's appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the plaintiffs); *Stanley & Co.*, agents for *A. W. Mawer & Co.*, Liverpool (for the defendants); *Jaques & Co.*, agents for *Dodds, Ashcroft & Cook*, Liverpool (for the third party).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

EMBERSON v. ROBINSON.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), July 23, 1953.]

Rent Restriction—House "reasonably required by landlord"—Landlord by purchase after Sept. 1, 1939—Contract for sale of dwelling-house in June, 1939—Completion of purchase in September, 1945—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (h) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

In June, 1939, the plaintiff entered into a contract with the vendors for the sale of a dwelling-house to which the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, applied, and paid a deposit thereon. The contract provided that vacant possession of the premises should be given on payment of the balance of the purchase price and completion of the purchase. In August, 1939, the plaintiff was called up for military service. In November, 1939, the vendors let the premises to the defendant. There was no completion until September, 1945, when the vendors confirmed the amount of the purchase price and the payment of the deposit and informed the plaintiff of the letting to the defendant. The plaintiff then paid the balance of the purchase money and the transfer was completed. In an action by the plaintiff for possession of the premises the defendant contended that he (the plaintiff) was a landlord who had become landlord by purchasing the dwelling-house after Sept. 1, 1939, within the meaning of para. (h) of sched. I to the Act of 1933, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), sched. I, and so was not entitled to possession under that paragraph.

HELD: the completion which took place in September, 1945, was a completion of the original contract, the plaintiff having waived his right under the original contract to demand vacant possession; the plaintiff became landlord when the contract of sale was signed in June, 1939; and

so he was not a landlord who had become landlord by purchasing the house after Sept. 1, 1939.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I, para. (h), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1060.

Case referred to:

- (1) *Barrett v. Marshall*, (1920), 54 I.L.T. 214; 31 Digest, Replacement, 719, 2591. A

APPEAL by the defendant from an order of His Honour JUDGE REGINALD CLARK, Q.C., at Ilford County Court, dated May 5, 1953.

In June, 1939, the plaintiff entered into a contract of sale with the owners of a dwelling-house to which the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, applied and paid a deposit. The contract provided that vacant possession of the house should be given on payment of the balance of the purchase price and completion of the purchase. In August, 1939, the plaintiff was called up for national service and he served in the army until 1945. In November, 1939, the vendors let the premises to the defendant. The purchase was not completed until September, 1945, when the plaintiff's solicitors wrote to the vendors' solicitors expressing the plaintiff's wish to complete the purchase. The vendors then confirmed the amount of the purchase price, the payment of the deposit, and informed the plaintiff of the letting to the defendant. Thereafter the balance of the purchase price was paid by the plaintiff and the transfer was completed. B C

The plaintiff then claimed possession of the premises, relying on the provisions of sched. I to the Act of 1933, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, which provides: D

"A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation . . . if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after Sept. 1, 1939) for occupation as a residence for (i) himself . . ."

The defendant contended that the plaintiff was precluded from relying on that provision by reason of the fact that he (the plaintiff) was a landlord who had become landlord by purchasing the dwelling-house after Sept. 1, 1939. The learned judge made the order for possession, holding that the plaintiff had become landlord by purchasing the premises before Sept. 1, 1939. F

Merriton for the defendant, tenant.

A. E. Holdsworth for the plaintiff, landlord.

SOMERVELL, L.J., stated the facts and continued: The question is whether or not the plaintiff is a landlord who became landlord by purchasing the dwelling-house after Sept. 1, 1939. Counsel for the tenant submitted that there were two points: (i) Was the completion in 1945 a completion of the contract entered into in June, 1939, or should it be regarded as a new contract? and (ii) whether, having regard to the circumstances, the plaintiff purchased in 1939 at the date of the agreement or in 1945 at the date of completion? G H

I think it is convenient to take the second point first. Assume a case where the binding contract was signed before Sept. 1, 1939, everything then proceeded with the speed which was contemplated, and the completion took place after Sept. 1, 1939. Would the purchaser have become a landlord by purchasing after Sept. 1? I think not. In my view, the relevant date in applying the exception in para. (h) to these facts would be the date when he signed the binding contract. I derive support for that conclusion from *Barrett v. Marshall* (1)

although that decision does not bind us. In that case the same point arose and DODD, J., held that the purchaser became landlord and the vendor ceased to be landlord when the contract of sale was signed and that what remained was merely carrying the contract into complete effect.

The question, then, is whether the length of time which expired in the present case leads to some different conclusion. That, I think, may be put in this way. Was what took place in 1945 a completion of the contract in 1939, or should it be regarded as a different contract involving a different subject-matter? Two points are relied on, and both of them seem to me to be important. It is emphasised, in the first place, that the original contract was a contract for vacant possession. It is plain that, if a vendor enters into a contract to give vacant possession, he does not fulfil his contract if he tenders a house without vacant possession. It is also emphasised that in November, 1939, the vendor let the house, and it is not suggested that either the plaintiff knew of that letting until 1945 or—although I do not think this is material—that the tenant was told anything about the plaintiff's right under the contract which had been entered into. I have come to the conclusion that the completion which took place in 1945 should be regarded as a completion under the contract of 1939. The history of this transaction was obviously due to the war. The plaintiff did not tender the purchase price within what would normally be a reasonable time, but the vendor does not appear to have taken any point on that. He was content that the matter should remain open; he did not seek to repudiate the contract owing to delay and sell to anyone else, but he let it to the tenant. When the parties came together in 1945 the plaintiff clearly waived the right which he had under the original contract to demand vacant possession. The transaction, undoubtedly, went through in circumstances other than those which were originally contemplated, but when one reads the correspondence and sees how the completion took place, I think the right view is that which was taken by the learned county court judge, namely, that it ought to be regarded, for the purpose of the application of the exception, as a completion of the original contract of June, 1939. In those circumstances, for the reasons which I gave earlier in this judgment, I do not think that the plaintiff falls to be regarded as a landlord who became landlord by purchase after Sept. 1, 1939. I would dismiss the appeal.

JENKINS, L.J.: I agree.

F HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *G. Houghton & Son*, Romford (for the plaintiff landlord); *Gedge, Fiske & Co.*, agents for *Mullis & Peake*, Romford (for the defendant tenant)

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

EARL BEATTY v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Vaisey, J.), July 8, 9, 24, 1953.]

*Income Tax—Assessment—Additional assessment—“If the surveyor discovers”
—Facts known to commissioners adequate to support assessment—Assessment made on basis of erroneous belief that facts otherwise—Competency of assessments—Income Tax Act, 1918 (c. 40), s. 125 (1).*

In and after 1946 additional assessments to income tax and surtax were made on the taxpayer under the Finance Act, 1936, s. 18 and sched. II, in respect of the income of a Canadian company, which income had been omitted from the first assessments. The taxpayer did not dispute that the relevant facts and circumstances (viz., that transfers of assets to the company had been made by persons other than the taxpayer and his wife) resulted in his becoming chargeable to income tax and surtax as assessed, but he contended that, although those facts were known to the Crown on which an assessment could have been warranted, the Crown did not appreciate them, and, as was demonstrated by correspondence, the assessments had been made on the footing that the facts were different from the true facts (viz., that the taxpayer or his wife had made transfers of assets to the company), and that, therefore, there had been no discovery of relevant facts to support additional assessments by virtue of the Income Tax Act, 1918, s. 125.

HELD: the discovery required by s. 125 to justify additional assessments need not be a complete and detailed or accurate appraisal of the facts necessary to support an assessment; the circumstances placed in the possession of the commissioners entitled them to make the additional assessments; and the fact that they failed to appreciate the legal effect of those circumstances did not prevent the assessments from being competent.

FOR THE INCOME TAX ACT, 1918, s. 125, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 69.

Cases referred to:

- (1) *Congreve v. Inland Revenue Comrs.*, [1947] 1 All E.R. 168; *affd.*, H.L., [1948] 1 All E.R. 948; [1948] L.J.R. 1229; 30 Tax Cas. 163; 2nd Digest Supp.
- (2) *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K.B. 768; *sub nom. R. v. Bloomsbury Income Tax Comrs. Ex p. Hooper*, 85 L.J.K.B. 129; 113 L.T. 1015; 7 Tax Cas. 59; 28 Digest 98, 588.
- (3) *R. v. Kensington Income Tax Comrs.*, [1913] 3 K.B. 870; 83 L.J.K.B. 364; 109 L.T. 708; *reversd.* C.A., [1914] 3 K.B. 429; 83 L.J.K.B. 1439; 111 L.T. 393; *affd.*, H.L. *sub nom. Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215; 84 L.J.K.B. 2169; 113 L.T. 1083; *sub nom. R. v. Kensington Income Tax Comrs. Ex p. Aramayo*, 6 Tax Cas. 613; 28 Digest 102, 622.
- (4) *Williams v. Grundy Trustees*, [1934] 1 K.B. 524; 103 L.J.K.B. 204; 150 L.T. 378; 18 Tax Cas. 271; Digest Supp.
- (5) *Inland Revenue v. Mackinlay's Trustees*, 1938 S.C. 765; 22 Tax Cas. 305; Digest Supp.
- (6) *Commercial Structures, Ltd. v. Briggs*, [1948] 2 All E.R. 1041; 30 Tax Cas. 487; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

In July, 1938, one Ronald Tree caused to be incorporated in Canada a company named Bretisle Co., Ltd., and he subscribed for the whole of the equity share capital and \$231,000 non-interest bearing redeemable debentures in bearer form. In due course, through the hands of a nominee of Ronald Tree, the said shares and debentures were gratuitously transferred to the Montreal Trust Co., Charlottetown, Prince Edward Island, for the account and subject

to the order of the taxpayer, Earl Beatty. The Inland Revenue Commissioners raised various questions with regard to the taxpayer's income from foreign companies, and the relevant information with regard to Bretisle Co., Ltd., was given. The facts were not fully comprehended and the commissioners remained under the impression that the taxpayer or his wife had made transfers of assets to Bretisle Co., Ltd. Additional assessments to income tax and surtax, by virtue of the Income Tax Act, 1918, s. 125, were raised on that footing under the Finance Act, 1936, s. 18 and sched. II. The taxpayer contended that, in the circumstances, there had been no discovery within the meaning of s. 125, and, therefore, that the assessments, which were made for each of the years 1939-40 to 1943-44 were incompetent. The Special Commissioners rejected that contention. The taxpayer appealed.

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Graham-Dixon, Q.C., and *H. B. Magnus* for the taxpayer.

Senter, Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

Cur. adv. vult.

July 24. VAISEY, J., read the following judgment. This was an appeal to the Special Commissioners against certain assessments to income tax and surtax made on the appellant, Earl Beatty. That appeal was dismissed, and the assessments upheld. The appellant now appeals to this court, and asks that the assessments should be discharged. The only point in the case is that the assessments were invalid by reason of the absence of any previous "discovery" as required or as alleged to be required by the Income Tax Act, 1918, s. 125. That involves two questions: first, was a "discovery" an essential pre-requisite in the circumstances?, and, secondly, if it was, was there discovery within the meaning of the section? In a sense, therefore, the appellant's appeal is unmeritorious. On the other hand, the revenue authorities ought not to be allowed to impose or enforce taxation otherwise than in strict compliance with the prescribed procedure.

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The assessments in question were made in and after 1946 under sched. D, Case VI, for the years 1939-40 to 1943-44, under the provisions of s. 18 of and sched. II to the Finance Act, 1936. They were made in respect of the income of a Canadian company named the Bretisle Co., Ltd. The correctness of the amounts assessed is not in question. For each of the relevant years other assessments had been made on the appellant to surtax and also to income tax at the standard rate under the same provisions of the Finance Act, 1936, in respect of income of certain other foreign companies. The appellant did not, and does not, dispute that the facts and circumstances stated in the Case resulted in his becoming chargeable to income tax and surtax as assessed by virtue of the said provisions of the Finance Act, 1936, as interpreted in *Congreve v. Inland Revenue Comrs.* (1), which was decided in the Court of Appeal on Dec. 9, 1946, and in the House of Lords on May 13, 1948. Notices of the assessments under appeal for the year 1939-40 were issued before the date of the decision of the Court of Appeal, while those for 1940-41 and 1941-42 were issued after the decision of the Court of Appeal but before the decision of the House of Lords. That decision establishes the proposition that transfers to Bretisle on behalf of, although not by, the appellant attracted tax as much as transfers made by himself or his wife, confirming in that respect the decision in the Court of Appeal which had reversed or substantially varied the decision of *WROTTESEY, J.*, in the court below.

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It is, I suppose, necessary for me to set out from the Case a statement of the facts, which are undisputed, giving rise to the question with which I have to deal:

(1) Earl Beatty and his brother, the late Honourable Peter Beatty, are half-brothers of Mr. Ronald Tree, who was the son of the late Countess Beatty by her first marriage. Under the will of her father, the late Eugene Marshall Field, Countess Beatty had power to appoint

to Ronald Tree, but not to his half-brothers, the income from a fund of \$1,000,000 and, upon his attaining the age of forty, the capital of the fund absolutely. This power she exercised, but Ronald Tree did not attain the age of forty till September, 1937. At the time that she exercised this power she wrote a letter dated Aug. 21, 1930, to Ronald Tree (which was lodged with the Public Trustee and communicated to him shortly after her death in July, 1932) asking him to divide equally between himself, Earl Beatty and the Honourable Peter Beatty the money passing to him by virtue of the appointment. Immediately after the receipt of this letter, Ronald Tree informed the appellant and his brother that in pursuance of his mother's wish he intended to make this division between them, but he would not be in a position to do so before he attained the age of forty, i.e., before 1937. He also wrote to them to this effect on Apr. 6, 1933. (2) The contemplated gifts were referred to from time to time in conversations between Ronald Tree and his half-brothers. Ronald Tree was willing to meet their wishes as regards the form and subject-matter of the gifts. For financial and sentimental reasons the appellant and his brother desired to keep the money and investments in the United States and Canada. They were already familiar with the American market and the financial advisers upon whom they had come to rely were in New York and Montreal. They did not, however, take the same financial views and they decided that the two sets of assets should be separately controlled. The appellant wished that part of the gift to him (i.e., \$44,000) should be in cash. (3) In these circumstances Ronald Tree consulted his solicitors in London (Messrs. Withers & Co. who also act for the appellant and his brother) and counsel as to the best way of making the division so as to preserve equality between the three of them and in manner most beneficial to the appellant and his brother, and, on the advice he received, the transactions set out in the following sub-paragraphs were entered into with regard to an amount of \$231,950 (being part of the sum Mr. Tree intended to make over to the appellant). (4) In July, 1938, Mr. Ronald Tree caused to be incorporated in Canada a Canadian investment company named Bretisle Co., Ltd. (hereinafter called Bretisle), and subscribed for the whole of the equity share capital (i.e., ninety-five 'B' shares of \$10 each) and for \$231,000 non-interest bearing redeemable debentures in bearer form. The debentures were redeemable in Canadian dollars, or, at the holder's option, in United States currency or in sterling at a fixed rate of exchange. The shares and debentures were issued to Mr. Ronald Tree's nominee, Mr. F. G. Bush, who held them to the account and subject to the order of Mr. Tree. In due course, on the instructions of Mr. Tree's Canadian lawyers, Mr. Bush transferred the said shares and debentures free of value to the Montreal Trust Co. in Charlottetown, P.E.I., for the account and subject to the order of the appellant, his executors, administrators, or assigns. These transactions were initiated through the agency of Messrs. Withers & Co. (hereinafter called Withers), who had received instructions from Mr. Tree to instruct Canadian lawyers to form the company. The Canadian lawyers so instructed arranged the transactions in direct communication with Mr. Tree, who was in Chicago at the relevant times and signed all the necessary papers there. (5) Bretisle was incorporated on July 14, 1938. The 'B' shares and the debentures were issued on Aug. 5, 1938. (6) Prior to the incorporation of Bretisle, a sum of \$231,950 was placed by Mr. Tree at the Bank of Montreal in Montreal to the account of Withers. Out of this money Withers purchased certain securities, to the value of \$125,786, through the Bank of Montreal, whom they instructed to hold such securities to the order of the Canadian lawyers (Messrs. Brown, Montgomery and McMichael). After the incorporation of Bretisle, Withers instructed the Canadian lawyers to have the

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securities transferred to Bretisle, and also instructed the Bank of Montreal to pay the balance of their account (\$106,164) to Bretisle. This was done on July 27, 1938. It was by this method that Tree's subscription moneys for the shares and debentures in Bretisle were satisfied, i.e., partly by shares transferred to Bretisle and partly by cash. (7) In June, 1938, \$44,550 (£9,000) was transferred from Withers' account with the Bank of Montreal in Montreal to their account with that bank in London."

The facts set out as above-mentioned were not known to the assessing Special Commissioners prior to 1943, but they did become known to them in the course of a correspondence beginning on July 12, 1943.

I think that the points in issue on this appeal can be elicited from the summary of the contentions of the parties set out in the Case. I will take the contentions of the Crown first. It was submitted under a head numbered 3 that the assessments under appeal were not additional assessments made under s. 125 of the Act of 1918, but were assessments properly made in principle under s. 18 of the Act of 1936. I am inclined to think that that contention is well founded. If it is, there is an end of the case. I was much impressed with the argument of Mr. Stamp on this point and I should have elaborated my reasons for agreeing with it if that had been the only point in the case. But as almost the whole of the arguments addressed to me were concerned with this matter of discovery or no discovery, I will, for the purposes of this judgment, assume that s. 125 does apply. I cannot, however, find that s. 125 has anything to do with surtax.

In the forefront of the Crown's submissions I find that prior to the making of each of the assessments the Special Commissioners had "discovered" (within the meaning of s. 125) that profits chargeable to tax had been omitted from first assessments so that the additional assessments were properly made in principle under that section. Now this is, or ought to be, a short, simple point. The Special Commissioners must have made the assessments because they thought that something had not been disclosed by the appellant, and, therefore, not discovered (in the fullest sense) by the Special Commissioners. The facts amount to this: that though the relevant facts had been disclosed by the appellant, their relevance was not appreciated by the Special Commissioners, and the question seems to me to be whether they can be said to have discovered something which they did not understand. They went on asking, if I may so express it, the wrong question, viz., whether there had been transfers to Bretisle by the appellant or his wife. The right question for them to have asked was whether there had been transfers to Bretisle by persons other than the appellant or his wife, though to that unasked question, strangely enough, the answer had already been supplied to them.

I have expressed my reluctance to add to the many pronouncements on the subject of what "discovery" is. To say that it means to "find out" does not seem to me to help very much. Is there, perhaps, a distinction to be drawn between "finding" and "finding out"? Does a man discover a diamond by finding it in the ground believing it to be a piece of glass, that is, not finding out that what he has found is a diamond? Such speculations as these can be indulged in to an almost unlimited extent. Looking at the words "if the surveyor discovers" without guidance from other people's opinions, I confess that I should have supposed that the object of those words was merely to prevent assessments being made blindly and officiously in cases where no omission from earlier assessments was in the surveyor's contemplation or purview or was suspected. Be it observed that he has not to discover the exact quality or quantity of the omission; it would surely suffice if he were to find out that there had been some omission, and it would not matter if it was a much greater or much smaller omission than he had supposed. If that is accepted, why should it be any less a discovery when the actual omission was of some different kind to the supposed omission? Could he not say: "I have

discovered that there is an omission. I am not yet in a position to say what it is, either in quality or in quantity, but that is why I have made these assessments" ? Evidently in the present case omissions were strongly suspected, and the suspicions were acted on by the making of the assessments. It is now known that the suspicions were correct, and that they were justified by the facts already known to the tax authorities. It seems to me that this is a true analogy:—A man finds or discovers in his land a diamond. He thinks it is only a piece of glass, but, though he did not at first find out that it was a diamond, he had in the true sense discovered it on the day that he found it.

On the part of Lord Beatty, the appellant, it is admitted that at the respective times when the assessments were made, the facts of the transfers by Ronald Tree were known to the commissioners, although it was not until the last of the assessments had been made that the commissioners held or came to hold the opinion that such transfers were what operated to bring the income of Bretisle within the charge. It is said that the assessments were made solely on the basis of a suspicion (erroneous in point of fact) that there had been transfers by the appellant or his wife, and hence that there was no "discovery" to satisfy the requirements of the section.

The appellant's contentions are plain enough, but I am of opinion that they place undue emphasis on the necessity for "discovery" in the terms of the section. I think that the discovery need not be a complete and detailed or accurate discovery and that when the commissioners find out, or think that they have found out, the existence of an omission or other error it is not necessary for them to have probed the matter to its depths or to define precisely the ground on which they have made the assessments. Here the relevant facts were all known to them. What was lacking was a comprehension of those facts. The facts were there, the commissioners, to revert for a moment to my analogy, thought that the diamond which they had found was only a piece of glass, but it was none the less a discovery.

Many cases were brought to my notice, and these on the whole seem to me to support the Crown's contentions. In *R. v. Bloomsbury Income Tax Comrs.* (2) ([1915] 3 K.B. 785) LORD READING, C.J., paraphrases "if he discovers" by the words "if he honestly comes to the conclusion on the information in his possession". Pausing there, did not the commissioners come to the conclusion that the assessments were justified on the information in their possession? What information? Possibly because they had been told facts which tended to show that Lord Beatty had more income at his disposal than the commissioners could account for. In *R. v. Kensington Income Tax Comrs.* (3) the paraphrases adopted were if he "comes to the conclusion from the examination he makes and from any information he may choose to receive"—that is a quotation from BRAY, J. ([1913] 3 K.B. 889)—and also "has reason to believe": per AVORY, J. (*ibid.*, 897); and also "finds" or "satisfies himself": per LUSH, J. (*ibid.*, 898). *Williams v. Grundy Trustees* (4), and *Inland Revenue v. Mackinlay's Trustees* (5), are entirely favourable to the case of the Crown in this appeal: see also *Commercial Structures, Ltd. v. Briggs* (6).

I cannot see that even on this most technical of all technical points the appellant has any right to succeed and I dismiss the appeal.

Appeal dismissed.

Solicitors: *Withers & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

GODSTONE RURAL DISTRICT COUNCIL v. BRAZIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.),
July 24, 1953.]

Town and Country Planning—Enforcement notice—Need to specify both date on which notice takes effect and period within which it must be complied with—Town and Country Planning Act, 1947 (c. 51), s. 23 (2), (3).

A *Town and Country Planning—Development—Permission to use land “for any purpose on not more than twenty-eight days in total in any calendar year”—Information charging unlawful use on Jan. 12, 1953, and on two dates in December, 1952—Town and Country Planning General Development Order, 1950 (S.I., 1950, No. 728), art. 3 (1), sched. I, Part I, class IV, para. 2.*

B The respondent was the owner of a piece of land on which, in 1951 or during January, 1952, she stationed a caravan in which from that time she lived. On Oct. 31, 1952, the local authority, acting on behalf of the local planning authority, served on her a notice purporting to be an enforcement notice under the Town and Country Planning Act, 1947, s. 23 (1), which required her to remove the caravan “within seven days after the expiry of twenty-eight days from the date of the service of this notice”. As she did not comply with the notice, in February, 1953, the local authority preferred an information against her charging her with an offence against s. 24 (3) of the Act in that on Dec. 17 and 30, 1952, and on Jan. 12, 1953, she had unlawfully used her land as a site for a caravan without grant of permission under Part III of the Act of 1947 and in contravention of the enforcement notice.

HELD: (i) under s. 23 (2) and (3) of the Act of 1947, an enforcement notice should specify two periods: (a) the period at the expiration of which the notice would take effect, and (b) the period allowed for the execution of the work after the notice had taken effect, and, as the notice of Oct. 31, 1952, did not specify the former period, it was invalid.

E *Burgess v. Jarvis* ([1952] 1 All E.R. 592), followed.

(ii) by the Town and Country Planning General Development Order, 1950, art. 3 (1), and sched. I, Part I, class IV, para. 2, the respondent was permitted to use her land for any purpose on not more than twenty-eight days in total in any calendar year, and, therefore, the information was, on the face of it, bad as it alleged an unlawful use of the land on Jan. 12, 1953, although twenty-eight days of 1953 had not then elapsed, and it was also bad for duplicity as it alleged, not only an offence in 1953, but also offences in 1952.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 and s. 24, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 524-528.

G Cases referred to:

(1) *Burgess v. Jarvis*, [1952] 1 All E.R. 592; [1952] 2 Q.B. 41; 116 J.P. 161; 3rd Digest Supp.

(2) *Mead v. Plumtree*, [1952] 2 All E.R. 723; 116 J.P. 589; 3rd Digest Supp.

CASE STATED by Surrey justices.

H At a court of summary jurisdiction sitting at Dorking an information was preferred by the appellant council, through their deputy clerk, charging the respondent with an offence against the Town and Country Planning Act, 1947, s. 24 (3), in that on Dec. 17 and 30, 1952, and on Jan. 12, 1953, she unlawfully used her piece of land, known as the Platt, Lone Oak Estate, Smallfield, Burstow, Surrey, as a site for a caravan for the purpose of human habitation without the grant of permission under Part III of the Town and Country Planning Act, 1947, and in contravention of an enforcement notice which was served on her on Oct. 31, 1952.

At the hearing of the information on Feb. 18 and Mar. 18, 1953, it was proved or admitted that, at some date in 1951 or 1952 which was before Jan. 31, 1952, the respondent stationed on her land a caravan for living purposes and resided therein until Oct. 31, 1952, when the council served on her a notice which purported to be an enforcement notice, and which required her to discontinue the use of the land as a site for the caravan and to remove the caravan from the land "within seven days after the expiry of twenty-eight days from the date of the service of this notice upon you"; that the respondent did not apply for planning permission under Part III of the Act of 1947 and did not appeal against the notice; and that she did not discontinue the use of the land as a site for a caravan or remove the caravan. The council contended, *inter alia*, that the enforcement notice was in accordance with s. 23 of the Act of 1947 and that the offence was proved. The respondent contended that the notice was invalid in that (a) it failed to specify the two periods required to be specified by s. 23 (2) and (3) of the Act, viz., (i) the period, not being less than twenty-eight days, at the expiry of which it was to take effect, and (ii) the period within which the use was to be discontinued and the caravan removed, and (b) it failed to specify the former use of the land. The justices, being of the opinion that the respondent's contentions were correct, held that the notice was not an enforcement notice and dismissed the information. The council appealed.

Scarman for the council.

J. Deakin James for the respondent.

LORD GODDARD, C.J., stated the facts and continued: By the Town and Country Planning Act, 1947, s. 23 (3), an enforcement notice is to take effect at the expiration of such period, not being less than twenty-eight days after the service thereof, as may be specified therein. In *Burgess v. Jarvis* (1) the Court of Appeal held that, under s. 23 (2) and (3), the enforcement notice should specify two periods: (i) the period at the expiration of which the notice took effect, and (ii) the period within which the particular steps for restoring the land to its original condition had to be taken. That decision was followed by this court in *Mead v. Plumtree* (2). The notice served in the present case is as follows:

"Whereas it appears to the rural district council for the rural district of Godstone . . . acting for and on behalf of the Surrey County Council, the local planning authority, that the following development of land has been carried out after July 1, 1948, without the grant of permission required in that behalf . . . viz., the placing of a movable structure, to wit, a caravan, which is used for human habitation on the land specified in the schedule hereto which said caravan has remained thereon for more than twenty-eight days in total in the year 1952 . . . And whereas it is considered expedient, having regard to the provisions which will be required to be included in the development plan for securing the proper planning of the area . . . that, for restoring the land to its condition before the development took place, you should take the steps hereinafter specified within the period also hereinafter specified. Now therefore the council do hereby give you notice, in pursuance of their powers for and on behalf of the local planning authority under s. 23 and s. 24 of [the Act of 1947]: (a) to discontinue the use of the said land . . . as a site for the said caravan or movable structure; (b) to remove from the said land the said caravan or movable structure stationed thereon within seven days after the expiry of twenty-eight days from the date of the service of this notice upon you."

The council probably intended that the work should be done within thirty-five days of the service of the notice, but they did not say that the notice would

take effect at the expiration of twenty-eight days from the service thereof. The object of telling the person on whom the notice is served when it is to take effect is to give him notice of the period in which he can appeal. In my opinion, therefore, this notice does not comply with the decision of the Court of Appeal in *Burgess v. Jarvis* (1) that an enforcement notice should specify both the date when it is to take effect and the period within which the work is to be done after the notice has taken effect, and, therefore, the decision of the justices on this point was right.

Counsel for the respondent raised a second point. The information is in these terms:

“ . . . for that she did on Dec. 17 and 30, 1952, and on Jan. 12, 1953, unlawfully use her own piece of land . . . as a site for a caravan for the purpose of human habitation without the grant of permission in that behalf under Part III of the Town and Country Planning Act, 1947, and in contravention of an enforcement notice.”

By the Town and Country Planning General Development Order, 1950, art. 3 (1), and sched. I, Part I, class IV, para. 2, the following development is permitted without the permission of the local planning authority or the Minister of Town and Country Planning, subject to certain conditions which are not relevant in the present case:

“ The use of land . . . for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use.”

By reason of this permission the respondent was entitled to use her land as a site for a caravan on twenty-eight days in any calendar year, and, therefore, on the face of it, the information is bad, as it alleges that she was unlawfully using the land as a site for a caravan on Jan. 12, 1953, although twenty-eight days of 1953 had not then expired. Moreover, it seems to me that, as the information alleges offences in 1952 and an offence in January, 1953, it must be alleging more than one offence. For these reasons, I think that the information is bad and that the justices were right in dismissing it.

PARKER, J.: I agree. In my view, the enforcement notice sets out only one of the periods which is required to be set out by s. 23 (2) and (3) of the Act of 1947, namely, the period during which the work must be done. Counsel for the appellant council contended that it was possible to read, and that one should read, the enforcement notice as specifying the two periods. I cannot agree with that. These notices are served on members of the public who do not know, although, no doubt, they are expected to know, all the provisions of the Act, and, in my view, the notices should set out clearly (i) the period at the expiration of which the notice is to take effect, and (ii) the period after the notice takes effect during which the work is to be done. This enforcement notice does not do so.

DONOVAN, J.: I also agree, although I was at first disposed to take the view that the enforcement notice was good.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellant council); *Langhams & Letts*, agents for *Hart, Scales & Hodges*, Dorking (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. STATUTORY VISITORS TO ST. LAWRENCE'S HOSPITAL,
CATERHAM. *Ex parte* PRITCHARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, J.J.),
July 20, 21, 1953.]

*Certiorari—Mental defective—Report to Board of Control by visitors—Mental
Deficiency Act, 1913 (c. 28), s. 11 (2), s. 11 (4) (a).*

*Discovery—Production of documents—Confidential medical report regarding
mental defective—R.S.C., Ord. 31, r. 16.*

On June 19, 1952, an infant was detained under s. 8 of the Mental Deficiency Act, 1913. On May 29, 1953, she was seen by the statutory visitors who prepared a special report under s. 11 (4) (a), which was submitted to the Board of Control, recommending that the detention order should be extended. The mother of the infant applied to the visitors to be allowed to be present at the examination of the infant and to be heard by counsel, but the visitors refused to permit this. In answer to a motion by the infant, acting by her mother and next friend, for an order of certiorari to bring up the report of the visitors to be quashed, the affidavit of the visitors referred to and exhibited medical reports received by them as to the condition of the infant, the visitors having been advised that, in view of the terms of R.S.C., Ord. 31, r. 16, they were bound to disclose those reports.

HELD: under s. 11 (2) it was for the Board of Control, and not for the visitors, to decide whether the continuance of the detention order was required in the interests of the infant and to make an order for that purpose; the visitors were not a tribunal and had no power to come to any decision; the special report submitted by them to the board merely contained evidence to enable the board to come to a decision; and, therefore, certiorari would not go to quash the report of their opinion.

R. v. Boycott. Ex p. Keasley ([1939] 2 All E.R. 626), distinguished.

Per LORD GODDARD, C.J.: We do not think it was ever intended that the reports received by the visitors as to the infant's condition should be treated as other than highly confidential. The reports should be in court so that the court can look at them, but they are not to be disclosed unless the court thinks that a good purpose would be served.

EDITORIAL NOTE. Section 31 of the Mental Deficiency Act, 1913, was repealed by the Education Act, 1944, s. 121 and sched. IX, Part I; see now s. 57, as amended, of the Education Act, 1944. Section 1 of the Elementary Education (Defective and Epileptic Children) Act, 1899, was repealed by the Education Act, 1921, s. 171 and sched. VII, which was in turn repealed by the Education Act, 1944, s. 121 and sched. IX, Part I; see now s. 34, as amended, of the Education Act, 1944. The Mental Deficiency (Notification of Children) Regulations, 1914, were repealed and replaced by the Mental Deficiency (Notification of Children) Regulations, 1928, which were in turn repealed and replaced by the Education, England and Wales, Reports to Local Authorities (Records) Regulations, 1946 (S.R. & O., 1946, No. 250), as amended by the Reports to Local Authorities (Records) Regulations, 1949 (S.I., 1949, No. 1970).

FOR THE MENTAL DEFICIENCY ACT, 1913, s. 11, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 1196.

Cases referred to:

- (1) *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.
- (2) *R. v. Metropolitan Police Comr. Ex p. Parker*, [1953] 2 All E.R. 717.
- (3) *R. v. Boycott. Ex p. Keasley*, [1939] 2 All E.R. 626; [1939] 2 K.B. 651; 108 L.J.K.B. 657; Digest Supp.

- (4) *R. v. London County Council. Ex p. Entertainments Protection Assn., Ltd.*, [1931] 2 K.B. 215; 100 L.J.K.B. 760; 144 L.T. 464; 95 J.P. 89; Digest Supp.
- (5) *R. v. Manchester Legal Aid Committee. Ex p. Brand (R. A.) & Co., Ltd.*, [1952] 1 All E.R. 480; [1952] 2 Q.B. 413; 3rd Digest Supp.
- (6) *R. v. Postmaster-General. Ex p. Carmichael*, [1928] 1 K.B. 291; 96 L.J.K.B. 347; 137 L.T. 26; 91 J.P. 43; 21 B.W.C.C. 226; Digest Supp.

A

MOTION by Janet Edith Pritchard, an infant, acting by her mother and next friend, Dolly Edith Roomer, for an order of certiorari to bring up and quash the report of the opinion reached by the statutory visitors of St. Lawrence's Hospital, Caterham, in the county of Surrey, on May 29, 1953.

B

On June 19, 1952, the infant pleaded Guilty before a metropolitan magistrate to a charge of larceny. She was remanded for a week for a medical report, and was then detained under s. 8 (1) of the Mental Deficiency Act, 1913. The infant appealed to quarter sessions which declined to interfere with the order of detention. On Aug. 19, 1952, the infant was taken to St. Lawrence's Hospital, Caterham. On May 29, 1953, the statutory visitors to the hospital, appointed under s. 40 of the Mental Deficiency Act, 1913, assembled to examine the infant for the purposes of making a report under s. 11 (4) (a) of the Act. They allowed the mother and her counsel to enter the room in which they had met, but they did not allow either of them to be present at the examination or to address them. In their report to the Board of Control the visitors recommended that the detention order should be extended.

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The infant now applied for an order of certiorari to quash the report of the visitors' opinion, or, alternatively, to quash any confirmation or order of the Board of Control subsequently made on considering the report, on the grounds (i) that the statutory visitors failed to carry out their duty under s. 11 (4) (a) of the Act in that they failed to inquire from the mother and lawful guardian of the infant what means of care and supervision would be available to the infant if she were discharged, (ii) that the opinion of the visitors was not arrived at judicially in that neither the mother nor her counsel was allowed to address them before they reached their opinion, and neither the mother nor her counsel was allowed to be present while the visitors examined the infant, and (iii) that the proceedings held by the visitors were null and void on account of denial of natural justice by the exclusion of the mother and her counsel.

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F

Sir Frank Soskice, Q.C., and *Benenson* for the applicant.

F. H. Lawton and *Southall* for the visitors.

S. B. R. Cooke for the Board of Control.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of certiorari, to remove into this court and quash the report of the opinion reached by the statutory visitors on May 29, 1953, at St. Lawrence's Hospital, Caterham, in respect of Janet Edith Pritchard. The Mental Deficiency Act, 1913, s. 11, provides:

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"(1) An order made under this Act that a defective be sent to an institution or placed under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided: Provided that in the case of any institution the [Board of Control] may by order direct that orders that persons be sent thereto shall, unless continued as hereinafter provided, expire on the quarter day next after the day on which the orders would have expired under the above provision. (2) An order shall remain in force for a year after the date when under the preceding provisions of this section it would have expired, and thereafter for successive periods of five years, if at that date and at the end of each period of one and five years respectively the board, after considering such special

reports and certificate as is hereinafter mentioned and the report of any duly qualified medical practitioner who, at the request of the defective or his parent or guardian or any relative or friend, has made a medical examination of the defective and the means of care and supervision which would be available if the defective were discharged consider that the continuance of the order is required in his interests and make an order for the purpose: Provided that, where a defective was, at the time of being sent to the institution or placed under guardianship, under twenty-one years of age, the case shall be re-considered by the visitors appointed under this Act within three months after he attains the age of twenty-one years."

That proviso does not yet arise in this case because the infant has not attained the age of twenty-one years. It will be observed that on the clear terms of sub-s. (2) it is the Board of Control that has to come to a decision after considering "such special reports and certificate as is hereinafter mentioned" and also the report of any duly qualified medical practitioner, who, at the request of the defective or his parent or guardian, has examined the defective. Section 11 continues:

"(4) The special reports above mentioned shall be—(a) A special report by the visitors made within one month after having seen the defective as to his mental condition and the means of care and supervision which would be available if he were discharged, and stating whether, in the opinion of the visitors, the defective is still a proper person to be detained in his own interest in an institution or under guardianship."

It is now sought to quash the special report by the visitors. It seems to me that the first thing that has to be borne in mind in all these cases is: What is the scope of the order of certiorari? In these days certainly this court has no desire to limit the scope of the order of certiorari. Before modern legislation so enormously increased the number of orders and inquiries which are made by various government departments, certiorari only applied to what was strictly an inferior court. The writ of certiorari which used to be issued from this court was directed to the inferior tribunal, whatever it might be, calling on that tribunal to return into this court the record and orders it had made or the particular process it was desired to question in order that this court might examine what had been done and see whether or not it was in accordance with law. In modern times the scope of the order of certiorari has been considerably increased, and in a well-known judgment in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), ATKIN, L.J., said ([1924] 1 K.B. 205):

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the [Queen's] Bench Division exercised in these writs."

It will be observed that there must be "authority to determine", and that the persons must be those who have a duty to act judicially, in which case, their orders, if they act in excess of their authority, can be reviewed by this court under the order of certiorari which has now taken the place of the writ. It is essential to remember, as we tried to emphasise recently in *R. v. Metropolitan Police Comr. Ex p. Parker* (2), that there must be something that can be called a determination which will affect the rights of the applicant and a tribunal whose duty it is to act judicially. It is not easy to give an exact definition of what is meant by "act judicially", but I should say that for this purpose it means a body bound to hear evidence from one side and the other. There need not be anything called strictly a *lis*, but the body would have to hear submissions and evidence by each side and come to a judicial

A decision approximately in the way that a court must do. Unless there is an order or a determination by the body to whom it is suggested the order should be directed the order of certiorari will not lie. Attempts are constantly made in this court nowadays to enlarge the order of certiorari beyond that which can possibly be allowed. We do not in any way desire to limit the control which this court can exercise over various bodies which are set up under a variety of statutes because it is very important that those bodies, though they may be given wide powers affecting the property of Her Majesty's subjects, should be controlled and kept within the bounds of the jurisdiction which has been conferred by Parliament. But if Parliament has put duties on, or given powers to, persons, it is not for this court to take away those powers unless we can find that the tribunal is exceeding its powers. The first question we have to decide in this case is whether the persons to whom this order is sought to be directed are a tribunal at all.

It appears clear to me, despite the authorities to which we have been referred, that these visitors are not, for this purpose, a tribunal at all and that they have no power to give a decision. The decision whether the infant is to remain in the hospital after the year has elapsed, that is to say, after Aug. 19, 1953, is to be the decision of the Board of Control, and these visitors' reports, which are prescribed in the Act, are no more than material which is put before the board to enable the board to come to a decision. The visitors have no power under s. 11 (4) (a) to say that this infant is to be detained after a year. All they have to do is to see her, to ascertain the means of care and supervision which will be available if she is discharged, and to state whether, in their opinion, she is a proper person to be detained in her own interest in the institution.

When the visitors assembled to consider this case the mother of the infant desired to be heard by them and to be represented by counsel. The visitors allowed the mother and her counsel to come into the room, but they did not hear her or her counsel in the way they would have been bound to hear her, if they had been a tribunal. If the tribunal was one which had power to come to a decision in the sense I have tried to explain, no doubt they would have heard her.

Where do we find that there is any obligation on the visitors to hear anybody? They are not entrusted with the duty of coming to a decision; that is the duty of the board. The board are told by Parliament what evidence or facts or matter they are to have before them when they come to a decision. It is always possible for the parent or guardian and the detained person himself to obtain the opinion of a duly qualified medical practitioner, who may or may not agree with the view put forward by the medical officer of the institution. To that, if it were put forward, no doubt the visitors would pay attention. Undoubtedly the board would pay attention to it. The secretary of the board has filed an affidavit in opposition to this motion in which there is set out the procedure the board follows and shows the care they take before they extend the order over a period of one year. In my opinion, it is abundantly clear that the visitors here are not a body against whom an order of certiorari will lie because they have no power to come to a decision. If the board come to a decision that this infant is to be detained, a question may then arise for our determination, but we cannot grant certiorari to bring up a report which is nothing more nor less than a piece of evidence to lay before the board. I have never heard of a case, and no case has been quoted, which shows that this court has ever granted certiorari to bring up a report.

Reliance was placed on *R. v. Boycott. Ex p. Keasley* (3), which, it is said, is conclusive of this case. That case was decided under s. 31 of the Act of 1913, and deals with an entirely different matter. In my opinion, that decision has no application to this case. I think that there are certain matters with regard to that decision which some day may be considered by the Court of Appeal,

but I do notice that counsel for the respondents in that case appeared to admit that the order was one which could be subject to certiorari, for HUMPHREYS, J., said ([1939] 2 All E.R. 631):

"In my opinion, the order of certiorari ought to go in this case in regard to all three documents. In regard to the most important of those three—namely, the certificate of Oct. 5—as I understood the argument of [counsel for the respondents], he was not in a position to contend that, if that document was one which could not be allowed to stand, and ought not to stand, it was not a document which, in the circumstances, would fall within the language used by ATKIN, L.J., in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), to which [LORD HEWART, C.J.] has referred. Therefore, as I understood his argument, he was admitting (and certainly not contending to the contrary) that, if that document was a document exhibiting the defects which it was alleged to exhibit, it might be the subject of this order of certiorari."

Section 31 provided:

"(1) The duties of a local education authority shall include a duty to make arrangements, subject to the approval of the Board of Education, (a) for ascertaining what children within their area are defective children within the meaning of this Act; (b) for ascertaining which of such children are incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes; (c) for notifying to the local authority under this Act, the names and addresses of defective children with respect to whom it is the duty of the local education authority to give notice under the provisions hereinbefore contained. In case of doubt as to whether a child is or is not capable of receiving such benefit as aforesaid, or whether the retention of a child in a special school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education."

In *R. v. Boycott. Ex p. Kearsley* (3) the local authority had made arrangements with the local education authority with regard to the education of a boy who, it was reported, was a fit subject for a special school. His parents were aggrieved by that, and wanted to argue that he could be normally educated at an ordinary school. Section 31 continued:

"(2) The provisions of s. 1 of the Elementary Education (Defective and Epileptic Children) Act, 1899, shall apply with the necessary modifications for the purposes of this section."

Section 1 (1) of the Act of 1899 provided for arrangements to be made for defective and epileptic children and the manner in which they were to be made, and by s. 1 (3):

"For the purpose of ascertaining whether a child is defective or epileptic within the meaning of this section, a certificate to that effect by a duly qualified practitioner approved by the education department shall be required in each case. The certificate shall be in such form as may be prescribed by the education department."

I think it is desirable that some parts of the decision in *R. v. Boycott. Ex p. Kearsley* (3) should be considered by the Court of Appeal especially with regard to the admission made by counsel which, speaking for myself, I do not feel convinced was right. But there the court treated as documents which could be brought up and quashed both the certificate, which had to be given under s. 11 (4) (b) of the Act of 1913 because it was a certificate which decided the question whether the boy was an imbecile, and a letter which, it appeared to the court, decided the question whether or not the local education committee should make provision for the child. But, as I say, that has nothing to do

with this particular case because here we are dealing with another section which is worded in a different manner, and whether or not it would have been desirable, at the meeting held by the visitors, that the mother should be allowed to attend and make representations, is not a matter for this court. It is a matter for Parliament.

- A It seems to me that there is nothing in s. 11 which could be construed as saying that the visitors have to receive evidence or even to allow anybody to be present other than the patient. It seems to me that such an argument is inconsistent with the provisions of the section, which, I think, is intended for the guidance of the board in considering whether they are going to make an order for the detention of the patient under the Act. After the year has expired they are to get the opinion of the visitors, who are to see the patient and form their opinion of him. Then they are to have a certificate from the doctor of the institution or some other doctor who may be appointed for that purpose with regard to the condition of the patient. If the parent or guardian of the patient chooses to have the opinion of a medical practitioner, that, no doubt, has to be considered by the board, but the decision is to be the decision of the board and not the decision of the visitors. It is impossible, looking at the whole of the section, to say that the visitors are to hold anything which can be called an inquiry in the sense that persons shall be allowed to be present at the inquiry or that they shall hear evidence. They have to form an opinion and report to the board, and to say that their report, which is nothing more than a report of their opinion, can be brought up to be quashed by this court by means of certiorari would be extending the doctrine relating to certiorari to an unlimited and an unfortunate extent. It may be that many people might think that increased facilities should be given to persons interested in these cases to make representations to the visitors. They can make representations, no doubt, to the board. As I say, the board has set out in an affidavit the procedure they follow, and I have no doubt that their desire is to consider most carefully everything that can be placed before them before they come to a decision whether or not a patient is to be detained. I am not expressing any opinion in what circumstances, if any, certiorari will lie to the board; it is not a matter with which we are concerned at the present time.

- E I ought, perhaps, to say that reliance was placed by counsel for the infant on the Mental Deficiency Regulations, 1948, reg. 99, which, he says, recognises that the report of the visitors is a decision. I do not think it does. Regulation 99 deals with visitors acting not only under s. 11 (2) of the Act of 1913, but also under s. 11 (3) which is concerned with a different matter and provides:

- G "On such re-consideration the visitors shall visit the defective or summon him to attend before them and inquire into his mental condition and the means of care and supervision which would be available if he were discharged and into all the circumstances of the case, and, if it appears to them that further detention in an institution or under guardianship is no longer required in the interests of the defective himself, shall order him to be discharged: Provided that, if the visitors do not order his discharge, the defective or his parent or guardian may, within fourteen days after the decision of the visitors has been communicated to the defective and his parent or guardian, appeal to the board."

- H The visitors are given a power to make a decision within three months after the date when a patient attains the age of twenty-one, and the patient is not entitled to be discharged by reason of the order expiring, but merely on the fact that he has arrived at an age when either he will be discharged by the decision of the visitors or his parent or guardian can appeal to the board. That is simply a provision as to what is to happen when a person who has been committed while an infant comes of age, quite irrespective, it seems to me, of the period for which the order is to remain in force under s. 11 (2). If

the order has come to an end, there is no need for the re-consideration, but, if the order has not come to an end, there is to be a re-consideration and the patient may be discharged if the visitors think it is no longer necessary that he should be detained. I think reg. 99 is, as the marginal note shows, giving what I may call an omnibus form of directions to the visitors when they are inquiring under s. 11 (2) and (3), and their duties and powers are quite different. Therefore, I do not think reg. 99 helps the infant in this case.

The result is that, in my opinion, this application is misconceived because certiorari will not lie, and, therefore, the motion must be dismissed. But I want to say one other word on a matter of some importance before I part with this case. Two reports, both of which were properly before the visitors, one of the medical officer of the institution, and the other of an officer of the London County Council Public Health Department, were made exhibits to the affidavit which two of the visitors made and counsel for the visitors told us that he advised that those reports should be disclosed so that no suggestion could be made that the visitors were concealing anything from the court. I think, however, it should be understood that these reports are of a highly confidential nature. I do not suggest for a moment that Crown privilege can be claimed for them, but these are reports which officials are directed to make to enable the visitors to carry out the duty of forming an opinion under this Act. It is obvious that in making these reports matters of a private nature have to be dealt with. They have to report on the condition of the home, on their opinion of the parents, and also on the condition of the patient. It is most desirable that officers who have to make this kind of report to a body such as the visitors to be laid before the Board of Control should be able to report frankly and freely without any fear that the reports will be disclosed in courts of law or shown to persons, which might lead to actions of libel or something of that sort. The right course is that where reports have been before the visitors they should mention the facts and then submit those documents for the consideration of the court. We do not think it was ever intended that these reports should be treated as other than highly confidential and they are not to be disclosed unless the court thinks that a good purpose would be served. The reports should be in court so that the court can look at them. The court, if it thinks they ought to be shown to the other side, will so direct and, if necessary, will allow an adjournment for them to be considered. Although I can understand why they were produced, and we are not attaching any blame to counsel for the advice he gave to the visitors, we think for the guidance of the authorities in these matters that these reports ought not to be disclosed unless the court is of the opinion that they should be.

PARKER, J.: I agree. In my opinion, it cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision. In the passage my Lord has already quoted ([1924] 1 K.B. 205) from *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), it is plain that **ATKIN, L.J.**, was dealing with a determination of questions affecting the rights of subjects; and in *R. v. London County Council. Ex p. Entertainments Protection Assn., Ltd.* (4), **SCRUTTON, L.J.**, said ([1931] 2 K.B. 233):

"The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the court of [Queen's] Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court."

There has been a great deal of discussion and a large number of cases extending the meaning of the word "court". A number of such cases was referred to

in *R. v. Manchester Legal Aid Committee. Ex p. R. A. Brand & Co., Ltd.* (5), but nothing in that case was intended to or did in any way enlarge the scope of the remedy by way of certiorari so far as it affects this point. There must be a decision or determination. The sole question in debate in that case was the scope of the court or tribunal or body of persons, and nothing to do with whether it was or was not necessary to have a determination or decision.

A In the present case, as the notice of motion itself states, the court is being asked to quash the report of the opinion reached by the statutory visitors. Parliament itself has pointed, it seems to me, the contrast between the duties of the visitors under s. 11 (2) of the Act, which is the case here, and under s. 11 (3). Section 11 (3) is clearly dealing only with the case of re-consideration when a patient comes of age and enables the visitors to arrive at a decision. B Parliament uses the word "decision", and the visitors can order the discharge or the continued detention of the patient, and in the event of the latter decision there is a right of appeal to the board. When they are acting under s. 11 (3) the visitors are clearly coming to a decision, whereas under s. 11 (2) all they have to do is to report to the Board of Control whether in their opinion the defective is still a proper person to be detained in his own interests in an institution. C Having made that report, it is then for the board alone to come to a decision on the matter and to direct, if the board so decides, a continuation of the detention order.

Counsel for the infant has pointed to the use of the word "decision" in the Mental Deficiency Regulations, 1948, and, in particular, in regs. 99 and 102. So far as reg. 102 is concerned, where it says that the visitors shall communicate their decision on the case to the board, it is perfectly plain that that regulation D is dealing only with the case of re-consideration under s. 11 (3). By reg. 99 (2), however, it is provided that before making any decision the visitors shall consider a report as to a number of different matters. By the marginal note to reg. 99, it appears that it is an omnibus provision dealing with the way in which the visitors are to carry out their duties both under s. 11 (2) and (3). So far as s. 11 (3) is concerned, "decision" is the word used by the Act itself.

E Counsel also relied on *R. v. Boycott. Ex p. Keasley* (3). So far as that case is concerned, I would say two things. First, as my Lord has said, it was there conceded, rightly or wrongly, that the certificate in question was a document with regard to which certiorari would lie, but, quite apart from that, the case arose under different sections of the Act, and, in particular, under s. 31 which F empowered, and, indeed, made it the duty of, the local education authority to ascertain what children within its area were incapable of receiving further benefit at school. It was further provided, by invoking the Elementary Education (Defective and Epileptic Children) Act, 1899, that in arriving at that decision they were required to have a certificate to the effect that the child was a defective by a duly qualified practitioner approved by the education G department, and it was that certificate which was quashed in *Boycott's* case (3). By the Mental Deficiency (Notification of Children) Regulations, 1914, made under the Mental Deficiency Act, 1913, s. 2 (2), it was further provided that the local education authority, having got that certificate, had to consider the matter. If they thought it was a question of doubt, they had under, s. 31 (1) and reg. 2 (2), to refer the matter for the determination of the Board of Education. H On the other hand, if they were satisfied that there was no doubt, they had, under reg. 2 (1), to send on the certificate with a covering letter to the proper department of the local authority, the Mental Deficiency Act, 1913 committee, and in *Boycott's* case (3) it is to be observed that the procedure was followed out and on Oct. 10, 1938, the education committee wrote to the mental deficiency committee saying ([1939] 2 All E.R. 630):

"I am directed to forward herewith copy of the report of Dr. Norman Boycott on Form 306 M with regard to this boy and am to request that

the committee under the Mental Deficiency Act will be so good as to consider the advisability of arranging for the boy to be medically examined with a view of his certification . . .”

So it may be that—I am not deciding it—the matter was conceded before the court, but it may be that the decision there could be justified on the basis that that letter coupled with the report was the decision of the local education authority under s. 31, that there was no doubt which would require the matter to be referred to the Board of Education, and that they had ascertained that the child was incapable of deriving any further benefit. A

Reference was also made to *R. v. Postmaster-General. Ex p. Carmichael* (6), where the certificate of the Post Office medical officer certifying that a workman was suffering from telegraphist's cramp was quashed on the ground that the medical officer in question was not the person laid down by the Act. That case was also relied on as being one of a certificate being quashed, but it is to be observed that, although that certificate did not completely conclude the matter, in that the workman who had got the certificate still had to show that his condition resulted from his employment, nevertheless it was final and conclusive on the point that the workman was suffering from cramp, which was the first condition of his obtaining compensation. B C

In my view, this motion fails on the ground that there is no decision or determination to be quashed, and, accordingly, it is unnecessary for me to consider whether the visiting justices could be said to be under any duty in a case such as this to hear the mother or any representation on her behalf. I agree that this motion fails. D

DONOVAN, J.: I agree. In particular I agree with the views expressed by the other members of the court for distinguishing this case from *R. v. Boycott. Ex p. Keasley* (3).

Motion refused.

Solicitors: *Harold Miller & Co.* (for the applicant); *Wontner & Sons* (for the visitors); *Solicitor, Ministry of Health* (for the Board of Control).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BROWNING v. J. W. H. WATSON (ROCHESTER), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 28, 1953.]

Street Traffic—Express carriage—Special occasion—Conveyance of private party—Conveyance of members of club to football matches on six separate occasions—Road Traffic Act, 1930 (c. 43), s. 61 (2)—Conveyance of persons not members of club—No knowledge by owners of carriage—Vicarious liability—Road Traffic Act, 1934 (c. 50), s. 25 (1).

The respondents were charged under the Road Traffic Act, 1930, s. 72 (1), with unlawfully permitting a motor coach to be used as an express carriage without a road service licence. On six Saturdays during the period August to November, 1952, they hired a motor coach, which was not being used under such a licence, to a club to take members of the club to a nearby town to watch league football matches. On one occasion, unknown to the respondents, two persons who were not members of the club travelled on the coach, so that the party conveyed was not a "private party" within the proviso to s. 61 (2) of the Act.

HELD: (i) the words "special occasion" in the proviso to s. 61 (2) of the Road Traffic Act, 1930, must be construed to include occasions ejusdem generis with the race meetings and public gatherings mentioned in the proviso to s. 61 (1); the football matches in question were special to the locality in which they were played; and, accordingly, each of the occasions was a "special occasion" within the exception in the proviso to s. 61 (2).

(ii) the mere fact that the respondents did not know that on one occasion there were persons in the coach who were not members of the club did not absolve them from liability; they should have taken precautions to see that only members of the club were on the coach; and, therefore, they were guilty of an offence on that occasion.

Reynolds v. G. H. Austin & Sons, Ltd. ([1951] 1 All E.R. 606), distinguished.

FOR THE ROAD TRAFFIC ACT, 1930, s. 61 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 626; and FOR THE ROAD TRAFFIC ACT, 1934, see *ibid.*, p. 728.

Cases referred to:

- (1) *Nelson v. Blackford*, [1936] 2 All E.R. 109; Digest Supp.
- (2) *Miller v. Pill. Pill v. Furse. Pill v. Mutton (J.) & Son*, [1933] 2 K.B. 308; 102 L.J.K.B. 713; 149 L.T. 404; 97 J.P. 197; Digest Supp.
- (3) *Wurzal v. Dowker*, [1953] 2 All E.R. 88; 117 J.P. 336.
- (4) *Victoria Motors (Scarborough), Ltd. v. Wurzal*, [1951] 1 All E.R. 1016; [1951] 2 K.B. 520; 115 J.P. 333; 2nd Digest Supp.
- (5) *Reynolds v. G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606; [1951] 2 K.B. 135; 115 J.P. 192; 2nd Digest Supp.

CASE STATED by city of Rochester justices.

At a court of summary jurisdiction sitting at Rochester on Mar. 27, 1953, the appellant, Ernest Clifford Browning, on behalf of the licensing authority for public service vehicles for the South Eastern Traffic Area, preferred six informations against the respondents, J. W. H. Watson (Rochester), Ltd., charging that on six Saturdays during the period August to November, 1952, they unlawfully permitted a motor vehicle to be used as an express carriage within the meaning of the Road Traffic Acts, 1930 to 1937, on the road between Rainham and Gillingham in Kent, otherwise than under a road service licence granted by the licensing authority, contrary to the Road Traffic Act, 1930, s. 72 (1).

It was proved or admitted that the respondents were coach proprietors and owners of a double-decked motor coach. On Aug. 30, Sept. 13 and 27, Oct. 18,

and Nov. 1 and 15, 1952, the motor coach was hired from the respondents by the secretary of the United Services Club, Rainham, to take members of the club to Gillingham football ground, where, on each occasion, the first team of the Gillingham football club was playing in a Third Division (Southern) League match. On each occasion the hiring was arranged a few days beforehand. On Nov. 15, 1952, the appellant and one Lander, a traffic examiner in the service of the licensing authority, boarded the motor coach when it was standing outside the club premises at Rainham and travelled to Gillingham football ground as passengers, returning by the motor coach after the match. Fares were collected from them and from a few other passengers by a member of the committee of the club. Neither the respondents' servants nor anyone else, save the appellant and Lander, were aware that the motor coach was carrying as passengers anyone who was not a member of the club. Had this fact been known, the coach would have been stopped immediately and the appellant and Lander compelled to leave it. Except on this one occasion, all persons who travelled in the motor coach on those dates were members of the United Services Club. According to the work tickets relating to the journeys, and in fact, each of the journeys was from the United Services Club, Rainham, to Gillingham football ground. On each occasion the respondents complied with the Road Traffic Act, 1934, s. 25 (1) (b) to (g). Section 25 (1) (a) was complied with on all occasions except Nov. 15, 1952, when the appellant and Lander were present in the motor coach. The respondents had no road service licence to use the motor coach as an express carriage on any of the material dates.

It was contended on behalf of the appellant that the journeys were not made on special occasions within the meaning of the Road Traffic Act, 1930, s. 61 (2), and that, as the appellant and Lander had been able to travel as passengers on the motor coach on Nov. 15, 1952, it was not used on that date for the conveyance of a private party. It was contended on behalf of the respondents that a separate hiring of the motor coach was made in respect of each journey to Gillingham, and, accordingly, each occasion should be considered separately. As on each occasion a football match was taking place at Gillingham, each occasion was a special occasion. As the presence of the appellant and Lander in the motor coach on Nov. 15, 1952, was unknown to the respondents, their servants or agents, the respondents had not permitted the motor coach to be used otherwise than for the conveyance of a private party.

The justices dismissed the informations and the appellant appealed.

Skelhorn for the appellant.

Van Oss for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the city of Rochester before whom the respondent company was charged on six informations with allowing a vehicle, alleged to be in the category of "express carriage", to be used without the appropriate licence for the conveyance of persons, contrary to the Road Traffic Act, 1930, s. 72 (1). The answer made by the respondents was that the persons in the vehicle were being conveyed as private parties on special occasions. This raises the sometimes difficult questions which come before this court, both on the meaning of "special occasion" and on the meaning of "private party". [HIS LORDSHIP stated the facts and continued:] The appeal is brought to test whether the justices were right in holding that the occasions were special occasions, and it is sought to say that, because there were six football matches, they could not be special occasions.

The proviso to s. 61 (1) of the Road Traffic Act, 1930, provides:

" . . . a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares."

By s. 61 (2):

"It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

Obviously the proviso to sub-s. (1) does not, in terms, apply to this case, because the vehicle in question was adapted to carry more than eight passengers. The cases which have dealt with this matter start with *Nelson v. Blackford* (1), where this court, in giving judgment, said ([1936] 2 All E.R. 110):

"A special occasion must be a particular and individual occasion analogous to a race meeting."

That was a case under s. 61 (1) and in the proviso to that sub-section "special occasions" is part of the phrase "race meetings, public gatherings and other like special occasions". If the expression "special occasions" is used twice in the same section it bears the same meaning. Therefore, the court has said, practically in so many words, that, in construing the proviso to sub-s. (2), one must apply the ejusdem generis rule and consider whether the occasion is something in the nature of a race meeting or public gathering—an occasion for which it is contemplated that extra transport will be required to satisfy the public who want to go to these places. The justices have found that these football matches were special occasions, and the question is whether they were right in view of the fact that there were six matches all taking place within a comparatively short space of time. It should be observed that there were no more than two in one month. We are not, therefore, dealing with a case like *Nelson v. Blackford* (1), where illuminations went on for seven weeks at Blackpool and this court said that there cannot be a special occasion where things go on for such a period. Here you have football matches of a special nature, in the sense that they are not just ordinary club matches, but are league matches, and occurring not more than twice a month. Could the justices on those facts, properly find that they were special occasions? In my opinion, clearly they could.

Reliance is placed on *Miller v. Pill*, *Pill v. Furse*, *Pill v. J. Mutton & Son* (2), which had to be considered by this court in *Wurzal v. Dowker* (3) because of a dictum of my own in *Victoria Motors (Scarborough), Ltd. v. Wurzal* (4), for which, I hope, in *Wurzal v. Dowker* (3) I stood sufficiently in a white sheet and with a candle in my hand because the attention of the court had not been called, in the *Victoria Motors* case (4), to *Miller v. Pill* (2). I still think the view we held was preferable to the view held in *Miller v. Pill* (2), but we are bound by the latter case. In *Miller v. Pill* (2) HUMPHREYS, J., said, rather summarising what the other members of the court had said ([1933] 2 K.B. 318):

"... I should come to the conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members of the party and points to something which can be described as a special occasion in the locality and was the object of the journey being undertaken."

A football match is frequently a special occasion in the locality. I cannot see, for this purpose, the difference between a football match and a race meeting. The Act has not provided, in enacting that race meetings are special occasions,

that they must be meetings which only take place two or three times a year or at certain specified intervals. Therefore, I think, when there is a football match and a club is playing a different club each time—and there is no pretence here of saying that this was being used simply to provide what I may call an unauthorised omnibus service; it was a trip provided for the members of a particular club to attend the particular occasion which the justices were, in my opinion, justified in holding was special to the locality—that the requirements of the decision of *Miller v. Pill* (2) and all the doubts which may have existed since then are amply satisfied by the facts of this case. Therefore, I think that, with regard to five of these informations, there was evidence on which the justices could find, and were justified in finding, that the occasions of the journeys were special.

With regard to the next point, on one of these occasions two persons in the employ of the Minister of Transport insinuated themselves among the members of the club and got into the coach, and, therefore, as they were not members of the club for whom the coach had been hired, but were outsiders, they prevented the party from being a private party. The justices thought that the respondents could not be convicted because they did not know of the presence of these two people among the members of the party in the coach. Reliance has been placed on *Reynolds v. G. H. Austin & Sons, Ltd.* (5), in which this court, in a reserved judgment, went very fully into the question of vicarious liability in these cases, but it should be observed that the facts in that case were of a somewhat special nature. A women's institute had engaged a coach to take them on an outing, and, as they had not sold enough tickets in the township where the institute was, they put an advertisement in the window of a shop some miles away, and, therefore, there had been a previous advertisement to the public of the arrangements for the party. We pointed out that the advertisement was an advertisement by the promoter and the trip was advertised a long distance away. There were no practical means by which the proprietors of the coach could know of the advertisement, and they had no reason to suppose that the trip had been advertised. Accordingly, reviewing the cases over a long period, we came to the conclusion that the proprietors were not vicariously liable by reason of the fact that the persons who engaged them had committed a breach of the Act. But I think it is implicit throughout the judgments that we were excluding a case where a man or a company might incur vicarious liability because of the conduct of their servants. Here, the coach was in charge of the respondents' servant, and, although he did not know that persons who were not members of the club got in the coach, that was because he did not inquire or take any precaution to see that only members were admitted, and we cannot absolve the respondents on that ground. The prohibitions in the Act are absolute, and, while it is true that in *Reynolds v. G. H. Austin & Sons, Ltd.* (5) we refused to impose vicarious liability and a good deal of discussion took place about the doctrine of mens rea, in cases of absolute prohibition mens rea can be supplied by the simple doing of the forbidden act. We cannot say here that, if a coach proprietor lets a coach to a club for the conveyance of the members of the club and allows people who are not members of the club to get into the coach, he is not liable. Of course, this was not a wilful violation, but it is clear that the respondents should have taken some precaution. They should have told the football club: "We will only do this if either you issue tickets to the members so that we can see that the people who get on the coach are members, or one of your servants, or the secretary of the club, or some other person, stands at the starting place to see that only members of the party get on to the coach." But I think that it would be going too far to say that, if the members of the public, other than members of the party, get on to the coach and are conveyed, it is an answer to say: "We did not know that that had happened". At the same time, the justices

are entitled to take all the facts into consideration. No court in England has ever liked action by what are generally called agents provocateurs resulting in imposing criminal liability. We must, therefore, hold that, in the case of the sixth information—i.e., the information relating to Nov. 15, 1952—there was an offence, but we remind the magistrates that it is possible for them to grant an absolute discharge and it is not necessary for them when they do grant an absolute discharge to order payment of costs. The case must go back to the magistrates with a direction that this offence is proved, and they can deal with it as they like.

PARKER, J.: I agree. I would only add that, on the facts found by the magistrates, it is impossible to say that they were wrong in holding that the six occasions in question were not special occasions. Speaking for myself, I should like to reserve the question whether, if in any particular case the facts showed that the occasions in question were more frequent, the time might come when those occasions ceased to be special occasions by reason of their frequency.

DONOVAN, J.: I agree, and I also agree with LORD GODDARD, C.J., that in determining what is a special occasion one must return in the end to the words in the proviso to s. 61 (1), namely: "race meetings, public gatherings and other like special occasions". These last words are to be construed to include "occasions" ejusdem generis with race meetings and public gatherings. I find it difficult to conceive of a genus which will include race meetings and public gatherings and yet exclude a football match, such as the present, an English league match probably attracting thousands of spectators. On the other aspect of the case I have no further observations to make.

D *Appeal allowed in part.*

Solicitors: *Treasury Solicitor* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

E *R. v. BERKSHIRE COUNTY COUNCIL. Ex parte BERKSHIRE LIME CO. (CHILDREY), LTD.*

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 22, 28, 1953.]

F *Street Traffic—Licence—Rate of duty—Goods vehicle—Agricultural engine—Mechanically-propelled lime-spreading vehicle—Carriage of lime—Vehicles (Excise) Act, 1949 (c. 89), s. 4 (2) (a) (as amended by Finance Act, 1950 (c. 15), s. 13 (2)), s. 5 (1).*

G The applicants were owners of mechanically-propelled lime-spreading vehicles, which were loaded with lime at lime quarries and driven by road to farms on which they operated as lime-spreaders. The applicants contended that they were agricultural engines within the meaning of the Vehicles (Excise) Act, 1949, s. 4 (2) (a), as amended by the Finance Act, 1950, s. 13 (2).

H **HELD:** although the vehicles were used for agricultural purposes, they were also constructed and used for the conveyance of lime, and, therefore, they were being used for carriage, and so were goods vehicles, and fell to be taxed as such under s. 5 of the Act.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 4 (2) (a), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1435, and FOR THE FINANCE ACT, 1950, s. 13 (2), see *ibid.*, Vol. 29, p. 678.

MOTION for an order of mandamus directing the Berkshire County Council to hear and determine an application made on Jan. 21, 1953, that three of the applicants' mechanically-propelled lime-spreading vehicles, registration

numbers CUD353, CBW383 and ERX305, be granted road vehicle excise licences as agricultural engines in accordance with the Vehicles (Excise) Act, 1949, s. 4 (2) (a), as amended by the Finance Act, 1950, s. 13 (2). The applicants carried on business as quarry owners and merchants of and dealers in lime. The vehicles were loaded with lime at the quarries, and were then driven by road to farms where they were operated as lime-spreaders. The council contended that the vehicles were not agricultural engines within the meaning of s. 4 (2) (a) of the Act of 1949, but were goods vehicles within the meaning of s. 5 of that Act. A

Leonard Caplan for the applicants.

J. P. Ashworth for the county council.

Cur. adv. vult.

July 28. The following judgments were read.

LORD GODDARD, C.J.: Counsel for the applicants moves for an order of mandamus directed to the Berkshire County Council commanding them to hear and determine according to law an application that three of the applicants' mechanically-propelled lime-spreading vehicles be granted road vehicle excise licences as agricultural engines in accordance with s. 4 (2) of the Vehicles (Excise) Act, 1949, as amended by s. 13 of the Finance Act, 1950. The point which has to be determined is this: Are these vehicles to be regarded as agricultural engines as the applicants contend or as goods vehicles as the county council contends? The difference in the duty payable is very considerable, according to whether they fall into one class or the other. The vehicles in question are of a composite nature, consisting of an internal combustion engine and driver's cab mounted on a chassis on which is also imposed a large receptacle for the purpose of holding lime. The receptacle is fitted with a device for enabling the lime to be spread on the agricultural land over which the vehicle is driven, and the applicants' business is to carry lime to the fields of the farmers who may employ them and then spread it. B

Section 4 of the Vehicles (Excise) Act, 1949, prescribes the duty chargeable in respect of the mechanically-propelled vehicles to which the section applies, and sub-s. (2), as amended by s. 13 of the Finance Act, 1950, is in these terms: C

"This section applies to the following mechanically-propelled vehicles, that is to say—(a) locomotive ploughing engines, tractors, agricultural tractors and other agricultural engines, which are not used on public roads for hauling any objects, except as follows . . ."

and then in the following five sub-paragraphs are set out the articles which, and the circumstances in which, they may be hauled by these agricultural tractors and engines. The sub-section goes on to deal with a variety of other vehicles, such as those designed and constructed for trench digging and excavations and as mobile cranes which may be used under certain conditions on public roads, mowing machines, and certain other vehicles which it is unnecessary to mention. Section 5 of the Act provides for the duties payable in respect of a goods vehicle, and by s. 27 (1) D

"'goods vehicle' means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

In considering into which category these lime-spreaders, which are, undoubtedly, used for agricultural purposes, but also are constructed and used for the conveyance of lime, fall, it is necessary to refer to s. 1 of the Act. That reads: E

"Subject to the provisions of this Act—(a) there shall be charged in respect of mechanically-propelled vehicles used on public roads in Great Britain the duties of excise provided by the next five following sections of this Act . . ."

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It is clear, therefore, that the main purpose of the Act is to tax vehicles used on public roads. So long as a vehicle is not used on a road it escapes tax altogether. Once it comes on a road it becomes liable to tax unless it can be brought within an exemption. Section 4 (2) is dealing with mechanically-propelled agricultural vehicles which may, from time to time, come on to the public roads. They will remain taxable at the lower rate so long as they only are used on the roads for the purpose of hauling, but, if they are on the roads and are used for carrying goods, I can find no ground for saying that they are not taxable as goods-carrying vehicles. They must not be used on public roads for hauling any objects except those set out specifically in s. 4 (2), and that sub-section, so far as it relates to agricultural vehicles, is dealing with haulage and nothing but haulage. The Act clearly distinguishes between haulage and carriage. An agricultural vehicle is entitled to haul under certain conditions, but it is not entitled to be used for carriage, and that seems to me to dispose of the case and to show that the county council are right in the view that they have taken. In my opinion, the motion fails and must be dismissed.

PARKER, J.: I agree.

DONOVAN, J.: I agree. I add a few observations in order to deal with specific arguments of counsel for the applicants. There is no definition in the Act of "an agricultural engine." Counsel for the applicants suggests as a definition: "A machine by which power is applied to the doing of farming work, e.g., ploughing, sowing, manuring, etc." It is unnecessary for the purposes of the present case either to adopt or reject this definition, though, for my own part, I would not quarrel with it. "Goods vehicles" are defined by s. 27 (1) of the Act in terms which LORD GODDARD, C.J., has already quoted.

In my opinion, it is not possible to say that "agricultural engines" and "goods vehicles" are, within the meaning of the Act, mutually exclusive terms. The Act itself contemplates the contrary, for s. 4 (3) provides that some, only, of the vehicles charged under s. 4 (2) shall not be chargeable under s. 5. These excepted vehicles are mobile cranes. It follows that an "agricultural engine" may also be a "goods vehicle". In my opinion, that is true of the vehicles here in question, for they plainly carry goods, namely, the lime, which is going to be supplied to the farmer together with the service of spreading it. The lime which is to be so supplied and so spread cannot be regarded as akin to the petrol carried by a lorry for its own propulsion as counsel for the applicants suggests.

In these circumstances, why is the lime-spreader not chargeable under s. 5? The answer suggested is that s. 5, unlike s. 4, begins with the words: "Subject to the provisions of this Act", and this makes s. 4 paramount. If the words quoted were otherwise empty of content, there might be something to be said for this construction, but they are not. They refer, *inter alia*, to the numerous exemptions from duty contained in s. 7. There are, in addition, clear indications in the statute that, if a vehicle comes within s. 5 as a goods vehicle, it is to be taxed as such. The first is that contained in s. 4 (3), exempting, out of the whole category of s. 4 (2) vehicles, only mobile cranes from chargeability under s. 5. Another is s. 2 (3) which specifically exempts vehicles chargeable under s. 2 from chargeability under s. 3 or s. 5. It would be unnecessary to provide this specific exemption from s. 5 if the opening words of that section were enough. Here it is material to observe that the words: "Subject to the provisions of this Act" do not appear in s. 2 any more than they do in s. 4. Another indication is s. 13 (1), providing that, if a vehicle has been taxed under one category and is used for a purpose which brings it within another, taxed at a higher rate, the higher rate is to become chargeable.

These considerations make it clear, in my view, that, if a vehicle is a goods vehicle, it is to be taxed under s. 5, whether it is also an agricultural engine

or not. For the reasons already stated I think the lime-spreader is a goods vehicle within the statutory definition. In this connection it is not uninteresting to observe that local authorities' water carts which spread water on the streets are specifically named in sched. IV to the Act as goods vehicles. For these reasons I agree that the motion should be dismissed.

Application refused.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Ormond & Fullalove*, A
Wantage (for the applicants); *Treasury Solicitor* (for the county council).

[Reported by G. A. KIDNER, Esq., *Barrister-at-Law*.]

Re HERWIN (deceased). HERWIN AND ANOTHER *v.* HERWIN B AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.),
July 16, 17, 1953.]

Court of Appeal—Fresh evidence—Evidence obtainable at time of trial—Adminis- C
tration action—Sexual impotence of father—Children's failure to make
inquiries—Reasonableness.

During the subsistence of the testator's marriage to B., A. bore him three children, two sons and a daughter, born in 1920, 1928 and 1933 respectively. On June 8, 1943, B., who had had no issue, died, and the testator married A. one week later. No child was born during the subsistence of the testator's second marriage. By his will dated Mar. 7, 1949, the testator, who died in September, 1950, gave his residuary estate on trust to pay an annuity to A. and subject thereto on trust "for such of them my children or child (if only one) living at my death who shall attain the age of twenty-one years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common." The testator's personal representatives issued an originating summons to determine whether the gift to the testator's children operated as a gift to his illegitimate children, and asked, if necessary, for administration of the testator's estate and the usual accounts, inquiries and directions. On the construction of the will, it was held, at first instance, that the illegitimate children could not take. They appealed, and applied for leave to adduce evidence to show that at the date of the will the testator was, to his own knowledge, sexually impotent, a fact of which they were not aware until after the decision of the court. D

HELD: having regard to the facts that the proceedings were in the nature of an administration action in which the persons interested were entitled to assume that all the material facts would be put before the court, that one of the persons concerned to establish the evidence was an infant, and that the matters with which the evidence dealt were of a personal, delicate nature on which the children would not ordinarily feel qualified to question their mother, it could not be said that reasonable diligence on the part of the children would have enabled them to adduce the evidence at first instance; and, as the evidence was such that, if it established the fact towards which it was directed, it would be conclusive in favour of the children, the evidence ought to be admitted. E

Dictum of TUCKER, L.J., in *Braddock v. Tillotson's Newspapers, Ltd.* G
[1949] 2 All E.R. 309, applied.

AS TO POWER OF COURT OF APPEAL TO RECEIVE FURTHER EVIDENCE, see
HALSBURY, Hailsham Edn., Vol. 26, p. 120, para. 238; and FOR CASES,
see DIGEST, Practice, pp. 775-782, Nos. 3396-3458. H

Cases referred to:

- (1) *Braddock v. Tillotson's Newspapers, Ltd.*, [1949] 2 All E.R. 306; [1950] 1 K.B. 47; 2nd Digest Supp.
- (2) *Brown v. Dean*, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; Digest, Practice, 602, 2431.
- (3) *Re Wohlgenuth*, [1948] 2 All E.R. 882; [1949] Ch. 12; [1949] L.J.R. 231; 2nd Digest Supp.
- (4) *Megson v. Hindle*, (1880), 15 Ch.D. 198; *sub nom. Re Hindle*, 43 L.T. 551; 44 Digest 816, 6682.

APPEAL by the first three defendants from a decision of VAISEY, J., dated Jan. 22, 1953.

By his will, the testator devised his residuary estate subject to an annuity to his wife for life "for such of them my children or child (if only one) living at my death who shall attain the age of twenty-one years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common." The testator left no legitimate children, but had three illegitimate children. The administrators took out an originating summons for the determination of the questions and for the relief following: (i) whether on the true construction of the said will and a codicil thereto the devise and bequest to the children operated as an effective devise or bequest to the first three defendants or who otherwise was entitled to the said residuary estate under the said devise or bequest, (ii) for an order that one of the defendants should represent the whole class of next of kin, (iii) for administration of the real and personal estate of the testator, and (iv) for all usual necessary accounts, inquiries and directions. The only evidence before VAISEY, J., was an affidavit of one of the administrators which did not deal with the issue of the testator's sexual capacity. After the decision of VAISEY, J., the first three defendants obtained evidence that at the date of his will the testator was to his knowledge permanently incompetent. They applied for leave to adduce fresh evidence on the issue of incompetence.

J. A. Armstrong for the first three defendants.
Spears for the administrators.
Rubin for the next of kin.

SIR RAYMOND EVERSLED, M.R.: The late Mr. William Rufus Herwin, who died in September, 1950, made a will on Mar. 7, 1949, which was plainly a professionally drawn will, and in it he disposed of his residue as follows:

"The bank [Lloyds Bank, Ltd., whom he had appointed executor and trustee] shall stand possessed of [the trust fund] upon trust to pay out of the income thereof an annuity of £250 to my wife Annie Dorothea Herwin during her life and subject thereto upon trust (as to both capital and income thereof) for such of them my children or child (if only one) living at my death who shall attain the age of twenty-one years or being daughters or a daughter have attained or shall attain that age or previously marry and if more than one in equal shares as tenants in common."

By a codicil dated Aug. 18, 1950, the testator bequeathed certain additional legacies, including (a) a legacy "to my wife Annie Dorothea Herwin" of £100, and (b) "to my daughter Sheila the sum of £500 upon her attaining twenty-one years."

The testator was twice married. The date of his birth seems a little uncertain. We have before us what is called an agreed statement as to dates, which gives the date of birth as being Oct. 21, 1873, but counsel for the next of kin has stated that that date is not in fact agreed, and it may not be accurate. On Apr. 6, 1896, he was married to his first wife, and it is clear that he must have been, then, at any rate, an adult. The marriage between the testator and his

first wife appears to have been childless, and she, the first wife, died on June 8, 1943. The testator married his second wife, the wife referred to in his will, Annie Dorothea Herwin, a week after the death of his first wife, on June 15, 1943, and that fact alone would indicate that the testator and the present Mrs. Herwin had been closely associated for some time before their marriage. Indeed, the testator had had three children by the present Mrs. Herwin, all born during the period of the subsistence of his first marriage. Those three children are the appellants in this court, two sons and one daughter. The sons are William Sidney Rufus Herwin, who was born in September, 1920, and, therefore, is now nearly thirty-three, and Frank Stuart Herwin, born in November, 1928, and, therefore, now about twenty-four; the daughter is Sheila Patricia Mary Herwin, who has since been married, and who was the daughter Sheila referred to in the codicil, born on Aug. 8, 1933, and, therefore, now a young woman not quite twenty. No children were born to Mrs. Herwin after the date of her marriage to the testator in June, 1943.

The question arose whether the disposition of the testator's residue in favour of "my children or child" took effect in the absence of any legitimate children. In order to resolve that doubt the widow and Alec John Herwin, who had together taken out letters of administration cum testamento annexo, issued a summons in the ordinary form in the Chancery Division, to which they joined as defendants the three children of the testator who were born, as I say, to Mrs. Herwin before her marriage, and also four other persons as being next of kin of the testator. These latter would take (alone or with others) the residue if the gift to the children should be found ineffective.

The form of the summons in the ordinary way would not, perhaps, be worthy of note, but having regard to the argument I will draw attention to the fact that by it the two plaintiffs, as administrators, ask for

"the determination of the questions and for the relief respectively following, that is to say :—1. whether upon the true construction of the said will and codicil thereto . . . the devise and bequest to his children . . . contained in cl. 6 of his said will operates as an effective devise or bequest to the above-named [the first three defendants, the three illegitimate children] or who otherwise is entitled to the said residuary estate under the said devise or bequest."

Secondly, the plaintiffs ask for an order that one of the defendants should represent the whole class of next of kin who would take in default of the testamentary provision taking effect, and, thirdly, if necessary, for administration of the real (if any) and personal estate of the said testator and for such purpose all usual and necessary accounts, inquiries, and directions.

The evidence which supported that summons consisted solely of an affidavit of Alec John Herwin, the second plaintiff and one of the administrators, in which, following the normal practice, he set out the relevant parts of the will, and then proceeded to state as follows:

"During the lifetime of the said Clara Clayton [the testator's first wife] and during the subsistence of the marriage referred to in para. 6 hereof [the marriage with Clara Clayton] there were born to the said Annie Dorothea Herwin by the testator three children . . ."

and then the three first defendants are named. That was the whole of the evidence which was before the court as to the relationship of the children to the testator, or of the relevant circumstances of the testator from and after the date of his second marriage.

At first sight it might appear that the reference in the codicil to "my daughter Sheila" could be regarded as an indication that when the testator spoke in his will (which by codicil he confirmed) of "my children" he was at least intending to include the children who had been born to his then wife, although

they were not born in wedlock. Indeed, the impression which the will conveys is clearly such as to raise the plainest possible suspicion in one's mind that the testator, by his reference to "children" in cl. 6 of the will, meant to include those three children. I do not propose to take time, in the circumstances, by reading other parts of the will, but, perhaps, I might add, by way of enforcing what I have said, that he appointed his then wife, Mrs. Herwin, the guardian of those children or such of them as were infants, and Sheila was, and is still,

A an infant. So, indeed, the will struck the mind of VAISEY, J., whose duty it was to construe it, but, having regard to the long-established (though, it is sometimes thought, somewhat harsh) line of authorities, he felt, on the material before him (and the admissible surrounding circumstances were very limited, as I have already said) that he was unable to conclude as a matter of construction that the intention to comprehend illegitimate children, though likely, was
B certain. He, therefore, came, and as I say, he came reluctantly, to the conclusion that the residue of the estate was undisposed of.

The first three defendants, the three children, thereupon appealed to this court, but on May 1, 1953, while the appeal was pending, they served a notice of motion on the other defendants and the plaintiffs, asking, in accordance with the procedure normally adopted, that this court should give leave to the
C appellants on the hearing of the appeal to call fresh evidence, that evidence being directed to establishing the very important matter of fact that at the time when the testator made his will and his codicil, and, indeed, at all times that are relevant, not only was he in fact impotent and, therefore, incapable of having any further children at all, but also that he was well aware of that fact. I shall come in a moment to refer briefly to the evidence in support
D of those assertions, but first I must deal as a matter of principle with the question whether it is right that in this court the plaintiffs should be allowed to tender that further evidence.

The rule which has been laid down—and it is one which rests on the firm basis that it is in the public interest that there should be an end of litigation—has many times been stated, and recently so in this court in *Braddock v. Tillotson's Newspapers, Ltd.* (1). That was a somewhat unusual case in that
E the application was not to call some new witness, but to have a witness for the other side re-called in order that he might be cross-examined. The appellants in the case that I am citing stated that they had no knowledge at the time of the trial, and had no reasonable means of finding out, that the particular witness was a person of light character, who might have been most effectively
F cross-examined as to credit had the facts been known to the appellants, and they further contended that the destruction of the credibility of this witness would, at the very least, have had a very strong influence on the conclusion reached at the trial. I have referred to those facts to indicate that it was a peculiar case, and, of course, it is not, on the facts, in the least like the present matter which is of a more usual character, viz., an application to lead fresh
G evidence in chief in support of the appellants' claim.

The decision of this court in *Braddock v. Tillotson* (1) was adverse to the appellants seeking to have the witness re-called, on the ground that it was not in accordance with the principle which this court adopts to allow a witness to be re-called merely in order that he or she may be cross-examined as to credit. TUCKER, L.J., in giving the leading judgment, referred to the general
H rule on which this court acts, in language which I respectfully adopt and which it is convenient to cite. He said ([1949] 2 All E.R. 309):

"It has been the invariable practice of this court to confine the admission of fresh evidence in circumstances such as this to evidence which could not reasonably have been discovered before the trial and to evidence which, if believed, either would be conclusive or, as has been said by some judges, would lead to the reasonable probability that the verdict would

have been different. But the practice has hitherto been confined to evidence relating to an issue in the case, or, at any rate, to an issue which could and might yet be raised if there were a new trial in the action. No case has been cited in which this court has ever admitted, or has been asked to admit, evidence going to credit only. That, of course, is not conclusive, and it is certainly not conclusive in regard to the jurisdiction of this court, and for myself, I think that this court clearly has jurisdiction to take any course which it thinks fit with regard to a matter of this kind. The invariable practice is, however, clear, and, furthermore, when one comes to apply the first test, viz., whether the evidence could have been discovered by reasonable diligence before the trial, that language is hardly applicable to evidence of this kind, because in the ordinary normal event a solicitor or a client would not be expected to inquire into the past record of any witness whom he expected to be called. Generally speaking, he would not know who were the witnesses who were going to be called . . . But I do not think that it is reasonable that any inquiries should have been made with regard to a man in this position. I am only saying that what has always been regarded as the essential test, viz., that the evidence could not have been obtained by reasonable diligence, is hardly applicable to a case of this kind."

Later, the learned lord justice quotes a passage from the speech of LORD LOREBURN, L.C., in *Brown v. Dean* (2) ([1910] A.C. 374):

"My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine 'Interest reipublicae ut sit finis litium', remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist."

Those citations will, I think, suffice to lay the necessary foundation of law for the reasoning which now follows. As will have been appreciated, there is a double obligation on an applicant in this court for further evidence to be called. I will state the two conditions which have to be satisfied, in the order in which counsel for the children dealt with them. First, it must be shown that the new evidence, if given, and if true, would be at least likely to have a strong influence on the conclusion in the court below, and, secondly, it must be established not only that the evidence which is sought to be called is evidence in fact unknown at the date of the trial to the party applying, but it must be shown also that its existence could not with reasonable diligence have been discovered.

On the first point there has been in this court no argument. I have already stated what the evidence, if admitted, is said to establish, and, if it is established, as the evidence tends to show, that the late Mr. Herwin not only was, from a date anterior to his will and ever afterwards for all his life impotent, but also that he was well aware of that fact, then it seems to follow that he must be taken (the court, as is sometimes said, placing itself in the testator's arm-chair) to have used the words "children or child" so as to mean his then existing children. In saying that, I am re-stating the conclusion at which JENKINS, J., when sitting as a judge of first instance, arrived in *Re Wohlgermuth* (3), a case which was, in principle, on all fours with the present case. In that case, the testator at all relevant dates was impotent and knew it, the facts of his impotence and knowledge having been brought about as the result of a violent physical accident. In the present case the result has been brought about by illness and an operation, but those are merely incidental matters, and the facts in both cases, this case and *Re Wohlgermuth* (3), are, in principle, the same.

It follows, therefore, that, if the evidence is admitted and found to establish the essential fact, it satisfies one condition. But, have the appellants satisfied

the other condition ? Have they shown that this was evidence which reasonable diligence on their part could not and would not have brought to light and enabled them to bring to the attention of VAISEY, J. ? It is in its relevance to this matter that I have thought fit to refer, as I have, in a little detail to the nature of the proceedings, for they are, in my judgment, essential to the conclusion. If this had been an action, by which I mean an action started by writ of the ordinary kind, what is sometimes called hostile litigation, in which the appellants had sued the executors claiming payment to them of the residue which (they alleged) belonged to them, then it might well be (although I do not so decide because it is unnecessary) that failure on their part at the trial to bring to the attention of the court all the relevant circumstances which might help their case would be fatal thereafter, and they could not be allowed, in the circumstances, to have the privilege of a second attempt to prove their case. But this action was not an action of that kind at all. It was, as I have already said, a proceeding taken out under the rules applicable in the Chancery Division, whereby the plaintiffs, in their capacity as administrators, sought the directions of the court, and it is quite plain, I should have thought, that acting in that capacity it was their duty, not only to the court but to all persons interested in the estate, to lay before the court all the facts which they had in their knowledge or possession which might assist the just determination of the questions which they raised. If, in such a proceeding—and I repeat that this is in form an administration action—it appears, or comes to the knowledge of plaintiff, executors or trustees after the hearing in the first court, that other facts should have been brought to the attention of the court, it is by no means clear to me that it is not their duty to bring those matters, even at so late a stage, before the court, either this court, or on some further application in the administration proceedings.

The matter is in this case further complicated by the circumstance, as frequently happens in these cases, that at the time when the matter was brought before VAISEY, J., the same solicitors were acting for the plaintiffs as were acting for the children, the present appellants. It is, therefore, said, and said with force, by counsel for the next of kin, that the present appellants and their advisers, if they had been properly alert, should have realised that matters of fact relating to the capacity to have children of either the testator or Mrs. Herwin, were vitally important. Indeed, counsel for the next of kin observed that in the court below an attempt was made (albeit that it was obviously foredoomed to failure) to establish that Mrs. Herwin was at all material times incapable because of her age of having further children, and that the testator knew it. From the fact that that argument was raised counsel for the next of kin, naturally enough, argued that the question of capacity as a matter of fact must have been, or should have been, well in the mind of the plaintiffs and the appellants and their advisers.

It must not be thought from observations which have fallen from me during the argument that I have been casting reflections on the care or competence of the advisers. I have no desire whatever to make any such suggestion. It is one of the best-known facts in life that it is easy to be wise after the event, and unless some clue arose it would occur, I imagine, in proceedings of this kind, no more to solicitors or counsel than it would to the children, to raise with the mother the question whether in fact she or her late husband had been impotent at the material date. The matter is obviously one of delicacy, and relates to the most intimate details of married life. Applying TUCKER, L.J.'s test, which he indicated in the *Braddock* case (1), I think that, in the absence of unusual circumstances which raise the question precisely, it is not reasonable in proceedings of this character to suppose that children (particularly if one of them happens, as in this case, to be an infant daughter) will interrogate their mother about the most intimate details of her married life, and the capacity of their father.

As I have said earlier, it was the duty of the plaintiffs, making this application to the court, to lay before the court all facts that might assist the court to a just conclusion, but I am not surprised, in all the circumstances, that it did not occur to Mrs. Herwin to tell her solicitors intimate details of this kind and that it did not occur to the solicitors to ask her.

The will itself was a professionally drawn document, though the solicitor concerned was not the same as the solicitors acting for Mrs. Herwin and her children when the proceedings started, and again, it is not, perhaps, surprising that they did not draw the will otherwise than as they did, or ask the searching questions I have indicated. If a mistake occurred in the use of the word "children", it was a mistake into which people may, perhaps, easily fall, although I have no doubt that it is true to say, as counsel for the next of kin suggested, that anyone particularly experienced in cases of this kind, or particularly astute, might, perhaps, have thought it desirable to ask questions, and might, had the question been asked, have fallen on the essential facts. A B

However, in my judgment, when the following circumstances are together considered, viz., first, the nature of the proceedings, which I do not repeat, secondly, the fact that the defendants, being defendants in proceedings of this kind, were prima facie entitled to assume that all the material facts would be put before the court and had been put before the court, and thirdly, that one of the defendants was an infant—when all these matters are considered in the light of the general nature of the evidence on this delicate subject-matter, I am for my part satisfied that we shall not be departing from the strict and proper application of the well-established rule if we say that the children have made good their application and have fulfilled both conditions which it is incumbent on them to fulfil in order to have the further evidence brought to our attention. C D

[HIS LORDSHIP considered the evidence of the widow and a surgeon, and continued:] Mr. Adlington, the surgeon, in the witness box, in answer to the questions put to him by counsel for the next of kin and by members of the court, made it, to my mind, as clear as possible that the testator was not only incapable in fact, but was perfectly well aware of it at all relevant dates. E

If that is the fact, it seems to me that the conclusion is clear, for the testator made a will referring to "my children" at a time when he had three natural children and when he could not have, and knew that he could not have, any legitimate children. In other words, the case is brought fairly and squarely within the decision of JENKINS, J., in *Re Wohlgemuth* (3). F

The conclusion, therefore, necessarily is, as a matter of construction, that the word "children" means, and meant, the three appellants in this court, and it is unnecessary for us to consider the matter of construction which VAISEY, J., decided without the immense advantage which this further matter of fact has given to us. I repeat that the learned judge made plain that he arrived at his conclusion with reluctance, and I fully understand that reluctance, but without hearing argument it would not be right for me to suggest that his decision was otherwise than in accordance with the authorities. We have heard no argument, and I express no view, therefore, on how the matter would stand apart from the evidence that we have heard, but in the light of that evidence, as, indeed, is made plain by something which fell from the learned judge himself, it is clear beyond doubt, to my mind, that the conclusion ought to be in favour of the children. G H

BIRKETT, L.J.: I am entirely of the same opinion. The matter of construction of the will is not a matter now to be discussed in this court, but there are two passages from the judgment of VAISEY, J., which I want to cite. He begins his judgment by saying:

"Well-settled principles of law and of construction compel me to decide

this case contrary to my inclination, and contrary, I believe, to the true intention of the testator."

Then VAISEY, J., cited a passage from the judgment of COTTON, L.J., in *Megson v. Hindle* (4) (15 Ch.D. 205):

A "To take a case out of the common rule that only legitimate children can take under a gift to 'children', there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him."

Later in his judgment, VAISEY, J., referred again to COTTON, L.J., and he said:

B "COTTON, L.J., says that to take the case out of the common rule that only legitimate children can take under a gift to children I must find on the face of the will something which really makes it certain, not merely very probable or very likely, but certain, that he must have been referring to his illegitimate children or had intended the word 'children' to include his illegitimate children."

When he came to deal with the construction of the will in the light of the surrounding circumstances, he said:

C "I cannot say that the testator must have believed or must have thought that no further child could be born of the marriage which he had then contracted. Although, as I have said, I should like to construe this will on what I regard as the probabilities of the case, I am warned by so many authorities that this rule is one which must be observed unless disregarding it is the only way to give sense to the documents which fall to be construed. Here I think that the testator might have hoped that his wife was going to have a legitimate child at an age at which women do have children, when approaching the time when such an event is not a possibility. He may have thought that his wife was going to have another child or might have another child for whom he made provision, and, of course, it was just possible."

E It was because of those observations that the application was made in this court to adduce further evidence, because Mr. William Sidney Rufus Herwin in his affidavit said:

F "The facts as to my father's capacity referred to in para. 10 of my mother's said statement and in para. 3 and para. 4 of the said Basil Adlington's statement were unknown to me until after the hearing of this matter in the court below. Shortly after the hearing my mother expressed surprise to me at the reasons given by the learned judge, and stated that it was impossible that my father could have had the birth of other children in mind at the time he made his will, as he then knew that he was incapable of having further children."

G So, of course, the issue in this court really resolves itself into this: Was the further evidence which was sought to be adduced properly admissible on this appeal? The two matters to which learned counsel directed his attention were the two matters which stood out prominently in the judgment of TUCKER, L.J., in *Braddock v. Tillotson's Newspapers, Ltd.* (1), that it must be shown that the evidence sought to be adduced would be conclusive, or might tend to that end, and, further, that the evidence sought to be adduced could not reasonably have been discovered before the trial.

H I do not desire now, in view of what my Lord has said, to add very many words about that. It is perfectly plain, I should have thought, in view of the decision of JENKINS, J., in *Re Wohlgenuth* (3), that, if this evidence had been before the learned judge, it is probable, or almost certain, that there would have been a different decision. In my view, the evidence, if it is admitted, is conclusive.

On the second point, whether it could reasonably have been discovered before the trial, my Lord has dealt with that in some detail, and I do not desire to add anything.

ROMER, L.J.: I also agree, and have very little to add. It is plain to me that if the evidence which has been adduced before this court had been before VAISEY, J., he would have decided this case in the way that we are deciding it today, because, having regard to the decision in *Re Wohlgemuth* (3), the evidence was not only admissible, but was conclusive of the question what the testator in his will meant by the use of the word "children". The evidence was not before VAISEY, J., and he decided the matter purely as one of construction, and the only question is whether the evidence could properly be admitted in this court.

It has to be borne in mind that these proceedings are by way of originating summons by the personal representatives of a deceased person, asking for the directions of the court in the administration of the estate, and it is the clear and traditional duty of executors or trustees, when applying to a judge in the Chancery Division for administrative directions, to lay before the court all relevant facts which are within their knowledge. I am not for one moment casting blame on anybody for the fact that a highly relevant matter was not introduced into the evidence in the court below, but, nevertheless, as I see it, the beneficiaries who were made respondents to this summons were entitled to assume that all the relevant facts, that is to say, all the facts material for the consideration of the judge on the question which was being brought before him, would be presented to the court by the plaintiffs. Nothing could be more plain than that the question on which Mr. Adlington has informed the court, both by affidavit and orally, was material, and the one person above all others who was in a position to know what the doctor had said was the widow, who was one of the plaintiffs on the summons. It seems to me, therefore, that having regard to the general procedural rule to which I have referred, which has long been accepted in the Chancery Division, the children here, the appellants, were entitled to assume that, if any evidentiary matter of that kind existed and was known to this lady, she would have informed the court about it.

That consideration, I think, is relevant because of the way in which TUCKER, L.J., approached one aspect of this question of the admissibility of evidence on appeal in *Braddock v. Tillotson's Newspapers, Ltd.* (1), to which my Lord has referred. He said ([1949] 2 All E.R. 309):

" . . . in the ordinary normal event a solicitor or a client would not be expected to inquire into the past record of any witness whom he expected to be called."

So here, having regard to the fact that this was an application on which it was the duty of the plaintiffs to lay all the material and available information before the court, I do not think that the children, more especially this young girl of nineteen, could reasonably be expected to inquire into the question of their deceased father's sexual capacity by interrogating their mother on the subject, and I do not think it was unreasonable of the children, in all the circumstances of the case, not to have made inquiries of their own on that subject. It seems to me, accordingly, that we are not departing in any way from the rules which have been laid down frequently with regard to the admission of new evidence in this court by admitting the evidence of the doctor, supplemented by the further affidavit which Mrs. Herwin herself swore. Indeed, it would be deplorable, to my mind, to exclude it in a case where the court is being asked to give directions in the administration of the estate of a deceased person, and for the court to shut its eyes to the facts which are decisive of the testator's intention, and, by so shutting them, to cause his estate to be administered in a way which the court now knows would be wholly contrary to his

intention. Accordingly, I agree that this appeal must be allowed, and I desire to say nothing on the question of construction which was the only matter with which VAISEY, J., dealt, and which was not argued before us.

Appeal allowed.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the first three defendants); *H. E. Thomas & Co.* (for the plaintiffs); *Clutton, Moore & Lavington* (for the remaining defendants).

A

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SHARKEY (INSPECTOR OF TAXES) v. WERNHER.

[CHANCERY DIVISION (Vaisey, J.), July 21, 22, 23, 24, 1953.]

B

Income Tax—Profits—Transfer of horses from stud farm to racing stable in same ownership—Credit figure in farm accounts—Cost of breeding or market value.

The taxpayer's wife conducted a stud farm in respect of the profits of which he was assessable to income tax under the Income Tax Act, 1918, sched. D, Case I. As a recreation, the wife trained horses and ran them at race meetings, and this activity gave rise to no liability for tax. In the relevant tax year, having transferred five horses from the stud farm to her racing stables, she showed in the farm accounts as a debit the cost of breeding those horses, and claimed that the figure to be brought in as credit should be the same amount.

C

HELD: the farm accounts should be credited with the higher figure of the market value of the horses on an assumed sale.

Watson Bros. v. Hornby ([1942] 2 All E.R. 506), applied.

Laycock v. Freeman, Hardy & Willis, Ltd. ([1938] 4 All E.R. 609) and *Briton Ferry Steel Co., Ltd. v. Barry* ([1939] 4 All E.R. 541), explained.

AS TO PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, p. 95, para. 190;

E

and FOR CASES, see DIGEST, Vol. 28, pp. 37-39, Nos. 199-204.

Cases referred to:

(1) *Watson Bros. v. Hornby*, [1942] 2 All E.R. 506; 168 L.T. 109; 24 Tax Cas. 506; 2nd Digest Supp.

(2) *Laycock v. Freeman, Hardy & Willis, Ltd.*, [1938] 4 All E.R. 609; [1939] 2 K.B. 1; 108 L.J.K.B. 270; 160 L.T. 41; 22 Tax Cas. 288; Digest Supp.

F

(3) *Briton Ferry Steel Co., Ltd. v. Barry*, [1939] 4 All E.R. 541; [1940] 1 K.B. 463; 109 L.J.K.B. 250; 162 L.T. 202; 23 Tax Cas. 414; 2nd Digest Supp.

(4) *Long v. Belfield Poultry Products, Ltd. Thorner Bros., Ltd. v. Macinnes*, (1937), 21 Tax Cas. 221; Digest Supp.

G

(5) *Inland Revenue Comrs. v. Wm. Ransom & Son, Ltd.*, [1918] 2 K.B. 709; 88 L.J.K.B. 342; 119 L.T. 369; 12 Tax Cas. 21; Digest Supp.

(6) *Dublin Corpn. v. M'Adam (Surveyor of Taxes)*, (1887), 2 Tax Cas. 387; 28 Digest 21, l.

CASE STATED by the Special Commissioners of Income Tax under the Income Tax Act, 1952, s. 64.

H

The taxpayer was assessed to income tax in respect of profits of his wife, Lady Zia Wernher, arising from her stud farm. In the year ended Dec. 31, 1948, Lady Wernher transferred five horses from her stud farm to her racing stables, which she carried on as a recreation and not as a trade. The cost of breeding the horses was debited in the stud farm accounts, and it was common ground between the parties that, consequent on the transfer of the horses, for income tax purposes some figure ought to be brought into the stud farm

accounts as a receipt. The market value of the horses was considerably in excess of their cost, and the sole ground of the taxpayer's appeal to the Special Commissioners was that the figure proper to be brought into the accounts was the cost of the transferred horses and not (as contended by the Crown) their market value on an assumed sale.

The Special Commissioners allowed the taxpayer's appeal and the Crown appealed to the court.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Grant, Q.C., Senter, Q.C., and P. M. B. Rowland for the taxpayer.

Cur. adv. vult.

July 24. **VAISEY, J.**, read the following judgment. This is an appeal by the Crown from a decision of the Special Commissioners discharging an assessment to income tax in the estimated sum of £5,000 for 1949-50 on the taxpayer, Sir Harold Wernher. The assessment was made in respect of the profits of the respondent's wife, Lady Zia Wernher, arising from a stud farm.

Lady Zia carries on the activities of a stud farm on premises at Newmarket, and those activities, that is to say, the whole of such activities, are admitted, for the purposes of the present appeal, to be "farming" activities, which, by virtue of the Finance Act, 1941, s. 10, and the Finance Act, 1948, s. 31 (1) (a), are to be treated as the carrying on of a trade of which the profits are charged to tax under Case I of sched. D. She also carries on separately other activities, namely, those of racing and training horses; such activities are neither farming nor any other kind of trading, but are purely "recreation" in character, not giving rise to any liability to tax. Lady Zia breeds horses at her stud farm for her racing stables, and from time to time transfers, or moves, horses from the farm to the stables. In the relevant year, five horses were so transferred or moved by her. In the stud farm accounts, the cost of breeding these horses had been debited, and the question is what sum in respect of the five horses ought, consequent on such transfer or move, to be brought into such accounts as a receipt or credit. The taxpayer says that the proper figure to be so brought into the accounts was the cost of breeding the transferred horses, the same figure appearing on both sides of the accounts, or, alternatively, omitted altogether. The Crown, on the other hand, contends that it should be the market value of the animals, viz., the price which they would have fetched on an assumed or notional sale, such value being considerably more than the costs of breeding them.

My decision in this case is based on the fact that it is, in my judgment, indistinguishable in principle from an earlier decision, that of **MACNAGHTEN, J.**, in *Watson Bros. v. Hornby* (1). Counsel for the taxpayer now admits this, but contends that that case ought not to be followed on the grounds (i) that it was plainly wrong, and (ii) that it was irreconcilable with the decisions of the Court of Appeal in *Laycock v. Freeman*, *Hardy & Willis, Ltd.* (2) and *Briton Ferry Steel Co., Ltd. v. Barry* (3). I am not altogether satisfied on either point, but taking the second one first it seems to me that the statements in the two latter cases on which counsel relies (to which I will refer in a moment) ought not necessarily to be treated as axiomatic, but rather as being of general though not universal application. Those two cases both dealt with the question of succession to discontinued businesses, and there is no doubt that the judgments in each case were based on the general principle that it is not legitimate to charge a man with the notional profits of a notional sale made or assumed to be made by himself to himself. In the *Briton Ferry* case (3), **SIR WILFRID GREENE, M.R.**, said ([1939] 4 All E.R. 546):

"It is not legitimate, in my view, to apply [r. 11 (2) of sched. D, Cases I and II] in such a way as to introduce some element of notional profit,

with the result of charging the taxpayer in respect of a profit which he has never realised.”

A I turn at once to *Watson Bros. v. Hornby* (1), which, in my view, governs the present case. The facts were as follows. The appellants carried on the business of poultry breeders and dealers. In addition to keeping birds on their farm for laying purposes, they had a hatchery which produced chicks primarily for sale as “day-old chicks”, although some were transferred to brooder houses and became part of the stock on the farm. In accordance with the decision in *Long v. Belfield Poultry Products, Ltd. Thornber Bros., Ltd. v. Macinnes* (4), the appellants were assessed to income tax for the years 1931-32 to 1934-35 under sched. D in respect of the profits of the hatchery part of their business, and under sched. B in respect of the profits of the farm. On appeal against the assessment under sched. D, the appellants contended that, in computing B the profits of the hatchery, the day-old chicks transferred to the farm should be credited as stock at the average price at which they were sold, and could have been bought, in the open market, viz., 4d. per chick, and that the difference between that price and the admitted cost of production of each saleable day-old chick, 7d., was an allowable loss. The Crown contended that the hatchery and the farm were two activities of the same person who could not make a loss C by transferring from one department to the other, that no allowance could be given for an unrealised loss, and that the chicks should be credited to the hatchery account at production cost. The general commissioners accepted the Crown’s contention. It was held that in the notional sale between the hatchery and the farm, which should be treated for the purpose as separate entities, the price to be credited was the “reasonable price” laid down by s. 8 of the D Sale of Goods Act, 1893, and that on the admitted evidence the reasonable price must be the market price of 4d. per chick. Note that the decision was (i) that a notional sale must be assumed between the two businesses of Messrs. Watson Brothers and (ii) that the two businesses must be treated for the purpose of the notional sale as separate entities.

E Obviously that decision could not be reconciled with the two cases in the Court of Appeal if the proposition on which those cases were based is universally and in all circumstances valid. The commissioners thought that the decision was distinguishable on the following ground:

F “That in that case there were for income tax purposes two businesses, namely, a farm (then assessed under sched. B) and a hatchery (assessed under sched. D) and stock was transferred from the hatchery to the farm and became stock in trade of the latter . . . In the present case, the horses were simply taken out of the stock of Lady Zia’s stud farm and did not become stock in trade of any other business.”

G With respect, I cannot see that this is a true distinction. The justification for departing in *Watson Bros. v. Hornby* (1) from the general principle that a man cannot trade with himself, buy from himself, sell to himself, and make notional profits out of himself, was obviously that the Income Tax Act, 1918, itself had, by splitting the personality of the taxpayer, and putting the two parts of him into different schedules, made such a notional dichotomy inevitable. If that is the explanation, I cannot see why a similar consequence should not follow from the splitting of Lady Zia’s activities between farming, which is H taxable, and racing, which is not. I am by no means convinced that *Watson Bros. v. Hornby* (1) was wrongly decided, and I think that it is my duty to follow it.

I was very much impressed by the arguments of counsel for the taxpayer, and apart from authority I might well have accepted them, though the point is, on any view of the matter, a doubtful and difficult one.

It is not necessary for me to refer in detail to the other cases to which my attention was directed. The Crown’s contentions are supported by the authority

of *Inland Revenue Comrs. v. Wm. Ransom & Son, Ltd.* (5). On the general principle that the notion of a man trading with himself is not an admissible conception, see *Dublin Corpn. v. M'Adam (Surveyor of Taxes)* (6). From the judgment in that case I may quote what PALLES, C.B., said (2 Tax Cas. 397):

"No man, in my opinion, can trade with himself; he cannot, in my opinion, make, in what is its true sense or meaning, taxable profit by dealing with himself . . ."

This principle is unexceptionable in itself, but the legislature itself has, in my view, made inevitable some invasion of it. I must allow this appeal.

Case remitted to commissioners.

Solicitors: *Solicitor of Inland Revenue; Baylis, Pearce & Co., agents for Stevens & Bolton, Farnham, Surrey (for the taxpayer).*

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

TRAVERS v. HOLLEY AND HOLLEY.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), June 17, 18, 19, July 14, 1953.]

Divorce—Foreign decree—Decree granted to wife in New South Wales on ground of husband's desertion—Acquirement by husband of foreign domicile after commencement of desertion—Recognition of decree by English court—New South Wales Matrimonial Causes Act, 1899, No. 14, s. 16 (a)—Matrimonial Causes Act, 1937 (c. 57), s. 13.

By the New South Wales Matrimonial Causes Act, 1899, No. 14, s. 16: "Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards . . . may present a petition to the court praying that her marriage may be dissolved on one or more of the grounds following—(a) that her husband has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left her continuously so deserted during three years and upwards and no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason only of her husband having thereafter acquired a foreign domicile."

In 1937 the parties left England and went to New South Wales. In 1940 the husband left the wife at Sydney and went to Armidaile in New South Wales. Subsequently, he joined the Australian armed forces and in 1943 or 1944 he obtained a transfer to the British forces. By a decree nisi pronounced on May 1, 1944, and made absolute on Nov. 13, 1944, the Supreme Court of New South Wales, in proceedings under s. 16 (a) of the New South Wales statute of 1899, instituted by the wife in 1943, which the husband did not defend, granted the wife a decree of divorce on the ground that the husband had deserted her in 1940. On May 5, 1945, the wife married the co-respondent. In 1952 the husband petitioned for a decree of divorce from the wife on the ground of her adultery with the co-respondent. In her answer the wife pleaded that her marriage with the husband had been dissolved by the court in New South Wales in 1944. The husband contended that that court had never had jurisdiction to deal with the marriage since he, and, consequently, his wife, had never acquired a domicile in New South Wales.

HELD: (i) (JENKINS, L.J., dissentiente) on the evidence, in 1940, when the desertion commenced, the husband had acquired a domicile of choice in New South Wales, and, therefore, the court in New South Wales had jurisdiction to entertain the wife's suit for dissolution of the marriage.

- (ii) the principle laid down in *Le Mesurier v. Le Mesurier* ([1895] A.C. 528), that the domicile of both spouses at the date of the institution of proceedings was the sole test of jurisdiction in divorce must be applied in the light of the provisions of s. 13 of the Matrimonial Causes Act, 1937, which corresponded substantially with s. 16 (a) of the New South Wales Matrimonial Causes Act, 1899, in that it gave the courts of this country jurisdiction in divorce in cases where a wife had been deserted by her husband who was immediately before the desertion domiciled in England or Wales, notwithstanding that the husband had changed his domicile since the desertion; the provisions of s. 16 (a) of the New South Wales Act could not, therefore, be said to be peculiar to the forum of that country, and where a rule of municipal law was not peculiar to the forum of one country, but corresponded with the law of another country, that municipal law could not be said to trench on the interests of the other country; where, as in this case, there was in substance reciprocity it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they themselves claimed; and, therefore, assuming that the husband had abandoned his domicile of choice in New South Wales on a date after the desertion and before the institution by the wife of the proceedings in 1943, the court would recognise the decree granted to the wife by the court of New South Wales.

Principle in *Le Mesurier v. Le Mesurier* ([1895] A.C. 528), considered.

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 843.

D Cases referred to:

- (1) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest 422, 885.
- (2) *Bell v. Kennedy*, (1868), L.R. 1 Sc. & Div. 307; 11 Digest 312, 36.
- (3) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest 312, 38.
- (4) *Bowie or Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588; 99 L.J.P.C. 134; 143 L.T. 388; Digest Supp.
- (5) *Donaldson v. M'Clure*, (1857), 20 D. 307.
- (6) *Huntly (Marchioness) v. Gaskell*, [1906] A.C. 56; 75 L.J.P.C. 1; 94 L.T. 33; 11 Digest 319, 84.
- (7) *Aikman v. Aikman*, (1861), 4 L.T. 374; 3 Macq. 854; 11 Digest 312, 34.
- (8) *Gatty (F. A.) & Gatty (P. V.) v. A.-G.*, [1951] P. 444; 2nd Digest Supp.
- (9) *A.-G. for Alberta v. Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; Digest Supp.
- (10) *Armitage v. A.-G.*, *Gillig v. Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest 430, 941.
- (11) *Ogden v. Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 11 Digest 334, 228.
- (12) *H. v. H.*, [1928] P. 206; 97 L.J.P. 116; 139 L.T. 412; *subsequent proceedings: sub nom. Horn v. Horn*, (1929), 142 L.T. 93; Digest Supp.

APPEAL by the respondent from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Dec. 9, 1952.

- H By a decree nisi pronounced on May 1, 1944, and made absolute on Nov. 13, 1944, the Supreme Court of New South Wales, on the petition of Cynthia Marjorie Travers (the wife), dissolved the marriage between her and Eaton Hugh Brereton Travers (the husband) on the ground that the husband had deserted the wife for a continuous period of three years and upwards. The husband did not defend the petition. On May 5, 1945, the wife married in the State of Michigan, U.S.A., George Holley, a citizen of the United States of America, and on Mar. 15, 1949, the husband married Thelma Taylor in

Bombay, India. In 1952 the husband presented a petition in the Divorce Division of the High Court for a decree nisi dissolving the marriage on the ground of his wife's adultery with George Holley, who was cited as co-respondent, and he asked for the discretion of the court in respect of his adultery with Thelma Taylor. On the hearing of the petition by Mr. Commissioner GRAZEBROOK he challenged the validity of the decree which had been granted to the wife in New South Wales, contending that neither he nor his wife had ever acquired a domicile of choice in New South Wales, and that, therefore, A the court of New South Wales had no jurisdiction.

The learned commissioner held that the New South Wales decree was invalid on the ground that the evidence before the court did not suffice to prove that the husband had ever acquired a domicile of choice in New South Wales in substitution for his English domicile of origin. He also rejected a contention by the wife that the husband was estopped from denying the validity of the B New South Wales decree, and he pronounced a decree nisi in the husband's favour. The wife appealed against that decree, and she contended that she and the husband had acquired a domicile of choice in New South Wales and that, therefore, the New South Wales decree pronounced in her favour was valid.

Ifor Lloyd, Q.C., and Hollins for the husband. C

Phillimore, Q.C., and Douglas Potter for the wife.

Cur. adv. vult.

July 14. The following judgments were read.

SOMERVELL, L.J. [after stating the facts and holding on the evidence that the husband had acquired a domicile of choice in New South Wales]: D Section 16 of the New South Wales Matrimonial Causes Act, 1899, No. 14, provides as follows:

"Any wife who at the time of the institution of the suit has been domiciled in New South Wales for three years and upwards (provided she did not resort to New South Wales for the purpose of such institution) may present a petition to the court praying that her marriage may be dissolved on one or more of the grounds following—(a) that her husband has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left her continuously so deserted during three years and upwards and no wife who was domiciled in New South Wales when the desertion commenced shall be deemed to have lost her domicile by reason E only of her husband having thereafter acquired a foreign domicile."

The relative date, therefore, for the purpose of that court was the date when the desertion commenced, and that, as alleged by the wife and found by the court, was in August, 1940. Apart, of course, from a special provision of this kind the relevant date under our law to consider the domicile is the date of the commencement of the proceedings. That would be in the present case Aug. 23, 1943. Since 1937 our law has provided that in the case of a deserted wife the date of the desertion is the relevant date. Section 13 of the Matrimonial Causes Act, 1937, reads as follows: G

"Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the [Supreme Court of Judicature (Consolidation) Act, 1925], notwithstanding that the husband has changed his domicile since the desertion or deportation." H

Although the wording is different, the result for present purposes is the same as the provisions of the New South Wales Act.

On principle it seems to me plain that our courts in this matter should recognise a jurisdiction which they themselves claim. I did not myself really understand on what grounds it was submitted that the result should be otherwise. If it is necessary to refer to authority, there is a sentence in *Le Mesurier v. Le Mesurier* (1) ([1895] A.C. 528) which is material. It is there said:

A “ . . . a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.”

B Applying this principle, the provisions of the New South Wales Act of 1899, are since 1937 no longer, so far as our courts are concerned, peculiar to its forum, but are common to its forum and our own. As I have come to this conclusion, it is unnecessary to consider the difficult matters which, to my mind, would have arisen if the decree in New South Wales was invalid. It is on the face of it very difficult to see how the husband can claim relief as for a matrimonial offence in respect of the intercourse with Mr. George Holley. Apart from any question of estoppel, the position is obviously very unusual. I desire to express C no opinion, but merely to indicate that, speaking for myself, I think it might well have been argued that there was conduct conducing or that the discretion of the court should not be exercised in his favour. For these reasons I would allow the appeal.

D JENKINS, L.J., stated the facts and continued: It is not in dispute that the New South Wales decree was made without jurisdiction, and was, therefore, invalid, if the husband never acquired a domicile of choice in New South Wales, and that it was, further, not in dispute that the onus of proving the abandonment of a domicile of origin in favour of a domicile of choice was on the person alleging the change of domicile, and that to discharge that onus it must be clearly shown that the individual whose domicile was in question removed from the country in which he had his domicile of origin to the country alleged to E have become his chosen place of domicile with a definite and fixed intention (what LORD WESTBURY called “a fixed and settled purpose” in *Bell v. Kennedy* (2) (L.R. 1 Sc. & Div. 321), and the EARL OF HALSBURY, L.C., “a fixed and determined purpose” in *Winans v. A.-G.* (3) ([1904] A.C. 288), then or subsequently formed of making the latter his permanent home in substitution for and to the exclusion of the former.

F I find it, for my part, impossible to hold consistently with the authorities that the evidence here suffices to establish that the husband had at any time before the presentation of the wife’s petition in the New South Wales court acquired a domicile of choice in New South Wales in substitution for his English domicile of origin. Change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct from a change from G one domicile of choice to another), has always been regarded as a serious step which is only to be imputed to a person on clear and unequivocal evidence. For this proposition I need only refer to LORD MACNAGHTEN’S speech in *Winans v. A.-G.* (3) ([1904] A.C. 291), where, referring with approval to LORD WESTBURY’S speech in *Bell v. Kennedy* (2) (L.R. 1 Sc. & Div. 321), he said:

H “Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote LORD WESTBURY again, a ‘fixed and settled purpose’. ‘And’, says his Lordship, ‘unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicile of origin continues’. So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a

domicil of choice! And rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil ”,

and to LORD BUCKMASTER'S speech in *Bowie or Ramsay v. Liverpool Royal Infirmary* (4) ([1930] A.C. 590), where he said:

“ The law upon the matter is settled. A domicil of origin can be changed and in its place a domicil of choice acquired, but the alteration is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by LORD CURRIEHILL in *Donaldson v. M'Clure* (5), in words unnecessary to repeat, which were expressly approved by LORD HALSBURY in *Marchioness of Huntly v. Gaskell* (6). To acquire a new domicil it is essential, in the words of LORD WENSLEYDALE in *Aikman v. Aikman* (7), to show that the person who is said to have changed his domicil ‘has abandoned his former domicil animo et facto ’.”

In the present case the evidence from which we are invited to infer the alleged change of domicil seems to me to be wholly inconclusive, even if the essential requirement of intention to settle permanently could be held to be satisfied by proof of a decision by the husband to settle permanently in some part or other unspecified of Australia, as distinct from a decision on his part to settle permanently in the particular State (that is, New South Wales) in which the disputed jurisdiction was exercised on the footing that he was domiciled there. If it is necessary (as I take it to be) to prove an intention on the part of the husband to settle permanently in New South Wales as distinct from any other part of Australia, there is, so far as I can see, no evidence at all of such intention, beyond the bare fact of his actual residence in that State, in the succession of temporary abodes above described, from January, 1938, to February, 1941, which, in my view, clearly cannot suffice.

The learned commissioner in the course of his judgment discussed the question whether what had to be proved in order to give the courts in New South Wales jurisdiction based on domicil was a domicil of choice in Australia generally or a domicil of choice in the particular State of New South Wales, and held it to be the latter, citing *F. A. Gatty & P. V. Gatty v. A.-G.* (8) (as to the jurisdiction of the courts of particular States of the U.S.A.) and *A.-G. for Alberta v. Cook* (9) (as to the jurisdiction of the courts of particular provinces of Canada) and expressing the view that the same principles should be applied with respect to New South Wales. As at present advised, I see no reason to differ from him in this, but, as he not only found it impossible to hold in the present case that there was ever a domicil of choice in New South Wales, but also said that he was not satisfied that a domicil of choice in Australia (that is, in Australia generally as distinct from the particular State) had been established, and as I agree with him on both points, it is unnecessary to pursue the question further. It follows that, in my opinion, the learned commissioner was right in his conclusion that the decree of the New South Wales court was made without jurisdiction, and was, therefore, invalid.

[HIS LORDSHIP said that, in his opinion, the decree granted to the husband, which was under appeal, ought to be allowed to stand. The husband's conduct in permitting the New South Wales decree to be made in default of defence and in acting on the footing that it was a valid decree by himself re-marrying did not amount to conduct conducing to the wife's adultery. He continued:] For these reasons I would, for my part, dismiss the appeal. My brethren take a different view as they have found it possible to hold on the evidence that

the husband had acquired a domicile of choice in New South Wales before the presentation of the wife's petition. Beyond expressing my regret that I have found myself unable to follow them in so holding, I need only add that I would not dissent from their conclusion to the effect that, on the footing that the husband had acquired a New South Wales domicile, the fact, if it was the fact, that, while in desertion from her and before the presentation of her petition, he abandoned his New South Wales domicile, and reverted to his English domicile of origin, should not be held to have deprived the New South Wales court of jurisdiction, having regard to the terms of s. 16 (a) of the New South Wales Matrimonial Causes Act, 1899, and s. 13 of our own Matrimonial Causes Act, 1937.

HODSON, L.J., stated the facts, held that the husband had acquired a domicile of choice in New South Wales, and continued: The husband has contended that, even on a finding of fact that he had previously settled in Australia with the intention of remaining there permanently, he is entitled to succeed because the New South Wales court would have no jurisdiction in the eyes of the courts of this country to dissolve the marriage unless at the date of the institution of the proceedings in New South Wales both parties were there domiciled. It is not, I think, necessary to form any conclusion as to when the husband abandoned his domicile of choice in Australia since I think that, even if he had done so at some time before the date of the institution of the New South Wales proceedings and after the date of the desertion, the husband's contention fails.

The argument is that domicile of both spouses at the time of the proceedings is the sole test of jurisdiction in divorce: see *Le Mesurier v. Le Mesurier* (1), which unequivocally established this test. Since the decision in this case the English courts have not recognised a decree of a foreign court unless the parties were at the time of the proceedings domiciled in the jurisdiction of the foreign court, or, if domiciled elsewhere, such decree would be recognised by the law of the domicile: *Armitage v. A.-G.*, *Gillig v. Gillig* (10). For this purpose New South Wales is a foreign court. It is contended that, the husband not being domiciled in New South Wales in August, 1943, the courts of this country will not recognise the decree of the court of that State. I think that this argument is not valid at the present day. For many years after the decision in *Le Mesurier's* case (1) the position was that the courts of this country only exercised jurisdiction in cases where both parties were domiciled here. Following certain dicta of **SIR GORELL BARNES, P.**, in *Ogden v. Ogden* (11) ([1908] P. 82), there was thought to be an exception to this rule in the case of wives deserted by husbands who at the time of the desertion were domiciled in England. It was thought that they might obtain a decree in this country although this country was not the true domicile of the husband. In undefended cases these courts did not inquire what had happened to husbands after desertion in such circumstances either because it was thought they were estopped from denying an English domicile or because the burden was on them to show an abandonment and they had done nothing to discharge the burden. When the question was raised in a defended case, however, the decision was against the view that there was any exception to the rule: *H. v. H.* (12). Indeed, the supposed exception had been adversely criticised in *A.-G. for Alberta v. Cook* (9).

The position has, however, been radically altered by statute. By the Matrimonial Causes Act, 1937, s. 13, it was provided that

"Where a wife has been deserted by her husband . . . and the husband was immediately before the desertion . . . domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings"

concerned with divorce. Since 1937 this exception has been largely extended, first, by the Matrimonial Causes (War Marriages) Act, 1944 (a temporary war measure), and later by the Matrimonial Causes Act, 1950, s. 18. It is unnecessary

to consider the effect of these later statutory provisions since, at the material time when the New South Wales proceedings were instituted, the Act of 1937 was in force and s. 13 of this Act corresponds in substance with the provision under which the New South Wales court claimed jurisdiction between the parties to this appeal. It seems to me, therefore, that Parliament has cut the ground from under the argument put forward on behalf of the husband. If English courts will only recognise foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.

LORD WATSON in the *Le Mesurier* case (1) used the following language
[1895] A.C. 528):

" . . . a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority."

Conversely, it seems that where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves. The principle laid down and followed since the *Le Mesurier* case (1) must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.

Appeal allowed.

Solicitors: *L. A. E. Stiles* (for the husband); *Patersons, Snow & Co.*, agents for *Mee & Co.*, Retford (for the wife).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

LOMAX (INSPECTOR OF TAXES) v. NEWTON.

[CHANCERY DIVISION (Vaisey, J.), July 17, 21, 1953.]

Income Tax—Deduction against profits—“Expenses incurred wholly, exclusively, and necessarily in the performance of . . . duties”—Territorial Army officer—Mess subscription and expenses, camp expenses, cost of necessary attendance at dances—Excess cost over allowance for hotel expenses at conferences and exercises—Income Tax Act, 1918 (c. 40), Rules Applicable to sched. E, r. 9.

The following expenses of a Territorial Army officer were *held* not incurred “wholly, exclusively, and necessarily in the performance of his duties” as an officer within the meaning of r. 9 of the Rules Applicable to sched. E to the Income Tax Act, 1918, and, therefore, not to be deductible in arriving at the emoluments of his office for income tax purposes under the schedule:—An annual mess subscription, which all officers were required to pay and which was used to provide a mess, but excluded the cost of wine and food, and the officer’s share of the cost of entertaining official regimental guests out of the mess funds, both being referable to personal and social obligations rather than to the performance of official duties; payments to a batman at week-end and annual camps and the cost of hire of camp furniture, the evidence submitted being insufficient to establish the claim; and the cost of tickets at sergeants’ and other ranks’ dances, sergeants’ annual dinner club, etc., these expenses being incurred from tradition and custom and accepted voluntarily and containing elements of personal choice and benefit.

The cost of hotel accommodation in excess of detention and ration allowances incurred by such an officer at conferences and exercises compulsorily attended was so incurred, and was, therefore, deductible, but only charges for “necessaries” should be included, and any “extras” involving a measure of extravagance and personal indulgence should be excluded.

Nolder v. Walters (1930) (15 Tax Cas. 380), applied.

FOR EXPENSES DEDUCTIBLE FROM THE EMOLUMENTS OF AN OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, p. 222, para. 448; and FOR CASES, see DIGEST, Vol. 28, pp. 88-90, Nos. 519-535.

FOR THE INCOME TAX ACT, 1918, RULES APPLICABLE TO SCHED. E, r. 9, see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 179.

Cases referred to:

- (1) *Nolder v. Walters*, (1930), 15 Tax Cas. 380; Digest Supp.
- (2) *Bolam v. Barlow*, (1949), 31 Tax Cas. 136; 2nd Digest Supp.
- (3) *Ricketts v. Colquhoun*, [1926] A.C. 1; 95 L.J.K.B. 82; 134 L.T. 106; 90 J.P. 9; 28 Digest 88, 519.
- (4) *Charlton v. Corke*, (1890), 17 R. (Ct. of Sess.) 785; 27 Sc.L.R. 647; 28 Digest 89, p.
- (5) *Jardine v. Gillespie* (*Surveyor of Taxes*), (1906), 5 Tax Cas. 263; 28 Digest 90, q.

CASE STATED by the General Commissioners of Income Tax for the division of Upper Strathforth and Tickhill, Yorkshire.

The taxpayer appealed against an assessment made on him for 1950-51 under sched. E to the Income Tax Act, 1918, in the sum of £54, being the amount of his pay as an officer in the Territorial Army. He held the rank of major, being second in command of the Hallamshire battalion of the York and Lancaster Regiment stationed in Sheffield. He claimed that he was obliged to spend sums on an annual mess subscription, mess expenses, camp expenses, hotel expenses, and certain dance tickets wholly, exclusively and necessarily in the performance of his duties as an officer and that such sums should be deducted from his emoluments as an officer for tax purposes. The Crown

contended that the only expenses which the taxpayer would have incurred wholly, exclusively and necessarily in the performance of his duties were those which were in fact provided by the government free of charge, viz., travel to and from camp or other places of training, rations and sleeping quarters, or allowances in lieu thereof; that the additional expenses claimed were incurred mainly from tradition and custom and were accepted by the officers of the unit; and that the expenses claimed contained an element of personal choice and private benefit and were not incurred wholly, exclusively and necessarily in the performance of the duties. The commissioners held that the expenses were incurred wholly, exclusively and necessarily in the performance of the taxpayer's duties as an officer, but that certain other expenses which it was also claimed were deductible were not so incurred. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Senter, Q.C., and H. B. Magnus for the taxpayer.

Cur. adv. vult.

July 21. **VAISEY, J.**, read the following judgment. The respondent to this appeal on the part of the Crown is a Major Newton, who was a Territorial officer, second in command of the Territorial battalion of the York and Lancaster Regiment stationed at Sheffield. He was represented at a hearing before the General Commissioners for Income Tax by his commanding officer, a Lieut.-Colonel Webster. The claim of the taxpayer was that certain items of expenditure had been incurred by him, in the words of the statute

"wholly, exclusively, and necessarily in the performance of [his] duties"

as an officer of the said battalion, so as to bring him in regard to that expenditure within the provisions of r. 9 of the Rules Applicable to sched. E to the Income Tax Act, 1918. Before coming to the particular items, I would observe that the provisions of that rule are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively, incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements of the rule, without specifying the detailed facts on which the finding is based. An expenditure may be "necessary" for the holder of an office without being necessary to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are, indeed, stringent and exacting. Compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that, when examined, they are found to come to nearly nothing at all.

The items of expenditure in this case were originally eleven in number. Of these, one was withdrawn and four were disallowed by the commissioners. I have to deal with the remaining six, which were found by the commissioners to have been incurred by the taxpayer wholly, exclusively, and necessarily in the performance of his duties as a major in the Hallamshire battalion, and the question is whether there was evidence before the commissioners on which they could properly have come to that decision. The contention of the Crown in this appeal is that there was no such evidence, and that all these items should have been disallowed.

The first item, "Annual mess subscription, £8", was a payment which all officers in this battalion were required to make. The proceeds of the subscriptions were used to "provide a mess". The taxpayer's contribution was said not to include any part of the cost of the wine or food supplied to the officers

No mention, however, is made of other amenities, such as arm-chairs, cigarettes and stationery. On those facts—and there were no others—I can find no evidence on which it was possible for the commissioners to find that this £8 was expended wholly, or, indeed, at all, in the performance of the taxpayer's duties as an officer.

Secondly, we have: "Share of mess guests' expenditure for the year, £9 16s." which is explained by the statement that the cost of entertaining official regimental guests was shared by the officers in amounts fixed by reference to their ranks. No doubt, the taxpayer was under an obligation to make his proper contribution to this as well as to the mess funds. But both payments must, in my judgment, be referable more to his personal and social obligations than to the performance of his official duties. It is, to my mind, irrelevant to say that he would have been asked to resign his commission if he had refused to incur this expenditure. The same consequence would presumably have ensued if he had omitted to procure and wear decent civilian clothing when not in uniform, but that consideration would not have justified an allowance under the rule in respect of his ordinary tailor's bill.

On the third item, "Payments to batman at week-end and annual camps, £3 10s.", and the fourth item, "Hire of camp furniture, £1 5s.", I have felt a good deal of hesitation because (unlike the first and second items) I think that evidence to justify these allowances might well have been forthcoming. But the difficulty in the taxpayer's way is the insufficiency of the evidence on these matters, and, as the onus of proof was on him, I cannot see that the commissioners could properly have allowed these items. It was not enough for him merely to say that the expenditure was essential to the performance of his duties. The test is whether it was made in the performance of those duties. The taxpayer did state in evidence that it was so made, and his evidence was corroborated in general terms by Lieut.-Colonel Webster, but I have only my own imperfect knowledge on such points as: (a) what the duties of a batman are, (b) for what services he receives pay from the officer employing him, (c) what is the appropriate amount of such payment, (d) whether the payments were really in the nature of a gratuity or "tip", (e) what camp furniture has to be hired, and (f) what is the proper cost of hiring it. I must disallow these two items, though I do rather regret having to do so.

The fifth item is: "Amounts paid for hotel accommodation at conferences and exercises in excess of detention and ration allowances—Harrogate, four days, £3; Buxton, three days, £3". This is explained as being the actual cost to the taxpayer over and above the ration and detention allowance granted. No doubt, his attendance at these conferences and exercises was compulsory, and he had no choice, I am told, of the hotels at which he had to put up, and, no doubt, the supplementing of the prescribed allowances is a serious burden on a Territorial officer. *Nolder v. Walters* (1) comes rather near to this point. I will read the headnote (15 Tax Cas. 380):

"An aeroplane pilot employed by a limited company claimed deductions in the assessment of his remuneration to income tax under sched. E in respect of various items of expenditure. Held, that no deduction could be allowed in respect of (a) the upkeep of a motor car to convey the pilot between the aerodrome and his home, or (b) a telephone at his home: but that a decision of the general commissioners allowing a deduction for an excess of actual subsistence expenses when away from home on duty over subsistence allowance granted by the company could not be disturbed as being erroneous in law."

My chief difficulty as regards this item is the paucity of the evidence. The commissioners have, however, found as a fact that this was expenditure wholly, exclusively, and necessarily incurred in the performance of the taxpayer's duties, and I cannot say that they were wrong in bringing this fifth item within

the rule. *Bolam v. Barlow* (2) and *Ricketts v. Colquhoun* (3) may be rather difficult to reconcile with *Nolder v. Walters* (1), but I decide this matter on the ground that I must not disturb a finding of fact which was a possible finding both as to quantum and otherwise. I am by no means sure that I should myself have decided this point as the commissioners did. While I feel bound to regard this item of £6 as having been admitted on a finding of fact which I cannot disturb, I venture to recommend that, as a precedent in other cases, it should be applied with very great caution. A hotel bill is certain to include charges for "extras" involving some measure of extravagance and personal indulgence as well as charges for necessities, and it is really only the latter which should have been taken into consideration by the commissioners in the present case. In view of their finding, however, I suppose that I must assume that that is what they did. A

The sixth and last item is: "Cost of tickets at sergeants' and other ranks' dances, sergeants' annual dinner club, etc., £2 15s." I agree that participation in the social life of the battalion was part of the social duties of the taxpayer, but was it any part of his official duties? Was he at the sergeants' dance in the proper sense of the expression "on duty"? I think not. I am quite unable to see how this item can be brought within the rule. I apply to it a description from the contentions of the Crown as set out in the Case, and say that these sums are expenses incurred from tradition and custom, accepted voluntarily by the officers of the unit and containing elements of personal choice and benefit, and, therefore, not within the rule. B C

In addition to the cases which I have already mentioned, other decisions were cited to me, but none of them, in my judgment, assists the taxpayer or me. *Charlton v. Corke* (4), was a case of a minister in the Scottish church whose position was not, perhaps, very closely analogous to that of a Territorial officer. All I would say about that decision is that I find it difficult to reconcile with either *Ricketts v. Colquhoun* (3) or *Bolam v. Barlow* (2). Another case to which similar considerations apply is *Jardine v. Gillespie (Surveyor of Taxes)* (5). I must allow this appeal, except as to £6 (item No. 5), calling attention, not for the first time, to the extreme and possibly unintentional narrowness of the rule, and also, if I may venture to do so, to the question whether the allowances to Territorial officers in such matters as those to which the present case relates do not require to be somewhat increased. I am told that the Crown has undertaken to pay the taxpayer's costs in this appeal, and I will direct that such costs be taxed, as between solicitor and client, if that be the arrangement. D E F

Appeal allowed generally.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Ellis, Peirs & Co.*, agents for *Pye-Smith & Son*, Sheffield (for the taxpayer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

GRIFFITHS (INSPECTOR OF TAXES) v. MOCKLER.

[CHANCERY DIVISION (Vaisey, J.), July 17, 21, 1953.]

Income Tax—Deduction against profits—“Expenses incurred wholly, exclusively, and necessarily in the performance of . . . duties”—Army officer—Annual mess subscription—Income Tax Act, 1918 (c. 40), Rules Applicable to sched. E, r. 9.

A An annual mess subscription to defray the ordinary expenses of the mess, which is a compulsory charge against every officer of the army and refusal to pay which would result in disciplinary action, is not money expended “wholly, exclusively, and necessarily in the performance of” the duties of the officer within the meaning of r. 9 of the Rules Applicable to sched. E to the Income Tax Act, 1918, and is not deductible in arriving at the emoluments of the officer under the schedule.

B FOR EXPENSES DEDUCTIBLE FROM THE EMOLUMENTS OF AN OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, p. 222, para. 448; and FOR CASES, see DIGEST, Vol. 28, pp. 88-90, Nos. 519-535.

FOR THE INCOME TAX ACT, 1918, RULES APPLICABLE TO SCHED. E, r. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 179.

C Cases referred to:

(1) *Lomax (Inspector of Taxes) v. Newton*, ante, p. 801.

(2) *Ricketts v. Colquhoun*, [1926] A.C. 1; 95 L.J.K.B. 82; 134 L.T. 106; 90 J.P. 9; 28 Digest 88, 519.

(3) *Simpson v. Tate*, [1925] 2 K.B. 214; 94 L.J.K.B. 817; 133 L.T. 187; 9 Tax Cas. 314; 28 Digest 89, 527.

D (4) *Nolder v. Walters*, (1930), 15 Tax Cas. 380; Digest Supp.

(5) *Blackwell v. Mills*, [1945] 2 All E.R. 655; 174 L.T. 217; 26 Tax Cas. 468; 2nd Digest Supp.

CASE STATED by the General Commissioners of Income Tax for the division of Leyland, Lancashire.

E The taxpayer appealed against an assessment to income tax made on him for 1950-51 under sched. E to the Income Tax Act, 1918, on the ground that a mess subscription of £11 7s. payable by him ought to have been deducted under r. 9 of the Rules Applicable to sched. E, as money expended wholly, exclusively, and necessarily in the performance of his duties as an army officer. The Crown contended that the payment was not an expense so incurred and that it provided to the taxpayer an element of private benefit and its deduction was, therefore, prohibited by r. 3 (b) of the Rules Applicable to Cases I and II of sched. D, as applied to this case by the invocation of s. 208 of the Income Tax Act, 1918. The commissioners held that the sum was money expended wholly, exclusively, and necessarily in the performance of the taxpayer's duty as an officer. The Crown appealed.

G *The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills* for the Crown.

The taxpayer did not appear.

Cur. adv. vult.

H July 21. VAISEY, J., read the following judgment. The respondent to this appeal was a major in the Royal Army Pay Corps. The appropriate general commissioners have found and held that the amount of his annual mess subscription in the year of assessment 1950-51 was money expended wholly, exclusively, and necessarily in the performance of his duty as an officer within the meaning of r. 9 of the Rules Applicable to sched. E to the Income Tax Act, 1918. The sum in question is £11 7s.

It appears that under the King's Regulations in force at the relevant time every officer must be a member of his regimental mess, subscriptions to which

were: (a) annual subscriptions to defray the ordinary expenses of the mess and (b) monthly subscriptions to meet incidental expenses. The subscription under (a) is a compulsory charge against every officer, and the proper amount in the case of the taxpayer was the sum which I have mentioned. The Crown appeals against the finding of the commissioners, which was based merely on the facts which I have stated, with the further fact that refusal to pay the annual subscription would have resulted in disciplinary action being taken against the taxpayer. They accepted his contention that the expense in question (namely, the payment of the £11 7s.) was incurred "wholly, exclusively, and necessarily in the performance of [his] duties".

The words of the statute which I have just quoted are notoriously narrow in their application. They require that the expenditure must not only be necessary but must also relate to the performance of the taxpayer's duties "exclusively". To that aspect of the matter the commissioners do not appear to have directed their attention, or at any rate not to have given any, or sufficient, weight. The Crown pointed out at the hearing that the payment provided an element of private benefit to the taxpayer, a fact which was, indeed, obvious and incontrovertible. I would venture to make this observation respecting cases such as the present—that it is not enough for the commissioners to be able to find that a particular expense is incurred wholly, exclusively, and necessarily in the performance of the official duty, that is to say, merely setting out the statutory expression. They should surely find the exact facts on which their conclusion is based. The onus is on the taxpayer to bring himself within the statutory words, and it is the duty of the commissioners to state with sufficient particularity the facts on which they find, if they do find, that he has succeeded in his attempt. It is not the function of this court to disturb a finding of fact unless such finding is a mere asseveration, unsupported by properly reasoned considerations. But in the present case the finding is no more than a verbal affirmation of the taxpayer's submissions and contentions. On the authority of the cases to which the commissioners were referred, and of the case which I have just decided (*Lomax (Inspector of Taxes) v. Newton* (1)) I must allow this appeal and reverse the finding of the commissioners.

The Crown do not ask for costs, and, indeed, would be willing to defray any that the taxpayer has incurred. If there are any, I will order a taxation on a solicitor and client basis if that is agreed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

R. v. WELSHPOOL JUSTICES. *Ex parte* HOLLEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 28, 30, 1953.]

Justices—Procedure—Retirement—Shorthand writer sent for by justices—Part of shorthand note read to justices—No statement in court as regards purpose for which her presence required—Presence of clerk and shorthand writer in retiring room.

A *Justices—Clerk—Shorthand writer—Presence in retiring room while justices consider decision.*

When justices retired to consider their decision on an information preferred before them by a police officer, their deputy clerk retired with them at their request to give his advice on certain points of law, and he remained in their room for substantially the whole of the retirement. Later, the justices requested a shorthand writer, who was in court, to come to their room and to bring her notebook with her, as they wished to have their impressions of part of the evidence confirmed by the shorthand note. Nothing was said in open court as to what point in the evidence required elucidation, or what part of the note was read to the justices. On their return into court, the justices announced that they convicted the defendant.

C On a motion for certiorari to quash the conviction,

HELD: (i) the justices were justified in taking the clerk to their room as they required his advice on law, and the mere fact that he remained while they were discussing the facts was not a sufficient objection to invalidate their decision.

D Per curiam: It is clear that the justices did nothing wrong in taking the clerk with them to their room as they required his advice on law, and in these circumstances we are not prepared to say, merely because he remained in the room while they were discussing the facts, that that in itself was sufficient to invalidate their decision. It is often difficult to disentangle what is purely a question of law from a question of fact, and a discussion on law must have regard to the particular facts of the case to which it is desired to apply the law.

R. v. East Kerrier JJ. Ex p. Mundy ([1952] 2 All E.R. 144), distinguished.

(ii) while it would have been better if the justices had come into open court and asked the shorthand writer to read her note on the particular point in question, in the circumstances there was nothing improper in their sending for her to come to their room, and, therefore, the conviction must stand.

G EDITORIAL NOTE. With regard to applications for certiorari to bring up to be quashed orders under the Licensing Acts practitioners will bear in mind that s. 102 of the Licensing (Consolidation) Act, 1910 (which, by s. 22 (2) of the Licensing Act, 1921, is to be construed as one with that Act), provides that no conviction or order made in pursuance of the Act of 1910 relative to any offence, penalty, fine, forfeiture, or summary order shall, if made by a court of summary jurisdiction, be removed by certiorari or otherwise into any superior court.

H AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918.

Case referred to:

(1) *R. v. East Kerrier JJ. Ex p. Mundy*, [1952] 2 All E.R. 144; [1952] 2 Q.B. 719; 116 J.P. 339; 3rd Digest Supp.

MOTION for an order of certiorari.

On Apr. 14, 1953, the applicant, Edward John Holley, was convicted by a petty sessional court sitting at Welshpool, Montgomery, of having, on Mar. 7,

1953, sold intoxicating liquor outside permitted hours, contrary to the Licensing Act, 1921, s. 4, and was fined £5. He applied for an order of certiorari to quash the conviction on the ground that (i) the deputy clerk retired with the justices when they retired to consider their decision and remained with them for substantially the whole of their retirement, (ii) a shorthand writer employed in the deputy clerk's office, who had been present in court during the hearing, was required to retire to the justices' room while they were considering their verdict, (iii) in sending for the shorthand writer and considering or checking extracts of the evidence as recorded in her notebook in the retiring room and not in open court the justices deprived the applicant of knowing what part of the evidence they were considering or checking, of checking against the note taken by the applicant's solicitor whether the evidence in question taken down by the shorthand writer was accurate, and of drawing attention to any other evidence which might have been relevant to the passages the justices were considering or checking. A B

P. L. W. Owen for the applicant.

Perrett for the justices.

Cur. adv. vult.

July 30. The following judgment of the court was read by

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of certiorari directed to the justices for the borough of Welshpool to bring up and quash a conviction of the applicant of selling intoxicating liquor out of permitted hours. The grounds on which the order is sought are irregularities at the hearing of the information in that the deputy clerk to the justices retired with them and remained in their room while they were considering the facts and that a shorthand writer was sent for by the justices and went to their room with her notebook while they were deliberating, though the applicant was not made aware of the precise purpose for which her presence was required or what the purport was of the information which she gave to the justices. From the affidavits it appears that at the hearing a question arose as to the admissibility of a letter which the applicant had written to the prosecutor. What possible objection there could have been to its admission we cannot conceive. The justices admitted it, and, so far as they were concerned, it would seem to have put an end to the matter as, if it was desired to contest its admissibility further, the remedy would have been by appeal. However, as the justices wished to have advice from the clerk on this matter, they required him to retire with them. Indeed, they say that several legal points had been raised by the defending solicitor requiring elucidation, but their affidavit does not state what they were beyond the relevancy of this letter. After an interval, it matters not for how long, the clerk came back into court and asked a young woman in his employment, who had been taking a shorthand note of the evidence, to go into the justices' room and take her notebook. In their affidavit the justices say that, after the legal points had been disposed of, they considered the evidence. They had formed certain impressions on the police evidence, but, before coming to a decision, they thought it advisable to have their impressions confirmed by the contents of the shorthand note, and the shorthand writer read to them a small portion of her notes, which confirmed their former impression. This affidavit, which is commendably frank, makes it quite clear that the clerk remained in the room while the justices were considering the facts and after he had given his advice on such matters of law as they required. It is also clear that nothing was said in open court as to what point in the police evidence required elucidation or what part of the note was read to the justices. C D E F G H

I do not think that anyone can misunderstand what the court meant by their judgment in *R. v. East Kerrier JJ. Ex p. Mundy* (1). It was that the clerk's presence in the room when the justices were deliberating should be only for

- the purpose of advising them on the law. In saying that, if they required his advice, they should send for him we did not mean, nor should I have thought there could be any misunderstanding on the matter, that, if a point of law had been raised during the hearing, the justices could not ask their clerk to come into the room with them when they retired so that they could at once consult him and then could consider the evidence in the light of his advice. Here the clerk went out with the justices, and, no doubt, stayed out with them while they were considering the facts and was present when some question arose on the evidence for which they thought it necessary to send for the shorthand writer. The latter fact shows that the justices needed to refresh their memories as to the evidence on some point on which, one may assume, there was discussion, and all this time the clerk remained in the room, and he still remained when his amanuensis was sent for. But it is clear that the justices did nothing wrong in taking the clerk with them to their room as they required his advice on law, and in these circumstances we are not prepared to say, merely because he remained in the room while they were discussing the facts, that that in itself was sufficient to invalidate their decision. It is often difficult to disentangle what is purely a question of law from a question of fact, and a discussion on law must have regard to the particular facts of the case to which it is desired to apply the law. We think it would be putting too high a burden on justices who had legitimately required the presence of their clerk for the purpose of taking his advice to say at a particular moment: "Now you must leave the room while we deliberate further". At any rate, we are not prepared to say that what happened in this case, so far as the clerk's presence was concerned, should invalidate the conviction.
- With regard to the presence of the shorthand writer, she was taking a note of the evidence to which the justices were entitled to refer. Had the clerk himself taken the note, even if he remained in court while the justices had retired, we cannot conceive that there would be any objection to their sending for his note to refresh their memory. Nor do we think that, in these circumstances, we can say that sending for the shorthand writer was improper. No one could have supposed that she had gone into the room for any purpose other than to read to the justices the evidence, or some of the evidence, which she had taken down. At the same time, it would be better, should this state of affairs arise again, if the justices came into open court and asked the shorthand writer to read his or her note on any particular point which they might require. Shorthand writers do occasionally make mistakes, though it is remarkable how few errors are made, but it would, we think, be better that this should be done in court where, if any question were to arise with regard to the accuracy of the shorthand note, it could be corrected. Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case (1) merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered. In this case, as we have said, we think the justices were entitled to have their clerk in the room with them, and, as we do not think there could be any reasonable misunderstanding as to the reason why they sent for the shorthand writer, the court will not in its discretion order a certiorari to issue and this motion, accordingly, fails.

Application refused.

Solicitors: *Jaques & Co.*, agents for *Emrys Jones & Co.*, Welshpool (for the applicant); *Robbins, Olivey & Lake*, agents for *Gilbert Davies & Roberts*, Welshpool (for the justices).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

PILKINGTON v. WOOD.

[CHANCERY DIVISION (Harman, J.), July 2, 3, 6, 21, 1953.]

*Solicitor—Negligence—Damages—Purchase of freehold property by client—
Defect in title—Damages recoverable by client—Duty to minimise loss.*

In 1950 the plaintiff, having obtained employment in Surrey, entered into a contract to purchase a house in Hampshire so as to be within easy reach of his work. The vendor had been one of the trustees of the property under the will of his father and the abstract of title showed that, in 1937 and 1938, he had purchased the property, in two parcels, through intermediaries, from himself and the other trustees. The class of persons claiming under the will was not closed and might embrace infants or persons unborn, and it could not be said with certainty that no claim could arise to upset the transaction. The solicitor employed by the plaintiff in connection with the purchase failed to inform him of the defect in title, and, by a conveyance dated Apr. 27, 1950, the vendor, conveying as "beneficial owner", assured the property to the plaintiff in fee simple for the sum of £6,000. The plaintiff borrowed part of the purchase money from his bank by way of an overdraft, but his solicitor was not aware of this fact. In December, 1951, the plaintiff relinquished his appointment in Surrey and entered into a contract to sell the property so as to be free to seek work elsewhere. On finding the defect in title, the purchaser refused to complete. In consequence, the plaintiff did not have the money to purchase another property near his new place of employment, which was in Lancashire, and, therefore, he found temporary accommodation in Lancashire during the week and returned at week-ends to the house in Hampshire where his wife continued to reside. In an action against the solicitor for damages for negligence, in addition to general damages the plaintiff claimed, *inter alia*, (a) certain expenses in connection with his new employment, including hotel expenses in Lancashire and the running expenses of his car between Hampshire and Lancashire, and (b) interest on his overdraft. The solicitor contended that it was the duty of the plaintiff, before suing him, to recover damages against the vendor under the covenant for title implied, under the Law of Property Act, 1925, s. 76 (1) (A), and sched. II, Part I, by reason of the conveyance as "beneficial owner."

HELD: (i) the plaintiff's duty to mitigate the damages did not go so far as to oblige him, even if he were given by the defendant an adequate indemnity against the costs, to embark on a difficult piece of litigation, and, therefore, he was not under a duty to bring an action against the vendor for breach of covenant.

(ii) the plaintiff was not under a duty to re-sell in order to quantify the damages, and the measure of the solicitor's liability was the difference, at the time of the conveyance in 1950, between the value of the property with a good title and its value with the defect.

(iii) when the solicitor assumed the duty of advising the plaintiff, the change of place of the plaintiff's employment was not a chance which could have been known to him, and the items claimed by the plaintiff in connection with his new employment were not such as might reasonably be supposed to have been in the contemplation of the parties, at that time, as liable to result from the solicitor's negligence, and, therefore, the plaintiff was not entitled to recover those items.

Hadley v. Baxendale (1854) (9 Exch. 341), applied.

(iv) the solicitor was not liable to the plaintiff for a fee paid by the plaintiff to a valuer for a valuation of the property in 1950, nor for the interest on the overdraft.

AS TO LIABILITY OF SOLICITOR FOR NEGLIGENCE, see HALSBURY, Hails-
ham Edn., Vol. 31, pp. 131 and 134, paras. 178 and 181; and FOR CASES, see
DIGEST, Vol. 42, pp. 91, 92, Nos. 826-848, and pp. 105-107, Nos. 997-1012.

Cases referred to:

- (1) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest 126, 343.
- A (2) *Dunkirk Colliery Co. v. Lever*, (1878), 9 Ch.D. 20; 17 Digest 126, 342.
- (3) *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581; 89 L.J.K.B. 17; 121 L.T. 563; 17 Digest 127, 349.
- (4) *Fay v. Miller, Wilkins & Co.*, [1941] 2 All E.R. 18; [1941] Ch. 360; 110 L.J.Ch. 124; 166 L.T. 33; 12 Digest, Replacement, 165, 1066.
- B (5) *Turner v. Moon*, [1901] 2 Ch. 825; 70 L.J.Ch. 822; 85 L.T. 90; 40 Digest 283, 2456.
- (6) *Hadley v. Bazendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.
- (7) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- C (8) *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 17 Digest 84, 33.
- (9) *The Edison*, [1932] P. 52; 101 L.J.P. 12; 147 L.T. 141; *on appeal, sub nom. Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub nom. The Edison*, 149 L.T. 49; Digest Supp.
- (10) *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.*, [1952] 1 All E.R. 970; [1952] 2 Q.B. 297; 3rd Digest Supp.

D ACTION for damages for the negligence of the defendant while acting as solicitor for the plaintiff in connection with the purchase by the plaintiff of certain freehold premises.

The defendant failed to advise the plaintiff that there was a defect in the vendor's title in that the premises had been part of the trust property under a will of which the vendor was a trustee and the abstract of title showed that the vendor had purchased it, through intermediaries, from himself and the other trustees. Later, the plaintiff entered into a contract to sell the premises, but, on finding the defect in the title, the purchaser refused to complete. The plaintiff thereupon brought an action for damages against the defendant. After the pleadings were closed, the defendant admitted negligence, and the issue before the court was the quantum of damages.

F *Russell, Q.C.*, and *R. Cozens-Hardy Horne* for the plaintiff.
Pennyquick, Q.C., and *E. I. Goulding* for the defendant.

Cur. adv. vult.

G July 21. **HARMAN, J.**, read the following judgment. This is an action for damages by a client against his solicitor, whom he charges with negligence in advising him on the purchase of a property known as Ewshott Corner in Hampshire. The only issue now remaining for decision is the quantum of damages for the negligence alleged, the fact of negligence having been admitted last month after the close of pleadings in the action.

H In 1950 the plaintiff, a civil engineer who had hitherto earned his living in Lancashire, obtained employment in Surrey. To live within reach of his work, he contracted to purchase the property in question and employed the defendant to act as his solicitor on the purchase. This was completed on Apr. 27, 1950, by a conveyance by which the vendor, one Colonel Wilks, conveying as beneficial owner, assured the property to the plaintiff in fee simple for a sum of £6,000. This sum of money the plaintiff raised by an overdraft at his bank on which interest was payable. He paid the defendant his scale fee of £63 for acting as purchaser's solicitor. The plaintiff in due course went into occupation of

the property. He spent £400 to £500 on improvements and repairs and purchased for a further £334 certain land surrounding his first purchase, the possession of which considerably added to the amenities and the value of the original plot. In December, 1951, the plaintiff relinquished his Surrey appointment, and, being desirous of freeing himself to take employment elsewhere, he put the property into the hands of local estate agents who found a purchaser who was willing to pay £7,500 for it with the additional plot, and who entered into a contract, accordingly, in that month. The plaintiff again employed the defendant as his solicitor. The purchaser's solicitors, on being supplied with an abstract of the plaintiff's title, pointed out that there was a defect in it and declined, as they were entitled to do, to go on with the purchase, with the result that the deposit had to be returned and a claim arose, which has not yet been resolved, for costs thrown away. The defect was that it appeared on the face of the abstract of title that Colonel Wilks, the vendor to the plaintiff, had purchased part of the property in 1937 and the remainder of it in 1938 from the trustees of his father's will, of whom he was himself one, thus transgressing the well-known rule that a trustee cannot validly purchase the trust property, whether directly or through an intermediary as was done here to give some colour of validity to the transactions.

It was admitted before me that the class of persons claiming under the will in question was not closed and might embrace infants or persons unborn, and that for a number of years it would be impossible to say with certainty that no claim could arise to upset the transaction, although hitherto no claim has been made. This is clearly a serious blot on the title, and not one that can be described with any propriety as a technical defect. There is a real danger that anyone acquiring this property with notice may be dispossessed of it hereafter. A beneficiary claiming to have the property restored to the trust must agree that the original purchase money and, in addition, money spent in improvements shall be repaid. That sum was assumed here to amount to £2,500. The defect in title does not extend to the further plot purchased by the plaintiff in 1951, but that plot by itself is of no greater value than the plaintiff paid for it.

It would appear then, at first sight, that the measure of the defendant's liability is the diminution in value of the property, i.e., the difference between the value, at the date of the 1950 purchase, of the property with a good title and its value with the title which, in fact, it had. The defendant, however, argues that it is the duty of the plaintiff before suing him in damages to seek to recover damages against his vendor, Colonel Wilks, under the covenant for title implied by reason of the conveyance as beneficial owner: see the Law of Property Act, 1925, s. 76 (1) (A), and sched. II, Part I. It is said that this duty arises because of the obligation which rests on a person injured by a breach of contract to mitigate the damages. This suggestion seems to me to carry the doctrine of mitigation a stage further than it has been carried in any case to which I have been referred. The classic statement of the doctrine is that of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (1), where he said ([1912] A.C. 688):

"The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain

to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of JAMES, L.J., in *Dunkirk Colliery Co. v. Lever* (2) (9 Ch.D. 25),

A ‘The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business’.”

For the present purpose, however, it seems to me that it is apposite to state the plaintiff's rights in the words of SCRUTTON, L.J. ([1919] 2 K.B. 589) in *Payzu, Ltd. v. Saunders* (3):

B “ . . . he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach . . . ”

Ought the plaintiff as a reasonable man to enter on the litigation suggested ?

C It was agreed that the defendant must offer him an indemnity against the costs, and it was suggested on the defendant's behalf that (i) if an adequate indemnity were offered, (ii) if the proposed defendant appeared to be solvent, and (iii) if there were a good prima facie right of action against that person, it was the duty of the injured party to embark on litigation to mitigate the damage suffered. This is a proposition which, in such general terms, I am

D not prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist. It may be conceded that the indemnity offered would be adequate and that Colonel Wilks is a man of substance. It was clear, however, that he would resist any claim and would, in his turn, claim over against his solicitors. About the third condition much more doubt exists. I listened to a considerable argument based on the

E extremely difficult words in which is couched the contract to be implied under the Law of Property Act, 1925, s. 76 (1) (A), and sched. II, Part I. I do not propose to decide whether any liability would arise in this case under those words. Nor need I decide whether Colonel Wilks, having regard to his position, was the “beneficial owner” of the property so as to bring the covenant into operation, it being a sine qua non that the covenantor must be in fact, as well

F as being expressed to be, the beneficial owner. Compare the observations of SIR WILFRID GREENE, M.R. ([1941] 2 All E.R. 23), in *Fay v. Miller, Wilkins & Co.* (4), where he was discussing the covenant implied in an assurance by a vendor as “personal representative”. It appears to be the law that a breach of the covenant can be sued on at once and that there is no need to wait till

G a claim is made against the covenantee: see *Turner v. Moon* (5).

I do not propose to attempt to decide whether an action against Colonel Wilks would lie or be fruitful. I can see that it would be one attended with no little difficulty. I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The

H damage to the plaintiff was done once and for all directly the voidable conveyance to him was executed. This was the direct result of the negligent advice tendered by his solicitor, the defendant, that a good title had been shown, and, in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation to protect the defendant from the consequences of his own carelessness. Next the defendant suggested that the injury might be lightened by a policy of insurance designed to cover the consequences of the defect. As to this, it is enough to say that no satisfactory evidence was adduced that any such

policy could be obtained. Policies to cover defects of title are, it appears, common enough when supported by cross covenants on the part of the author of the defect, here Colonel Wilks. It is clear that he would have been entirely unwilling to enter into such a covenant, and in the absence of that there was no evidence that a policy could be obtained nor what its cost would be. In any event, though a policy might mitigate the pecuniary damage, it would not mend the title or make the purchase more attractive to a person buying the property for a home, as this property would be bought.

It remains, then, to consider what is a proper amount of damages. This is, necessarily, highly speculative. The plaintiff was not bound, in my judgment, to re-sell in order to quantify the damages, particularly having regard to the fact that until quite recently the defendant denied that he was guilty of negligence. It is clear enough from the plaintiff's experience with the purchaser whom he found that an ordinary purchaser, finding the title defective in this respect, will merely throw up the purchase, and that it would be necessary to explain in advance, by way of condition of sale, the existence of the defect. The result would be, I think, to bring forward a different class of purchaser, namely, the speculator willing to chance the future, but only because the property could be had cheap. The several elements to be brought into account are, on the one side, (i) the sum which would have to be paid before the property were returned to the trust, (ii) the chance that no claim will ever be made and that the title will eventually ripen into security, and (iii) the chance of recovering something against Colonel Wilks on his covenant for title. The sum involved under head (i) may, having regard to the evidence, be put at £2,500. The chance referred to under head (ii) is not negligible after the lapse of fifteen years without a claim, and that under head (iii) cannot be put very high, as it would involve litigation with its attendant expense and delay and the uncertainty as to its result. On the other side of the account must be put the insecurity of the purchaser's tenure and the difficulties which he would encounter should he wish to raise money by mortgage or to re-sell. On the evidence, £6,000 may be taken as the true value of the property with a good title at the date of the breach in 1950. Balancing one factor against the other as best I can after listening to the evidence, I think that a fair estimate of the diminution in value of the property from its market price, at the date of the breach in 1950, of £6,000 with a good title ought to be sent at £2,000.

Beyond this, which may be styled the general damages, the plaintiff claimed damages under a number of special heads. These were: (i) the defendant's scale fee of £63; (ii) the cost of improvements done by the plaintiff and of the extra purchase; (iii) the plaintiff's expenses in connection with his new employment; (iv) the cost of a valuation of the property; (v) interest on an overdraft; and (vi) costs thrown away. I will deal with these in order. The first is the scale fee. It was conceded that this could not be recovered in this action. The second was cost of improvements and of the extra purchase. This claim was abandoned at the hearing. The third was the plaintiff's expenses in connection with his new employment. To understand this some further facts must be stated.

The plaintiff's contract for re-sale of the property at £7,500 was made in December, 1951, and it appears that it was not until this event that he felt free to look for further employment. This he found in Lancashire where he had formerly been employed, and he entered on his new job on Feb. 1, 1952. On Feb. 18 he was obliged to return the deposit of £750 made on the contract of December, 1951, the defect in his title having by then been discovered. As a result, being unable to complete the sale of the Hampshire property, he had not the financial means to purchase another property within reach of his new work, and he has ever since found himself temporary accommodation in Lancashire during the week and returned at week-ends to his Hampshire home,

where his wife has continued to reside. His claim under this head is (i) £175, for hotel expenses, (ii) £250 for the running expenses of his car between Hampshire and Lancashire, and (iii) £50 for the expense of telephone calls to his wife every evening during his periods of separation from her. In my judgment, none of these sums is recoverable against the defendant. They do not fall within the second rule in *Hadley v. Baxendale* (6) (9 Exch. 354), as to the damages recoverable. This rule was recently canvassed by ASQUITH, L.J., delivering the judgment of the Court of Appeal in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (7). ASQUITH, L.J., said ([1949] 1 All E.R. 1002):

- “What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following: (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *Wertheim v. Chicoutimi Pulp Co.* (8). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2): In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach.”
- These items were not, in my judgment, within the reasonable contemplation of the parties when the defendant assumed the duty of advising the plaintiff. The change of place of the plaintiff's employment was not one of the chances that could have been known to either of them. It was the voluntary act of the plaintiff, not a result of any contract existing when the bargain was made. The defendant cannot be responsible for the expense. The plaintiff might have bought or rented accommodation suitable to his new employment, and there is no evidence that the defendant knew that his financial position might render this impracticable. Still less can the defendant be called on to pay for the telephone calls.
- The fourth head is a sum of twenty-five guineas paid by the plaintiff to a valuer who, in 1950, was employed by him to value the property to quiet the doubts of the plaintiff's bankers as to his financial position. He complains that he would never have incurred this expense had he known that his title was defective. No doubt, this is true, but the defendant cannot be supposed to know that any such step was required by the plaintiff's position or contemplated by him. This claim I reject. The fifth claim represents the sum paid by the plaintiff to his bank on an overdraft which, he says, would not have existed had he been able to sell the property as he contracted to do. Here, again, it is objected that the defendant is being asked to pay for the plaintiff's impecuniosity, and it is pointed out that there is no evidence that the defendant knew that the purchase money had been borrowed by the plaintiff, and, moreover, that, if the plaintiff had been able to sell, he would have incurred a new liability similar to the old. In this connection I was referred to *The Edison* (9) and to *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.* (10). On the whole, I am of the opinion that the plaintiff does not make out his case on this point. His evidence was that it was his intention to purchase another house with the proceeds of sale of his present one and to finance the new purchase in the same way as before, namely, by an overdraft secured on the new property. It appears to me, however, that, to put the plaintiff as far as possible in the position in which he would have been if there had been no breach, I must

treat him as having sold the property at the date when the cause of action arose for what it would then fetch. This price I have assumed to be £4,000. He would then have been £2,000 out of pocket. The defendant, therefore, should recoup that sum with interest on it. Under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), the court has jurisdiction to award interest on damages from the date when the cause of action arose, and, accordingly, the sum of £2,000 will carry interest at 4 per cent. per annum from Apr. 27, 1950, till the date of this judgment. The sixth head of damages for costs thrown away was a matter of agreement at the hearing, and that agreement will be embodied in the judgment. A

Judgment for the plaintiff.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the plaintiff); *William Charles Crocker* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.] B

Re PILKINGTON BROTHERS, LIMITED WORKMEN'S PENSION FUND.

[CHANCERY DIVISION (Danckwerts, J.), July 9, 23, 1953.] C

Friendly Society—Trustee—Appointment of body corporate—Friendly Societies Act, 1896 (c. 25), s. 25 (1), (3).

In 1925 a pension fund was registered as a society under the Friendly Societies Act, 1896. In 1952 a new trust deed and new rules were adopted by the society and the rules were registered by the Registrar of Friendly Societies. A proposal was adopted by the society that a rule providing that there should be four trustees of the fund should be amended by providing that a company incorporated under the Companies Act, 1948, or any former enactment relating to companies might be appointed to be sole trustee of the fund. The registrar refused to register the amendment on the ground that it was contrary to the Act of 1896. D

HELD: the provisions of the Act of 1896 (which did not expressly prohibit the appointment of a corporate trustee) were not inconsistent with the appointment of a corporation as a trustee, and, in particular, it was possible for a corporate trustee to comply with s. 25 (3) (which relates to the signature of a resolution by the trustee), and, therefore, a "contrary intention" within the Interpretation Act, 1889, s. 19, not having been proved, the word "person" in s. 25 (4) and elsewhere in the Act of 1896 included a body corporate, and the registrar would be directed to register the amendment. E

Re West of England & South Wales District Bank. Ex p. Swansea Friendly Society (1879) (11 Ch.D. 768), distinguished.

Re British Games, Ltd. ([1938] 1 All E.R. 230), applied. F

AS TO TRUSTEES OF A FRIENDLY SOCIETY, see HALSBURY, Hailsham Edn., Vol. 15, pp. 331-334, paras. 586-590; and FOR CASES, see DIGEST, Vol. 25, p. 302, Nos. 94-102. G

Cases referred to:

- (1) *Re Thompson's Settlement Trusts*, [1905] 1 Ch. 229; 74 L.J.Ch. 133; 91 L.T. 835; 13 Digest 354, 920. H
- (2) *Re West of England & South Wales District Bank. Ex p. Swansea Friendly Society*, (1879), 11 Ch.D. 768; 48 L.J.Ch. 577; 40 L.T. 551; 43 J.P. 637; 13 Digest 350, 887.
- (3) *Ex p. Ross*, (1802), 6 Ves. 802; 31 E.R. 1316; 4 Digest 472, 4259.
- (4) *Ex p. Harris. Re Clarke*, (1845), De G. 162; 14 L.J.Bey. 25; 5 L.T.O.S. 80; 4 Digest 471, 4252.

- (5) *Wills v. Tozer*, (1904), 53 W.R. 74; 48 Sol. Jo. 654; 13 Digest 351, 892.
 (6) *Hirst v. West Riding Union Banking Co.*, [1901] 2 K.B. 560; 70 L.J.K.B. 828; 85 L.T. 3; 13 Digest 352, 897.
 (7) *Re British Games, Ltd.*, [1938] 1 All E.R. 230; [1938] Ch. 240; 107 L.J.Ch. 81; 158 L.T. 239; Digest Supp.

ORIGINATING MOTION.

- A The applicants, the present trustees of the Pilkington Bros., Ltd. Workmen's Pension Fund, appealed against the decision of the Registrar of Friendly Societies refusing to register an amendment to r. 53 of the rules of the fund, designed to permit the appointment of a body corporate to be sole trustee of the fund. The grounds of the appeal were: (a) that the refusal of the registrar was founded solely on the assumption that the provisions of the Friendly Societies Acts did not permit the appointment of a body corporate to be sole trustee of a friendly society; (b) that such assumption was incorrect in law; and (c) that the proposed amendment was one proper to be registered in accordance with the provisions of the Friendly Societies Act, 1896, s. 13.

Pennycuik, Q.C., and *E. W. Griffith* for the applicants.

Denys B. Buckley for the respondent, the Registrar of Friendly Societies.

- C *Cur. adv. vult.*

- D July 23. **DANCKWERTS, J.**, read the following judgment. This is an appeal from a decision of the Registrar of Friendly Societies, refusing to register an amendment of the rules of the Pilkington Bros., Ltd. Workmen's Pension Fund. As I understand the position, the registrar's functions in regard to the registration of rules or of amendments of rules do not extend to a consideration of the prudence of a proposed rule or amendment, and the ground of the registrar's decision is simply that the proposed amendment is not authorised by the terms of the Friendly Societies Act, 1896.

- E The fund was registered in 1925 as a society under the Friendly Societies Act, 1896, and it operates the pension fund of Pilkington Bros., Ltd., well-known glass manufacturers of St. Helens in the county of Lancaster. On May 1, 1952, a new trust deed and new rules were adopted by the society (the trust deed being expressed to be supplemental to the original trust deed of Apr. 28, 1925) and these rules were duly registered by the registrar under the Friendly Societies Act, 1896. Now, a so-called "partial amendment" of r. 53 has been duly adopted by the society in accordance with r. 44 of these rules, but the Registrar of Friendly Societies has refused to register this amendment on the ground that it is contrary to the provisions of the Acts under which the society is registered. The proposed amendment would add at the end of r. 53—which provides that

- G "there shall be four trustees of the fund of whom two shall be nominated by the representatives of the firm on the committee and two shall be nominated by the representatives of the members on the committee"

—a proviso in the following terms:

- H "Provided always that a company incorporated under the provisions of the Companies Act, 1948, or any former enactment relating to companies (as in such Act defined) may be appointed to be sole trustee of the fund in the place of all existing trustees; such appointment shall be made at a general meeting by a resolution of a majority of the members present and entitled to vote thereat; and a copy of such resolution signed on behalf of such company by some person acting under its authority and by the secretary shall be sent within fourteen days by the secretary to the registrar."

It is considered by the committee of management of the society that the appointment of a company to be the sole trustee will avoid the trouble and

expense of transfers of investments, and, by enabling the committee of management to control the company as the directors thereof, will vest the administration of the society in one body of persons instead of two. On the other hand, it is apparently not contemplated that the trustee company will provide the security of a "trust corporation" (as defined for the purposes of the Trustee Act, 1925).

At the date when the Friendly Societies Act, 1896, was passed, corporate trustees were not in common use, and difficulties in regard to corporate bodies with reference to joint tenancies existed then and until the passing of the Bodies Corporate (Joint Tenancy) Act, 1899, which enabled a body corporate to be a joint tenant with an individual or another corporation.

The Friendly Societies Act, 1896, s. 25 (1), requires every registered society to have "one or more trustees", and sub-s. (4) provides:

"The same person shall not be secretary or treasurer of a registered society or branch, and a trustee of that society or branch."

There is no express prohibition in the Act of the appointment of a corporation to be a trustee or a sole trustee. By the Interpretation Act, 1889, s. 19, in every Act passed after the commencement of that Act (that is Jan. 1, 1890) the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or incorporate. Accordingly, the burden is on those who contend that a body corporate cannot be appointed a trustee of a society registered under the Friendly Societies Act, 1896. It is contended that a contrary intention appears in that Act and that the provisions of that Act are inconsistent with the appointment of a corporate body to be such a trustee. It is necessary, therefore, to examine the provisions of the Act to see what are the difficulties or indications in regard to this point. Section 25 (3) requires the society or branch to send to the registrar a copy of every resolution appointing a trustee, signed by the trustee so appointed and the secretary of the society or branch. Section 34 provides for transfers of stock where a trustee becomes bankrupt, lunatic or dead, but does not provide for the case of liquidation or dissolution of a corporation. Section 35 provides for priority of claims of a society in the case of death or bankruptcy of an officer of a registered society and does not refer to liquidation or winding-up. By s. 106 (unless a contrary intention appears) the expression "officer" includes any trustee, treasurer, secretary, or member of the committee of management of a society or branch or person appointed by the society or branch to sue and be sued on its behalf. Section 50 deals with the vesting of property in "the succeeding trustees" on the death, resignation or removal of a trustee. Section 58, which deals with the estate of a member dying intestate, empowers distribution according to the decision of a majority of the trustees. Section 76 (5) provides for the examination of officers on oath. Section 90 provides for imprisonment of an officer for certain offences. Section 94, dealing with legal proceedings against officers and other persons, does not provide for service in the case of a corporation. It is also to be observed that s. 8 of the War Loan (Supplemental Provisions) Act, 1915, contains provisions allowing the transfer of any part of the funds of a registered friendly society to the Public Trustee, which, it is argued, would be unnecessary if a corporation could, under the Friendly Societies Act, 1896, be a trustee.

It is contended that all these provisions are inconsistent with a company or other corporation being a trustee under the Act. There is very little in the way of authority to assist a conclusion on these matters. In *Re Thompson's Settlement Trusts* (1) it was held that under the common form power of appointing new trustees contained in a marriage settlement of 1866 a corporation could be appointed to be a new trustee jointly with a surviving individual trustee since the Bodies Corporate (Joint Tenancy) Act, 1899, had enabled corporate bodies to hold property in joint tenancy with individuals. In *Re West of*

A England & South Wales District Bank. *Ex p. Swansea Friendly Society* (2), it was held by FRY, J., that an incorporated banking company could not be the treasurer of a friendly society within the meaning of the Friendly Societies Act, 1875. The Act of 1875 contained, in s. 15 (7), provisions dealing with priorities on the death, bankruptcy, etc., of an officer, which, except for the addition of the word "insolvency" (in the Act of 1875), are the same as those of s. 35 of the Friendly Societies Act, 1896, and the definition of "officer" is substantially the same in each of the two Acts. FRY, J. (after reading s. 15 (7) of the Act of 1875), says (11 Ch.D. 771):

B "Now the whole scope of that clause appears to me to refer to a private individual who takes on himself an office, and it gives certain rights in the event of his death, his bankruptcy or insolvency, for execution, attachment, or process against his property or himself, and it is very remarkable that if it were in the mind of the legislature that an incorporated company could be the officer, and that priority should be given in the case of a winding-up, this Act, which was passed long subsequently to any of the winding-up Acts, is entirely silent with respect to the liquidation of the company, or the winding-up and distribution of the assets of the company. It appears to me that I am bound to read this clause somewhat strictly, and for the reason pointed out by LORD ELDON, in *Ex p. Ross* (3), and by KNIGHT BRUCE, L.J., when Chief Judge in Bankruptcy, in *Ex p. Harris. Re Clarke* (4), the right given is one against the common rights of Her Majesty's subjects, and therefore those who claim that right must bring themselves within the express provisions of the statute. The only words which can be relied on here are those which mention process against the property of the debtor. It is said that those words include liquidation. It appears to me to be a very doubtful proposition; but I decide against the applicant, because I think that the legislature has considered the officer against whom and against whose estate the benefit is given, as a private person and not as a corporation."

E These observations must carry great weight in construing the similar section in the Act of 1896. FRY, J., was dealing with the case of the treasurer of a society, as an officer for the purposes of the section, and not the case of a trustee. But the relevance of his observations is that the definition sections of the two Acts (unless a contrary intention appears) treat a trustee and a treasurer equally as officers of a society. In truth, however, the question of priorities is not of the same importance in the case of a trustee in the event of the trustee's insolvency (except where personal claims against a trustee are involved) as in the case of an officer such as the treasurer or secretary of a society. In the case of the bankruptcy or liquidation of a trustee, the trust property vested in the trustee is distinguished and does not form part of the property distributable among the insolvent person's creditors. Such officers as a treasurer or secretary are more likely to be indebted to the society for moneys received by them in the course of their duties. It may be, therefore, that the conclusions of FRY, J., should not be applied to the case of a trustee of a registered society. There is also, as it seems to me, an indication in s. 35 that the expression "officer" in the section is not intended to include a trustee. The section provides that the "heirs, executors, or administrators, or trustee in bankruptcy" of the officer, or the sheriff, are, on demand in writing of the trustees of the society or branch or of any two of them, to pay the money, and deliver over the property to the trustees of the society or branch in preference to any other debt or claim against the estate of the officer. So, here is an apparent contrast between the expressions "trustees" and "officer". It is curious that the section refers to the demand of the trustees or "of any two of them". The draftsman seems to have forgotten that s. 25 allows a society to have a single trustee. In the circumstances, in my view, the *West of England* case (2)

is not a compelling authority against the validity of the appointment of a corporation to be a trustee.

As regards the other sections in the Act of 1896 dealing with "officers", the mere absence of provisions appropriate to a corporate trustee is not necessarily inconsistent with the appointment of a corporate trustee. Section 25 (3) of the Act (requiring signature of the resolution) is, however, specifically directed to the case of a trustee, and if it is not possible to comply with the provisions of that sub-section in the case of a corporation, then it would appear that a corporation cannot be appointed to be a trustee. Now, of course, a corporation cannot sign in person, and any signature of a corporation must be made by an officer or other agent of the corporation. Contracts, letters and other documents are, in practice, effectual so signed. The question is whether signature in this manner will satisfy the requirements of s. 25 (3), as, indeed, the proposed amendment anticipates.

There are a number of authorities touching on this question. In cases where the personal element required exclusive operation by an agent, it has been held that a corporation could not comply with the terms of the relevant statute: *Wills v. Tozer* (5) (the Commissioners' Clauses Act, 1847); *Hirst v. West Riding Union Banking Co.* (6) (Lord Tenterden's Act). But in *Re British Games, Ltd.* (7), in which the point turned on the provisions of the Moneylenders Act, 1927, s. 6 (1) requiring a note or memorandum in writing of the contract signed personally by the borrower, SIMONDS, J., held that it was a sufficient compliance with the Act if the contract was signed by a person acting under the authority of the company, express or implied. SIMONDS, J., reached this result through the provisions of the Companies Act, 1929, s. 29, dealing with the signing of contracts which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith. An acceptance by a trustee of his appointment to that position may not be, technically, a contract, but it seems to me that the same principle applies. In my view, therefore, it is possible for a corporation to comply in this manner with the requirements of s. 25 (3) of the Friendly Societies Act, 1896. If this is so, it seems to me that there is nothing in this provision to exclude the appointment of a corporation as the sole trustee of a registered society.

There remains to be considered the argument that in 1875 and in 1896 corporate trustees were practically unknown and were unlikely, in view of the difficulties then existing in regard to joint tenancies, and, therefore, it is quite reasonable that the Acts of 1875 and 1896 should not have contemplated the appointment of corporate trustees. This argument would apply with at least as much force to the settlement of 1866, which was the subject of the decision in *Re Thompson's Settlement Trusts* (1). None the less, it was held in that case that once the difficulties in regard to joint tenancies had been removed by the Bodies Corporate (Joint Tenancy) Act, 1899, the form of the power of appointing new trustees in the settlement of 1866 was capable of including the case of a corporate trustee. This argument, therefore, must, I think, fail.

The conclusion which I reach is that there is nothing in the Friendly Societies Act, 1896, to exclude the rule that a "person" includes a corporate body, and, accordingly, a corporate body may be appointed a trustee of a registered society, and the proposed amendment is not contrary to the Act.

Order accordingly.

Solicitors: *R. H. Eggar*, St. Helens, Lancs. (for the applicants); *Treasury Solicitor* (for the respondent).

[Reported by *R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

BEWLAY & CO., LTD. v. LONDON COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 29, 1953.]

Public Health—Dangerous structure—Metropolis—Notice to take down, repair, or otherwise secure—Discretion of magistrate to order one of the three courses to be pursued—London Building Acts (Amendment) Act, 1939 (c. xcvii), s. 64.

A A complaint was preferred under the London Building Acts (Amendment) Act, 1939, s. 64, against the appellants as owners of certain premises that they had failed to comply with a dangerous structure notice served on them requiring them to "take down repair or otherwise secure" certain portions of the premises. The magistrate took the view that he was bound to make
B an order in the terms of the complaint.

HELD: section 64 gave the magistrate a discretion to order the appellants either to take down the building, or to repair it, or otherwise to secure it, and the case must be remitted to him to deal with it on that basis.

FOR THE LONDON BUILDING ACTS (AMENDMENT) ACT, 1939, s. 62 and s. 64,
C see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 1238 and 1239.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Clerkenwell a complaint was preferred by the respondent council against the appellants as owners of a structure known as 27 Store Street, Holborn, that on May 19, 1952, a notice was served on them in pursuance of the London Building Acts (Amendment)
D Act, 1939, Part VII (Dangerous and Neglected Structures), requiring them forthwith to take down, repair, or otherwise secure such portions of the main front wall and the balconies on the main rear wall of the structure as were fractured, sagged out of the perpendicular, loose, insecurely supported, or otherwise insecure, and do any further work rendered necessary by the foregoing, and that the appellants failed to comply wholly with such notice as speedily as
E the nature of the case permitted.

At the hearing it was proved or admitted that the premises consisted of a shop occupied by a tenant on the ground floor and living accommodation on the three floors above occupied by three other tenants, the first floor rooms being let furnished and the other two tenants being protected under the Rent Restrictions Acts as statutory tenants. After the notice of May 19, 1952, had
F been served the appellants shored up the premises by means of external supports and buttresses and they had remained so shored. Attempts were made to get the tenants on the second and third floors to vacate the premises and to find them alternative accommodation, but without success. It was found that the premises were a dangerous structure and would be dangerous to the inmates if not shored up, that the district surveyor had refused to give a certificate
G under s. 67 of the Act (to the effect that the structure was dangerous to the inmates and enabling a court of summary jurisdiction to remove the inmates), and that the premises were not such as economically would warrant the expenditure required to put them in a safe condition and a reasonable state of repair and would in normal times have been demolished.

On behalf of the appellants it was contended that they had not failed to
H comply with the notice as speedily as the nature of the case permitted; that under s. 64 of the Act the learned magistrate had a discretion whether or not to make the order "to take down repair or otherwise secure" the premises and that this discretion should be exercised in the appellants' favour as the building was only fit to be pulled down, the expense involved in restoring it would be out of all proportion to its value, and that it would be highly dangerous to carry out the work with the tenants in occupation. On behalf of the respondents it was contended that the appellants had failed to comply with the notice;

that under s. 64 (1) the powers vested in the court had to be exercised if the conditions specified in the sub-section had been satisfied and that the only order which the court had jurisdiction to make was "to take down repair or otherwise secure to the satisfaction of the district surveyor". The learned magistrate found that the appellants had failed to comply with the order and that he had no discretion but to make the order asked for.

Rimmer, Q.C., and Wiggins for the appellants.

H. E. Francis for the respondents.

LORD GODDARD, C.J.: This is a Special Case which the court directed a metropolitan magistrate to state, arising out of proceedings taken by the London County Council against Messrs. Bewlay & Co., Ltd., as owners of a structure known as 27 Store Street in Holborn. A notice was served on them on May 19, 1952, as owners of the premises requiring them to

"take down repair or otherwise secure such portions of the main front wall and the balconies on the main rear wall as are fractured sagged out of perpendicular loose insecurely supported or otherwise insecure and do any further work rendered necessary by the foregoing."

The complaint alleged that the appellants had failed to comply with that notice as speedily as the nature of the case permitted.

The proceedings were taken under s. 62 and s. 64 of the London Building Acts (Amendment) Act, 1939. Section 62 provides:

"(1) The district surveyor upon completing any survey of a structure required to be made under s. 61 (2) . . . of this Act shall certify to the council his opinion of the state of the structure. (2) If the certificate is to the effect that the structure is not in a dangerous state no further proceedings shall be taken with respect thereto but if it is to the effect that the structure is in a dangerous state the council may shore up or otherwise secure the structure and may erect a proper hoard or fence for the protection of passengers and shall cause notice in writing to be served on the owner or occupier of the structure requiring him forthwith to take down repair or otherwise secure it as the case requires."

By s. 64 (1):

"If the owner or occupier on whom notice is served under s. 62 . . . of this Act fails to comply with the notice or the notice as amended or confirmed in accordance with the decision of the two surveyors or the award of the arbitrator as the case may be as speedily as the nature of the case permits a court of summary jurisdiction on complaint by the council may order the owner within a time to be fixed by the order to take down repair or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the court to be in a dangerous state."

On receipt of the dangerous structure notice, the appellants, as the owners of these premises, at once shored them up to prevent any immediate danger. They were then summoned before the magistrate who made an order directing them to take down, repair, or otherwise secure the building. Their case was that they were willing to take down, but they were not willing to repair because to do repairs to this dilapidated old structure would cost far more than it was worth and to repair the house was an uneconomic proposition, the expenditure on which they could not justify.

The difficulty arises because there are some statutory tenants in the house, and the district surveyor refuses to exercise the power he has under s. 67, of certifying that it is necessary to remove them. The order that has been made on the appellants is to take down, repair, or otherwise secure. They are ordered to do one of three things. If they were ordered merely to take down the premises, they would be protected because the Rent Restrictions Acts have

made provisions with regard to the tenants. But they were ordered to take down or repair, and it might hereafter be said against them: "You ought to have exercised the option given you by the order in a way which would not work to the detriment of the tenants who are in possession of part of the house". The magistrate has found that the premises are not such as economically would warrant the expenditure required to put them in a safe condition and a reasonable state of repair, and that in normal times the building would doubtless have been demolished as it is not worth repairing from an economical point of view, but he held that he was bound to make an order in the exact terms of the section, that is to say, to take down, repair, or otherwise secure. In my opinion, the magistrate was wrong in holding that he had no discretion. I think he had a discretion to say whether the appellants should take down, or whether they should repair, or whether they should otherwise secure. I am not saying that in a proper case the magistrate may not confirm the order in the words "take down repair or otherwise secure", but in the present case he held that he could only make an order in those terms, whereas it is quite clear as a matter of English that on the complaint he could order the owner to take down, or to repair, or otherwise to secure. Therefore, the case must go back to the magistrate with an intimation that he was wrong in holding that he had not a discretion as to which of these three courses he should order, and that, as he has found that the premises were not such as economically would warrant the expenditure required to put them in safe condition and a reasonable state of repair, it is open to him to order that the premises should be taken down. If such an order is made, the appellants will know where they stand and will, no doubt, at once obey. For these reasons the appeal must be allowed and the case must go back to the magistrate with that expression of opinion.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

Appeal allowed.

Solicitors: *Bartlett & Gluckstein* (for the appellants); *J. G. Barr*, Solicitor, London County Council (for the respondents).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law*.]

RIVOLI HATS, LTD. v. GOOCH.

[QUEEN'S BENCH DIVISION (Hallett, J.), July 17, 1953.]

Agent—Commission—Payments on account of commission—Repayment at termination of agency of excess of payments over commission earned.

The plaintiffs agreed to employ the defendant as a selling agent on the terms that he was to receive ten per cent. commission on all goods sold by him and delivered and paid for, after deduction of any discount allowed, and that a monthly sum be paid to him on account of the commission which would accrue due to him. When the defendant terminated the agreement he had been paid £1,005 in respect of the monthly sum, but the amount of the commission earned by him was less than that sum. On a claim by the plaintiffs for the difference between the two sums,

HELD: a term that the defendant should repay any overpayment on the termination of the agency was to be implied in the agreement, and, alternatively, the money paid to him monthly by the plaintiffs was a loan, and, therefore, the defendant must repay the balance to the plaintiffs.

Cases referred to:

(1) *Clayton Newbury, Ltd. v. Findlay*, (1951), post, p. 826.

(2) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; 3 Digest 159, 231.

(3) *Dies v. British & International Mining & Finance Corp., Ltd.*, [1939] 1 K.B. 724; 108 L.J.K.B. 398; 160 L.T. 563; Digest Supp.

ACTION for damages for breach of contract, and, alternatively, claim for money lent.

By an agreement evidenced in writing by a letter dated June 20, 1952, and signed by the defendant's solicitors on his behalf, the defendant agreed to act as a selling agent of the plaintiffs. The relevant terms of the agreement were that (i) the defendant should be the plaintiffs' agent and conform to all the accepted principles of agents during his employment as such; (ii) he was to receive ten per cent. commission on all goods sold by him and delivered and paid for, after deduction of any discount allowed; (iii) the plaintiffs were to pay him £125 a month on account of the commission which would accrue due to him. On Oct. 19, 1952, this sum was reduced to £95 per month. On Feb. 22, 1953, the defendant wrote to the plaintiffs terminating the agency. At that date he had received £1,005 from the plaintiffs on account of commission, but he had earned only £613 5s. 4d. commission. The plaintiffs claimed the balance of £391 14s. 8d. as damages for a breach of an implied term in the agreement that the defendant would repay any overpayment of the monthly sum at the termination of the agency. The amount claimed, due to some further commission which had accrued due to the defendant, was reduced to £383 19s. 8d. The defendant, relying on *Clayton Newbury, Ltd. v. Findlay* (1) (post, p. 826), contended that, on the true construction of the agreement, the £1,005 had been paid as remuneration for his agency and that no part of it was repayable either expressly or by implication, whether at the termination of the agency or otherwise.

Stable for the plaintiffs.

A. L. J. Lincoln for the defendant.

HALLETT, J.: I should have thought the point to be decided was very clear, and, indeed, despite the very careful argument of counsel for the defendant, beyond argument, if it were not for one circumstance which troubles me to some extent. I am told that the resistance to what appears on the face of it to be an unquestionably good claim has been prompted or encouraged by the fact that, in a publication called *CURRENT LAW*, which appears monthly for the purpose of helping the legal profession to keep up to date in their knowledge of the law, there is a note of a case (*Clayton Newbury, Ltd. v. Findlay* (1)) decided by *McNAIR, J.*, which appears to bear a very strong resemblance to the present case. In the days when I was at the Bar one was only allowed to cite to courts certain recognised series of reports in which the cases had been reported by barristers, and one could sometimes submit as part of one's own argument a passage from a text-book which afterwards met with approval, and I think that this case is an instance of the awkward result of regarding other publications which have not the status of recognised series of reports. I say that because I know nothing of this case at all beyond what this note says. It may very well be that there is some distinction between the case with which *McNAIR, J.*, was dealing and the one with which I am dealing here, and I hope there is, because, if there is none, I am afraid that, with the greatest respect, I do not agree with the view which *McNAIR, J.*, took.

[His LORDSHIP stated the facts and continued:] It is obvious that, when a man is being remunerated only by commission and is not even paid something extra for expenses, which was the case here, there may be a practical difficulty as to how he is to carry on in between the payments which he may earn, and, of course, there is also the further difficulty that the earnings of a commission agent may fluctuate. It is because this case does not differ from a great many others that it has some slight importance. It is an extremely common thing for what is called a drawing account to be arranged, whereby

the agent is allowed to draw on the principal up to a certain amount, irrespective of what he has earned, on account of what he is going to earn. Clause 4 of the letter of June 20, 1952, reads as follows:

“ A sum of £125 per month shall be paid on account of the commission which will accrue due to [the defendant].”

A There is not the slightest ground that I can see for the strenuous argument of counsel for the defendant that he is paid that sum in respect of services that he is rendering by being the plaintiffs' agent. It is plain that he is being paid it “ on account of the commission which will accrue due to him ”. It is referred to in a later letter as an advance of commission, and, to my mind, that is a correct description of it.

B In my judgment, it is clear on principle that, if an anticipatory payment is made and that which is anticipated does not occur in the future, and, accordingly, that in respect of which the payment made would have been earned never takes place, but the money has been paid over, it cannot be retained by the recipient. I agree with counsel for the defendant that analogies dealing with a different subject-matter may be very misleading, but, none the less, I think it may help to clear one's mind to consider that, whatever type of
C transaction one looks at, unless the payment on account can be regarded as a deposit (in which case there is ancient law according to which a deposit can be forfeited in the event of a breach of his obligation by the depositor) with the special incidents attaching to a deposit, in the absence of some provision entitling the recipient to retain the payment, if a payment is made in anticipation of something being supplied therefor and that something is not supplied, the
D payment becomes recoverable. That seems to be the law on the various reported cases, and it seems to me to be in accordance with common sense. I think I am doing justice to the argument of counsel for the defendant if I say that it depends on the assumption that the payments which were to be made on account of the commission which would accrue due to him in the future were not payments on account of that, as the words of the letter say, but were pay-
E ments on account of something which he was doing in *præsenti*. But the defendants were not to pay for what he was doing in *præsenti*. He was to be paid purely on results. I cannot see any possibility on which he can be entitled to retain the sum claimed.

There is only one more aspect of the matter with which I should deal. It is said that a difficulty arises in connection with the form of action. Counsel
F for the plaintiffs has claimed the sum in dispute as being due under an implied term that the defendant should repay any overpayment on the termination of his agency. Alternatively, he has claimed to recover the sum in question as money lent to the defendant at his request by the plaintiffs. He has not claimed it as money had and received. Counsel for the defendant submits that no such term ought to be implied, and he says that McNAIR, J., refused
G to imply such a term in *Clayton Newbury, Ltd. v. Findlay* (1). It is also said by counsel for the defendant that, on the true view of the facts, this money was not money lent, and he points out that a claim for money had and received is not made. If it had been made, he says, having regard to what has been said in *Sinclair v. Brougham* (2) and later cases as to the limits of an action for money had and received, such a claim could not succeed. On the other
H hand, I have ventured to point out that in *Dies v. British & International Mining & Finance Corp., Ltd.* (3), STABLE, J., refused to be deterred by difficulties as to the form of the claim, saying that once one was satisfied that the claim was right in principle, one ought not to be unduly deterred by difficulties as regards its form. In the present case I would be prepared to hold, if necessary, that the term is to be implied. I would also be prepared to hold, if necessary, that this money was, in truth, money lent. If you anticipate that a man is going to earn something in the future, and, to help him to carry

on in the meantime, you pay him that which is not yet due in the expectation that it will become due, I think that that money may be treated as a loan. For these reasons the sum which is now agreed as the amount of the claim, ought to be repaid, and the claim ought to succeed. There will be judgment accordingly.

Judgment for the plaintiffs.

Solicitors: *S. A. Redfern, Barron & Morton* (for the plaintiffs); *Hamblins, Grammer & Hamlin* (for the defendant). A

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

CLAYTON NEWBURY, LTD. v. FINDLAY. B

[KING'S BENCH DIVISION (McNair, J.), December 3, 1951.]

Agent—Commission—Payments for expenses—Repayment at termination of agency of excess of payments over commission earned.

In October, 1949, the plaintiffs, wholesale gown manufacturers, agreed orally to employ the defendant as their sales representative to cover their territory north of London and up to the Scottish border. This agreement was confirmed by letters. The defendant was to be paid a commission of $7\frac{1}{2}$ per cent. on all orders executed and paid for by customers in his territory, whether those orders came as a result of his own initiative, or were old orders, or were repeat orders, and he was to be able to draw £25 a week, for expenses while travelling, to be placed against his commission account. The defendant resigned his appointment in January, 1950. During the period of his employment as agent the plaintiffs had paid him £237 9s. expenses, but his commission earnings were only £85 6s. 6d. The plaintiffs claimed the balance of £152 2s. 6d. D

Cases referred to:

- (1) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; Digest Supp.
- (2) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp. E

Aron Owen for the plaintiffs.

Viscount Hailsham for the defendant.

McNAIR, J., held that the sum claimed was only recoverable if some implied term, oral or written, could be found in the agreement under which the repayment could be enforced. The court would only imply a term which was not expressly mentioned if it was satisfied that it was necessary to give business efficacy to the contract and was what both parties must have intended. The parties had not expressed in words what was to happen if the expenses exceeded the commission and he was left in complete doubt as to what the parties had intended. Therefore, he was unable to imply any term into the agreement as to the repayment of any sum paid by the plaintiffs to the defendant in excess of the commission earned by him, and the plaintiffs could not recover the sum claimed. F

Solicitors: *H. Fishman & Co.* (for the plaintiffs); *Hamblins, Grammer & Hamlin* (for the defendant).

G.A.K.

WAKEFORD v. WAKEFORD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), June 25, 1953.]

Justices—Husband and wife—Maintenance—Amount of—Amount based on desire of justices to force husband to grant wife a tenancy of the matrimonial home.

A In September, 1951, the husband left the wife, but he continued to pay the rent and the rates and for the lighting of the flat occupied by the wife which formed part of a building of which he was the leaseholder. In addition he paid her £3 a week for her maintenance. The wife offered to pay the husband £1 a week in return for a tenancy of the flat, but the husband refused to grant her a tenancy. The wife issued a summons **B** under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion, which he admitted. The justices adjourned the case to give the husband an opportunity of granting the wife a tenancy of the flat, and when he refused to do so they awarded the wife £4 a week maintenance, intimating to the husband that, if he granted the wife a tenancy, they would consider an application by him for **C** a variation of the amount.

HELD: the justices had no right to increase the amount of the award in order to force the husband to grant the wife a tenancy, and, as, in doing so, they had erred on a matter of principle, the sum awarded would be reduced to £3 a week.

D AS TO AWARDS OF MAINTENANCE FOR THE WIFE IN COURTS OF SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 840, para. 1342; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 705-708, Nos. 6729-6755.

APPEAL by the husband against a maintenance order made by Mortlake (Surrey) justices on Dec. 2, 1952.

The parties had lived together in a flat in a building of which the husband **E** was the leaseholder. In September, 1951, the husband left the wife, but he continued to pay the rent and rates of the flat and for the electricity, and, in addition, he paid the wife £3 a week for her maintenance. The wife offered to pay the husband £1 a week for a tenancy of the flat, but this was refused by the husband. In 1952 the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion. On Nov. 11, 1952, before the justices the husband **F** admitted desertion, and in cross-examination he said he did not want to allow the wife £3 a week and take back £1 a week for rent. The justices adjourned the hearing in the hope that the husband would grant the wife a tenancy of the flat. At the adjourned hearing on Nov. 25, 1952, the husband offered to grant the wife a licence to occupy, but not a tenancy of, the flat, and the case **G** was again adjourned. On Dec. 2, 1952, the husband not having changed his mind, the justices made an order that he should pay £4 a week to the wife for her maintenance. Against that award the husband appealed.

Stinson for the husband.

Miss C. Colwill for the wife.

H LORD MERRIMAN, P.: It is said that in the circumstances of this case the amount of £4 was excessive, and that on the figures, which in substance are uncontroversial, so far as the particular point in question is concerned, the amount should be £3. Let me say at once that where, on the respective means of the parties, a particular figure appears to be sustainable, even though this court may think that it is a shade high or a shade low, as the case may be, we are very reluctant to interfere unless it appears that some question of principle is involved. Though I express no concluded opinion about it, the sum of £4,

regarded merely in the light of the test of the husband's earnings and the fact that the wife was not earning substantial money, might be a difficult figure to attack, but, in my opinion, it is clear that a serious question of principle arises. The husband, in partnership with another man, owns two shops, one in Tooting, and the other in Barnes. He has a lease of the premises at Barnes on the ground floor of which is the shop, and he sub-lets that floor to the partnership. The wife lives rent free in a flat on the first floor. The evidence, about which there is no dispute, is that the husband pays the rates on the whole building and pays for the lighting of the flat. The value of the flat—rent, rates and light free—is £1 a week. That figure is common ground. The husband put that figure on it; the wife, who is paying nothing, offered to pay that precise sum if she could get a tenancy of the flat instead of being allowed indefinitely to go on living there. That is where the question of principle arises.

After the figures had been gone into, the justices adjourned the case for a week, expressing the hope that an agreement as to the wife's tenancy might be made because they felt that she should have some security of tenure. The husband had just said in cross-examination by counsel for the wife:

"I do not want to allow my wife £3 and take £1 back for rent [being the figure the wife had offered] because she has said she would see me in the gutter."

The justices evidently thought (this is a matter about which there can be no doubt) that they were entitled to put some pressure on the husband to give his wife the tenancy which she sought and he refused. In passing, I may say that, apart from any question whether the wife would take undue advantage of becoming the husband's tenant, there are obvious circumstances in which, from a business point of view, it might be inconvenient to tie this flat up with a tenancy of any substantial duration. After all, a situation might easily arise in which, for some business reason, it might be desired to get rid of the ground floor premises, which would be facilitated if the whole of the premises were free. There was a further argument after the week's adjournment. At the end of it the justices decided to make an order of £4 a week, it being clear that the wife was not going to obtain the security of tenure which they thought she ought to have.

In due course, for the purposes of this appeal, the justices' clerk was asked to set out the reasons, and he says that, as the husband had admitted desertion, he assumed that what was meant was the reasons for the amount of the order. This, he says, was based on the respective earnings of the parties. If the matter stood there, it might be difficult, if not impossible, for this court to intervene, but the statement of the reasons goes on:

"As to the security of the wife's living accommodation [the justices] felt that the wife's position would be safer if protected by an agreement for the sub-letting of the premises than by a licence, but intimated that should any offer as to an agreement of tenancy be made by the husband they would consider a variation of the financial part of the order on application by your client."

It is not difficult, I think, to penetrate the thin veneer by which the decision of the justices is covered. On the present basis the wife is in occupation of a flat provided by the husband which is worth £1 a week to her, and in actual cash her maintenance should be £3. If for any reason her occupation of the flat is terminated by the husband, the loss of the accommodation has to be made up to her, as could, and, I think, should be done, by an order increasing the amount of the cash benefit by whatever sum is necessary to produce alternative accommodation on a comparable basis. Instead of that, the justices have ordered a payment of £4 in order to force the husband to give a tenancy of unknown duration, with the suggestion that, if he does give such a tenancy, the cash part of the order will be reduced on application by him.

In my opinion, they had no right whatever to make an order on that basis, and in doing so have clearly gone wrong on a matter of principle. They have increased the cash amount of the order by £1 more than it ought to be, having regard to the fact that the husband has supplied the wife with this residence rent, rates and lighting free, in order to force him to change that permissive occupation into a formal tenancy, the hypothesis being that the wife would have to pay £1 a week for the tenancy. The facts have only to be stated, in my opinion, to make it apparent that the justices have done something which they had no right to do. This appeal should be allowed, and, as there is no dispute about the figures, we can safely take it on ourselves to reduce the amount of the order from £4 to £3.

PEARCE, J.: I agree. From the cross-examination it would appear that it seemed to the wife's counsel—and I do not think she now repudiates it—that the right figure for maintenance was £3, plus the use of the flat, but she was trying to get the husband to give her the security of a tenancy instead of merely allowing her to be there at his will. As he was obdurate the justices adjourned the matter. On the adjourned hearing the husband's counsel declined to give a tenancy, but offered a licence. Again the justices adjourned the matter in order that the husband might become willing to grant a tenancy. The case was finally heard on Dec. 2, 1952. The husband being still obdurate, the justices made an order for £4. Counsel for the wife suggests that the justices had in mind the fact that the wife might be turned out of the flat, and that then her living expenses would be greater. The justices had no reason to believe that the husband was about to turn her out. If they were providing for that contingency (which has not yet occurred) the order is in the present circumstances too high. In my view, they were attempting to force the husband to grant a tenancy that he did not wish to give by fixing the maintenance at £1 higher than it ought to be, with the allurements of a possible reduction if he would grant a tenancy. However worthy may be the motives which led them to seek that the wife should have security of tenure, that is no justification for using an excessive order as a means of making the husband take the course which they thought was the right one. For these and the reasons my Lord has given, I agree that the appeal should be allowed, and that the amount of £4 should be reduced to £3.

Appeal allowed.

Solicitors: *Sutton-Mattocks & Co.* (for the husband); *Musson & Co.* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

Re T. (an infant).

[CHANCERY DIVISION (Roxburgh, J.), July 30, 1953.]

Infant—Maintenance—Custody granted to mother—Means of mother taken into consideration in assessing sum payable by father—Guardianship of Infants Act, 1925 (c. 45), s. 3 (2).

Where the custody of an infant has been given to the mother under the Guardianship of Infants Act, 1886, s. 5, it is proper, when the court is considering the amount of the father's contribution to the infant's maintenance to be ordered under the Guardianship of Infants Act, 1925, s. 3 (2), to take into account, not only the means of the father, but also the means of the mother.

AS TO RIGHTS OF MOTHER TO CUSTODY OF INFANTS AND LIABILITY OF FATHER AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 17, p. 663, para. 1381; and FOR CASES, see DIGEST, Vol. 28, pp. 261, 262, 267, Nos. 1151-1157, 1199, 1200.

APPEAL from an order made by a metropolitan magistrate by which a father was ordered, under the Guardianship of Infants Act, 1925, s. 3 (2), to pay £1 per week towards the maintenance of each of his two infant children, the custody of whom had been given to the mother under the Guardianship of Infants Act, 1886, s. 5. The grounds of appeal were (i) that the amount ordered was inadequate; (ii) that the magistrate was wrong in law in that he took into consideration the means of the mother in assessing the amount of maintenance; (iii) that the magistrate was wrong in law in that he failed to consider what was reasonable maintenance for the infant having regard to the means of the father only; and (iv) that, in deciding the amount of maintenance, the magistrate failed to act in accordance with s. 3 (2) of the Act of 1925.

Coode for the mother.

Seuffert for the father.

ROXBURGH, J.: The stipendiary magistrate gave the custody of two children to the mother, and the mother asked for an order for maintenance. The Guardianship of Infants Act, 1925, s. 3, provides:

“(1) The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant. (2) Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable.”

Counsel for the mother deliberately abstained from calling evidence as to the mother's means and he submitted that, for the purposes of s. 3 (2), the means of the mother were wholly irrelevant. The magistrate took a different view, called the mother into the witness box, and took evidence from her as to her means. He made an order on that footing, expressly stating that he had taken the mother's means into account, so as to enable counsel for the mother to raise this point of law on an appeal. The result, therefore, is that, if he was right in taking the means of the mother into account, his order stands, but, if he was wrong, the matter would have to be remitted to him for re-consideration. Therefore, the question is one wholly of law.

Counsel for the mother relied on s. 5 (4) of the Act of 1925, though, in my judgment, it is strongly against him. Section 5 provides:

"(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death. (2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death. (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting. (4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable."

The difference between s. 3 (2) and s. 5 (4) is manifest. There is no power under s. 3, if custody is awarded to the father, to order the mother to make any contribution towards the maintenance of the child, but under s. 5 there is a power to order not only the father but also the mother to make a contribution towards that maintenance by payment to a guardian. The difference between the two sections seems to me to indicate clearly that those words "having regard to the means of the mother or father" are linked up with the word pay—"pay . . . having regard to the means of the mother or father"—in s. 5 (4), and may well be similarly linked in s. 3 (2), where the mother is omitted because she never has to pay under s. 3 (2).

The point that is taken is that, by reason of the phraseology of s. 3 (2), the court is not entitled to take into account the means of the mother in assessing the quantum of maintenance. I am unable to adopt that view. The object of the section seems to me quite clear. It will be noticed that the section is permissive—the court may make such an order—and the court, in considering whether to exercise its discretion, has first of all to address itself to the needs of the infant as regards its maintenance. The phrase employed is "towards the maintenance of the infant", not "in satisfaction of" or "in discharge of", or anything of that sort. It is "towards the maintenance". The first thing that the court has to consider is: What does the infant need? For that purpose, the court has to consider, for instance, the age of the infant, whether it is at school or in a perambulator or at a university, and its standard of life hitherto is by no means immaterial. It would quite plainly be permissible to consider whether it had funds provided for its maintenance by some deceased parent or aunt. Why not consider how far its mother is able to maintain it? I can see no reason for excluding that one circumstance, which seems to me to be very relevant, from all the other relevant circumstances which have to be considered.

Counsel, quite properly, says: "Why, then, is there this reference to the means of the father?" To my mind, the reason is quite plain. The first thing one has to consider is what is reasonably required for the maintenance of the infant, but it may well happen that what is reasonably required for the infant is more than it is just to order the father to contribute, having regard to his financial position. He is the person who has to pay, and this is a safeguarding provision, and the reason why the mother is not mentioned there is

because she never has to pay under s. 3 (2). The reason why the mother is mentioned in s. 5 (4) is because under that section she does sometimes have to pay.

Incredible results would follow if the court could consider, in exercising its discretion under s. 3 (2), only the means of the father—so incredible that counsel did not suggest that that was the interpretation. He says that it should be read as follows: "The court may further order that the father shall pay to the mother towards the maintenance of the infant such sum as the court may think reasonable, having regard to all relevant circumstances, including means, but, as to means, having regard to those of the father only". Section 3 (2) does not provide anything at all resembling that, and, as I do not find it difficult to construe the section without inserting any words, I am not prepared to insert words such as would be required to enable me to construe the section in the manner which counsel has suggested. It is, of course, no answer in law to say that counsel has for the first time raised this point on a section which has been applied without question on innumerable occasions, but it is comforting to me to feel that it is possible to give to this section a construction which has, I think, been adopted without question for nearly thirty years. Accordingly, in my judgment, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Hepburns* (for the mother); *F. W. Baldwin* (for the father).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

CHALLAND v. BARTLETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 21, 1953.]

Food and Drugs—Milk—"Possession for sale"—Possession by producer—Milk at place on farm agreed as collecting point with retailer—Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950 (c. 35), s. 9 (1) (c). Food and Drugs—Proceedings against third party—Form of information—Food and Drugs Act, 1938 (c. 56), s. 83 (3).

The respondent was a dairy farmer who sold his milk to the Milk Marketing Board, and was directed by the board to deliver the milk to W., a retailer. The respondent and W. agreed that the delivery point should be the dairy on the respondent's premises, where the respondent placed the milk churns to be collected by W. Samples were taken (i) from milk which was being retailed by W. about a mile away from the farm and which had come from the respondent's dairy, and (ii) from churns of milk standing at the respondent's dairy awaiting collection by W. The samples showed that water had been added to the milk. Three informations were preferred against the respondent. The first stated that he "by virtue of s. 83 (3) of the Food and Drugs Act, 1938, did have in his possession for the purpose of sale for human consumption milk to which an addition of water had been made, contrary to s. 9 (1) (c) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950", and the second and third informations alleged similar offences with the omission of the words "by virtue of s. 83 (3) of the Food and Drugs Act, 1938".

HELD: (i) the first information was bad in that, as was conceded, it did not allege that the local authority "are reasonably satisfied that the offence of which complaint is made was due to an act or default of" the respondent, and the summons in respect of that offence must be dismissed.

(ii) with regard to the second and third informations the milk which was at the respondent's dairy awaiting collection by W. was still in the respondent's possession, even though the property in it had passed to the

Milk Marketing Board, and, therefore, the respondent had the milk in his possession for the purpose of sale within s. 9 (1) (c) of the Act of 1950 and was guilty of the offences charged under that sub-section.

Oliver v. Goodger ([1944] 2 All E.R. 481), doubted.

EDITORIAL NOTE. Section 9 of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, reproduces s. 24 and s. 65 (1) (b) of the Food and Drugs Act, 1938.

FOR THE FOOD AND DRUGS ACT, 1938, s. 83 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 458.

FOR THE FOOD AND DRUGS (MILK, DAIRIES AND ARTIFICIAL CREAM) ACT, 1950, s. 9 (1) (c), see *ibid.*, Vol. 29, p. 266.

B Cases referred to:

(1) *Oliver v. Goodger*, [1944] 2 All E.R. 481; 109 J.P. 48; 2nd Digest Supp.

(2) *Kilsby v. Horsford*, (1949), 93 Sol. Jo. 601; 2nd Digest Supp.

CASE STATED by Sussex justices.

At a court of summary jurisdiction sitting at Uckfield on Mar. 5, 1953, the appellant, William Edward Challand, a chief inspector of weights and measures, preferred informations against the respondent, James Gilbert Bartlett, charging (i) under the Food and Drugs Act, 1938, s. 83 (3), that, on Jan. 11, 1953, he did have in his possession for the purpose of sale for human consumption milk to which an addition of water had been made, contrary to the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1) (c), and (ii) by two further informations, that on Jan. 12, 1953, he had in his possession for the purpose of sale for human consumption milk to which an addition of water had been made, contrary to s. 9 (1) (c) of the Act of 1950.

It was proved or admitted that the respondent was the owner and occupier of premises known as Lower Totease Farm, Buxted, where he carried on the business of farming and milk production; that on Sept. 1, 1950, he entered into a contract with the Milk Marketing Board to sell to the board all milk produced at his farm except what he lawfully used in his own household, etc.; that it was provided by cl. 3 of the contract that he should deliver the milk daily to such places and consignees as the board directed, and by cl. 4 (1) that the milk should be ready for collection at the farm collecting point, being, in the absence of other directions, the point at which the milk was usually put for collection; that the board directed the respondent to supply and deliver milk produced at his farm to one L. A. Wood and that the milk would be collected at the farm; that the dairy at the respondent's farm contained a milk cooler and a bottling machine; that the dairy was used by both Wood, who bottled the milk there, and the respondent; that the milking was done by the respondent in the cowstall, and that the milk was taken to the dairy and placed in the drum of the cooler and thence into churns which were placed in the centre of the floor of the dairy for collection by Wood; that this was agreed between the respondent and Wood as the place of delivery and collection of the milk, and that the respondent, having placed the churns in this position, had completed the delivery of the milk to Wood and had done all that he was required and directed to do by the board; that on Jan. 11, 1953, Wood was seen delivering milk in the village of Buxted about one mile from the respondent's farm; that samples were taken by an inspector who ascertained that the milk had been produced by the respondent; that the following morning the respondent's farm was visited and samples were taken from churns placed in the centre of the dairy floor, the agreed place of collection by Wood, who arrived shortly afterwards and commenced bottling milk from churns from which samples had been taken; that three of the samples contained added water; that samples were also taken of milk which was being produced when the inspector arrived at the dairy and these samples were found to be genuine milk.

On behalf of the respondent it was contended on the authority of *Oliver v. Goodger* (1) (i) that the milk of which samples were taken in the dairy, having been delivered to the agreed collecting point in accordance with the contract and direction of the board, was no longer in the respondent's possession at the time the samples were taken, and (ii) that the milk of which a sample was taken from Wood on his delivery round was also not in the respondent's possession. On behalf of the appellant it was contended that, so far as the milk sample of the delivery round was concerned, s. 83 (3) of the Food and Drugs Act, 1938, applied, and that the milk from which samples were taken in the dairy was in the possession of the respondent since it was still on the respondent's premises and Wood had not yet arrived to take possession of it.

The justices being of opinion (i) that the milk contained added water, (ii) that at the time when the sample was taken on the milk round the milk was not in the possession of the respondent, and (iii) that the milk of which samples were taken in the dairy had passed out of the possession of the respondent when it was placed by him at the agreed point for collection, dismissed the informations. The appellant appealed.

Paul Wrightson for the appellant.

J. H. Gower for the respondent.

LORD GODDARD, C.J.: The first information, in my opinion, was rightly dismissed. The justices found that the respondent had sold his milk to the Milk Marketing Board, and that the board had the right under the contract to direct him where the milk was to be delivered. They directed him to deliver the milk to one Wood, a retail milkman, who, by arrangement with the respondent, used to come to the respondent's farm and collect it from a particular place. One day, after Wood had fetched the milk, he was selling it in the village street, when he was stopped by the appellant, the sampling officer, who took samples. Having ascertained that the milk came from the farm, when it was found to have water added to it the appellant decided to take proceedings under the Food and Drugs Act, 1938, s. 83 (3), which allows the local authority, if they are satisfied that the breach of the Act is due, not to the person who actually sells, but to the person who supplies to the seller, and that the seller can put forward a defence, to proceed against the original supplier, in this case the respondent. The summons issued against the respondent charged him with being in possession of the milk that Wood was selling in the village. Of course, he was not in possession of that milk, the possession having passed to Wood who was selling it, but it was quite right, no doubt, to attempt to take proceedings under s. 83 (3). An information under that sub-section, however, should set out the facts and state that the local authority are reasonably satisfied that the offence of which complaint was made was due to the act or default of the person proceeded against under the sub-section. It may be that this is a technical point because on the merits, or, perhaps, the de-merits, of the case, there is no doubt that the respondent was responsible. But the proceedings under s. 83 (3) must be taken in proper form, and counsel for the appellant concedes, and it is the opinion of the court, that the information was not in the right form and did not give the justices jurisdiction.

With regard to the other two summonses, we think that the case must go back with a direction to convict. Those two cases related to sales of milk which was at the respondent's dairy. It seems to me that until Wood took possession of the milk, it always was and remained in the possession of the respondent. It must have been in the possession of somebody because there is no suggestion that it was abandoned. It was held by the respondent for Wood, and if a trespasser, or somebody representing himself as Wood, or a thief, had come to the farm, the respondent would not have delivered the milk to him, but would have said: "This is Wood's milk. You have to get authority from him". He was

keeping possession of it for Wood although it may be that the property in the milk had passed to the Milk Marketing Board. The property was in the Milk Marketing Board till it had been delivered to Wood and it seems to me it was in the possession of the respondent till it had been delivered to Wood.

A Before I refer to the cases cited, I would say that the point was made that, as the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1) (c), refers to "have in his possession for sale", and as the sale was complete in the sense that as soon as the milk was appropriated to the contract the property passed to the Milk Marketing Board, therefore, it was not in the respondent's possession for sale. But that is not, I think, the intention of the Act, which is to draw a distinction between an article of commerce to be sold to other people and an article to be used by the farmer for his own personal use. If he keeps B milk on his premises for his own personal use, there is no reason why he should not have milk and water if he prefers that to milk. In my opinion, this expression "possession for the purpose of sale" simply shows that s. 9 (1) (c) is dealing with milk treated as an article of commerce and not with milk kept for the farmer's own use. *Oliver v. Goodger* (1), which was cited to the justices and does seem at first sight to be very like this case, was a case in which a Divisional Court consisting of VISCOUNT CALDECOTE, C.J., HUMPHREYS, J., and BIRKETT, J., C decided that no offence had been committed. That case was considered by this court in *Kilsby v. Horsford* (2), which I remember because both OLIVER, J., and myself, and, I think, STABLE, J., the third member of the court, found D great difficulty in understanding the decision in *Oliver v. Goodger* (1). Certainly, *Oliver v. Goodger* (1) has not been followed, and I cannot help thinking that, if the effect contended for successfully before the justices should be given to that decision, it would, to use a common expression, drive a coach and four through this section of the Act. We distinguished *Kilsby v. Horsford* (2) from *Oliver v. Goodger* (1) by showing that the judgment in the latter case could be upheld on the ground that the milk had left the farm premises and had been put on the road outside the farm. Therefore, we said, to use the words of VISCOUNT E CALDECOTE, C.J. ([1944] 2 All E.R. 482), that on the evidence the justices were entitled to come to the decision which they had reached, and the decision which the justices in that case had reached was that the milk was no longer in the possession of the farmer. I say frankly, though I recognise I am bound by that case, that I feel doubt whether it was right, and I myself should not have decided that way. I said in *Kilsby v. Horsford* (2) (93 Sol. Jo. 601) that the milk was F as much in the possession of the respondent farmer as if it had been in the farm dairy or in a barn, because the delivery point in that case was within the curtilage of the farm. That case was not cited to the justices in the present case, and, therefore, they not unnaturally thought they were bound by *Oliver v. Goodger* (1). Therefore, as they did not come to a correct decision with regard to the second and third informations, the appeal must be allowed and those G informations must go back to the justices with an intimation that the offences were proved.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

Appeal partly allowed.

H Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. S. Martin*, clerk of the county council, Lewes (for the appellant); *Langhams & Letts*, agents for *Dawson & Hart*, Uckfield (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

STYLE v. STYLE AND KEILLER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), July 15, 29, 1953.]

Divorce—Settlement of wife's property—Power of court to order deed settled by conveyancing counsel—Power to ante-date deed to date of decree absolute—Matrimonial Causes Act, 1950 (c. 25), s. 24 (1).

On Mar. 20, 1950, the husband obtained a decree nisi of divorce on the ground of the wife's adultery with the co-respondent, and was awarded £5,000 damages. On May 31, 1950, the decree was made absolute. On June 20, 1950, the wife married the co-respondent. The husband applied under s. 24 (1) of the Matrimonial Causes Act, 1950, for a settlement on him of a portion of the wife's property. The husband was in receipt of an annual income from a pension and investments of £1,550; the wife had property to the value of about £450,000 (of which that in England was worth £54,000), and was in receipt therefrom of a gross annual income of £11,000 to £12,000. There were no children of the marriage, but the wife had a son by a previous marriage, and she was paying for his education.

HELD: in the circumstances a sum of £1,500 a year was not excessive and the wife would be ordered to settle on the husband property which would provide that sum; but under s. 24 (1) the court had no power to order a deed to be drawn up by conveyancing counsel of the court: *Lorrimer v. Lorrimer & Clair* ([1908] P. 282), doubted; or to ante-date the settlement to the date of the decree absolute: *Savary v. Savary* (1898) 79 L.T. 607, applied.

AS TO SETTLEMENT OF PROPERTY OF GUILTY WIFE, see HALSBURY, Hailsham Edn., Vol. 10, p. 797, paras. 1265, 1266; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 637-640, Nos. 5989-6031.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 24 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 411.

Cases referred to:

- (1) *Bacon v. Bacon & Bacon*, (1860), 2 Sw. & Tr. 86; 29 L.J.P.M. & A. 125; 2 L.T. 438; 164 E.R. 925; 27 Digest, Replacement, 637, 5989.
- (2) *Lorrimer v. Lorrimer & Clair*, [1908] P. 282; 77 L.J.P. 108; 99 L.T. 314; 27 Digest, Replacement, 637, 5994.
- (3) *Savary v. Savary*, (1898), 79 L.T. 607; 27 Digest, Replacement, 659, 6214.

APPLICATION by the husband under s. 24 (1) of the Matrimonial Causes Act, 1950, for a settlement of a portion of the wife's property on him.

The parties were married in 1938, the husband being then thirty-seven and the wife thirty years of age. There were no children of the marriage, but the wife had a son by a previous marriage. On Mar. 20, 1950, the husband obtained a decree nisi on the ground of the wife's adultery with the co-respondent and was awarded £5,000 damages. On May 31, 1950, the decree was made absolute. On June 20, 1950, the wife married the co-respondent. On Feb. 2, 1951, the husband served on the wife notice of an application under s. 24 (1) of the Matrimonial Causes Act, 1950, for a settlement of part of the wife's property to be made for his benefit. The husband, who, until his retirement in 1947 through ill health, had been manager of a brewery, was in receipt of a voluntary pension from his former employers of £1,000 a year, and he also had investments producing an income of £550 a year. The wife had capital of the value of about £450,000, of which £54,000 represented investments in this country, the rest of her property being in the United States of America, and her gross annual income was between £11,000 and £12,000. The wife was paying for the education of her son, now eighteen years of age, and she proposed to send him to Oxford University. In his report dated June 18, 1953, the registrar submitted that the wife should

be ordered to settle on the husband as from the date of the decree absolute a fund producing a gross sum of £1,500 a year for his life and that this should be provided from securities to be agreed by the parties or in default of agreement as directed by the registrar. On July 13, 1953, the wife filed notice of motion for a variation of that report on the grounds that the registrar's finding that the husband's conduct did not break up the marriage was against the weight of evidence, that the sum proposed in the report was excessive, and that the settlement ought not to date from the decree absolute and ought not to be for the husband's life. On July 14, 1953, the husband filed notice of motion for a variation of the report by increasing the proposed amount, but it was stated in court that, but for the wife's notice of motion, the husband would probably have been content with the award.

B *Beyfus, Q.C., Phillimore, Q.C., and R. H. W. Dunn* for the husband.
Laskey and Tilling for the wife.

Cur. adv. vult.

C July 29. **BARNARD, J.**, stated the facts and continued: The wife puts forward four grounds for varying the registrar's report. First, she says that the registrar misdirected himself in holding that the husband's habits and treatment of the wife did not affront or disgust her so as to cause the break-up of the marriage and so held against the weight of evidence. I propose to say little about this. The wife filed a number of affidavits in which she sought to establish that, quite apart from her adultery with the co-respondent, the marriage was a failure and that she would have had to leave her husband because of his habits. The registrar went into this most carefully and I have no doubt that he arrived at a true conclusion. After summing-up the evidence he says:

"I disbelieve the wife's affidavits. I think some of the allegations are entirely untrue whilst the others are exaggerated."

E I think that the registrar was right and I have no doubt that what really broke up this marriage was the wife's adultery with the co-respondent, and it is both idle and futile at this stage when she is seeking to prevent a settlement of her property to put this defence forward.

F Secondly, the wife says that the sum proposed in the report to be settled by the registrar is excessive, having regard to the absence of any reasonable prospect that the husband would have obtained any financial benefit from the wife's fortune if the marriage had continued. She relies on what the registrar says in his report, namely:

"In all the circumstances I am doubtful whether the wife would have allowed her husband to enjoy her fortune to the same extent as one would expect in a more normal case and indeed she did not do so even before meeting the co-respondent."

G The registrar adds this, however:

"There can be no doubt that he would have benefited fairly substantially had the marriage continued uncomplicated by this liaison."

I think the answer is that, but for the registrar finding those to be the facts, the sum he has recommended in his report would have been far larger.

H Thirdly, the wife says that the amount is excessive having regard to the amount of her capital in stocks and shares within the jurisdiction which the report would require her to settle. Now, the wife's fortune is fully dealt with in an exhibit to her affidavit, namely, a letter from her accountants in which they deal with her property in detail and in a schedule to the letter set out a full list of her free investments in this country. The capital value of those investments is about £54,000 and the income received from them for the year ending Apr. 5, 1952, was just over £2,000 a year. I am going slightly to vary the report made by the registrar, because I do not think it would be right to

tie up what might amount to three-quarters of the wife's free investments in order to produce the £1,500 a year. What complicates matters in this case is that the rest of the wife's property is situated in the United States of America, and a very large proportion of that is in joint ownership of land there. But she receives the income from it in this country and I have yet to learn that income received in this country does not constitute property. Taking that into consideration, I only propose to vary the registrar's report by giving slightly more detailed instructions as to how the property is to be settled. I think it correct to order the wife to execute a settlement of her property to produce £1,500 a year gross payable to the husband during his life, one moiety, that is to say, £750 a year, to be secured on the wife's free investments in this country and, as to the other moiety, the remaining £750 a year, by a charge on her income receivable in this country.

That does not, unfortunately, dispose of the matter. I must say that I would have liked to invoke the assistance of conveyancing counsel of the court and to have ordered any deed to be settled by conveyancing counsel of the court, but, strange to say, neither s. 24 (1) and (2) nor s. 25, which deals with variation of settlements, gives the court any jurisdiction to refer the deed to conveyancing counsel. That is distinct from s. 19 (2), s. 22 (4), s. 23 (2), or s. 26 (3), of the Act, by which the court is expressly given jurisdiction to refer the matters dealt with therein to conveyancing counsel. This distinction was commented on by the full court in *Bacon v. Bacon & Bacon* (1). I notice, however, that in *Lorriman v. Lorriman & Clair* (2), which was an application for a settlement of the guilty wife's property, the registrar followed the practice as in maintenance and submitted in his report that in default of the agreement the necessary deed should be referred to conveyancing counsel. This submission seems to have passed unnoticed when the matter came before the court.

Fourthly, the wife says that the settlement ought not to take effect as from the decree absolute, and she also objects to the sum being settled on the husband for his life. With regard to that latter objection it is well within the jurisdiction of the court to order a settlement for the life of the husband, and I think it is very right and proper in this case. As to the other matter I feel grave difficulty. I do not think myself on looking at the section that the court really has any jurisdiction either to ante-date the settlement or to ante-date the effect of the settlement. Section 24 (1) says:

"If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery . . . of the wife that the wife is entitled to any property either in possession or reversion . . ."

That is different from the wording of s. 19 (2) which deals with maintenance, and which commences "On any decree for divorce." I cannot help feeling that the court has no jurisdiction to do anything except to order the wife to settle the property. That, I think, must mean that it only becomes effective as from the date of the settlement. I am fortified in that view by *Savary v. Savary* (3) where the order of SIR FRANCIS JEUNE, P., was as follows (79 L.T. 610):

"It is ordered that the [wife] do settle and assign as beneficial owner upon the [husband] the two several annuities hereinafter mentioned during her life, to commence from the date of the settlement to be made under this order . . ."

This order of the President was reviewed by the Court of Appeal and SIR NATHANIEL LINDLEY, M.R., in no way criticised this part of it. I should like to think that I was wrong, because it is obviously inviting the guilty party who has been ordered to make a settlement to delay the proceedings as long as possible, and I am not at all sure that that has not been done in this case—

the husband's notice being dated June 29, 1950, and the date now being July, 1953. Nevertheless, I feel I must vary the report in this respect, and, therefore, the order which I propose to make must commence from the date of the settlement to be made under this order.

As to the £1,500 a year which the wife has been ordered to settle, I think the guiding principle is laid down in *Lorriman v. Lorriman & Clair* (2) by BUCKNILL, J., where, in the course of his judgment, he said ([1908] P. 289):

A

"The underlying principle is that the court must try to ascertain the nature and extent of the pecuniary change by the wife's criminality, and in order to see that it must look at the probable pecuniary position which the husband, the wife, and the issue of the marriage would have occupied if the marriage had not been dissolved."

B

Having regard to all the facts in this case I think that, if I had dealt with it in the first instance myself, I might not have ordered her to settle so much. There are no children of this marriage, and what the registrar recommends should be settled will, in effect, double the husband's income, but I think I should have only ordered a little less. That being so, I do not think it would be right to interfere with the sum that the registrar has arrived at after he has carefully considered every material fact. I also refrain from interfering with the sum recommended by the registrar, because I do not feel able to agree with him that you can ante-date the effect of this settlement to the decree absolute and there has been three years' delay. Therefore, except for the two slight variations I have made, one which details the security a little more than the registrar has done and the other which provides that the settlement is only to be effective as from the date of its execution, I confirm the report.

D

[After some discussion],

Subject to the consent in writing of the wife, the deed will be settled by conveyancing counsel to the court.

E

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband); *Edwin Coe & Calder Woods* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

DICKSON v. FLACK AND OTHERS.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), July 15, 16, 17, 1953.]

Factory—Dangerous machinery—Cutter of vertical spindle moulding machine—“Most efficient guard”—Protection from contact with cutters or from flying broken parts of machine—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 17—Factories Act, 1937 (c. 67), s. 14 (1).

A vertical spindle moulding machine in a factory was fitted with a Shaw guard, which was found by the trial judge to be the most effective to protect the operator from coming into contact with a cutter when the machine was being operated (that being much the greatest danger), but less effective than a cage guard to protect the operator from broken pieces of the machine flying out. The danger from flying fragments on such machines was recognised in two official pamphlets (Safety Pamphlet No. 8, published by the Home Office in 1928, and Form No. 279, 1935, reprinted in 1947, issued by the Ministry of Labour and National Service), and also in the trade and in evidence for the occupier of the factory, the employer of the plaintiff, and the pamphlets illustrated various guards, besides the Shaw guard and cage guards, which minimised the risk of injury from a piece of machinery ejected. While operating the machine the plaintiff was injured by a piece of a cutter which flew out, and he claimed damages against his employer.

HELD: (i) (DENNING, L.J., dissentiente) the requirement in reg. 17 of the Woodworking Machinery Regulations, 1922, that the cutter of every vertical spindle moulding machine should be “provided with the most efficient guard having regard to the nature of the work which is being performed” was intended to protect employees from the danger, not only of their coming in contact with the cutter, but also of a cutter, or part of a cutter or some part of the machine to which the cutter was attached, breaking away and injuring them, this being a danger which on the evidence had long been recognised; and as on the facts a guard affording this protection had not been, and could have been, provided, the employer was liable for breach of the regulation.

Harrison v. Metropolitan Plywood Co. ([1946] 1 All E.R. 243), approved.

Carroll v. Andrew Barclay & Sons, Ltd. ([1948] 2 All E.R. 386), distinguished.

(ii) in any event, the employer was liable for a breach of the requirement in s. 14 (1) of the Factories Act, 1937, that “Every dangerous part of any machinery . . . shall be securely fenced”, which covered the case of any dangerous part, including a part of the machine flying out, in so far as provision was not made in respect of it by reg. 17.

Benn v. Kamm & Co., Ltd. ([1952] 1 All E.R. 833) and dictum of LORD DU PARCQ in *Carroll v. Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. 391), applied.

Dictum of LORD PORTER (*ibid.*, 390), not applied.

Decision of HAVERS, J. ([1953] 1 All E.R. 236), reversed.

FOR THE FACTORIES ACT, 1937, s. 14 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1009. FOR THE WOODWORKING MACHINERY REGULATIONS, 1922, reg. 17, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 117.

Cases referred to:

(1) *Benn v. Kamm & Co., Ltd.*, [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 3rd Digest Supp.

(2) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

(3) *Harrison v. Metropolitan Plywood Co.*, [1946] 1 All E.R. 243; [1946] K.B. 255; 115 L.J.K.B. 187; 174 L.T. 190; 110 J.P. 130; 2nd Digest Supp.

(4) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 2nd Digest Supp.

(5) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.

APPEAL by the plaintiff against an order of HAVERS, J., dated Dec. 19, 1952, and reported [1953] 1 All E.R. 236.

The plaintiff was a woodworking machinist of fifty-three years' experience and was employed by a builder, being in charge of a joiner's shop which the employer occupied for the purposes of his building contracts. In the plaintiff's charge were ten or eleven machines, including two vertical spindle moulders, of which one, a re-conditioned machine, was twenty-five to thirty years old and mechanically in a very fair condition. The motive power was electric with flat-belt transmission, the power controls being of press-button type and conforming to the regulations. The spindle head-piece unit received and carried an interchangeable square cutter block with a groove, dovetail fashion, running lengthways on four sides. The grooves received cutter bolts and were the means, with washers and nuts, of securing the cutter to the block.

On Mar. 29, 1950, the plaintiff had to set up the machine for the purpose of running a window sill in connection with a shop front, the piece of wood being a straight piece five inches wide, three inches thick and five feet, six inches long. He put two cutters on the cutter block, and, according to his evidence, tightened them up by the nut with a spanner, and he started the machine to make a test run in order to ascertain whether the cutters were properly balanced before operating the machine on the wood. While the machine was working a bolt broke, one of the cutters flew off and either a nut or a nut and a portion of the bolt struck the plaintiff in his left eye and injured him. The machine at the time was fitted with a Shaw guard (spring guard (Shaw's patent) as shown in Safety Pamphlet No. 8, Fencing and other Safety Precautions for Woodworking Machinery, 1928 ed., p. 54, fig. 69, issued by the Home Secretary).

HAVERS, J., found as a fact that a guard of the Shaw type was the most effective to protect the operator from coming into contact with a cutter when the machine was being operated on a small section of straight wood, but that a cage guard would have been more effective to protect him from broken pieces of the machine flying out. The Shaw guard was also the more effective if both dangers had to be taken into account, since the danger from contact with a cutter was by far the greater. During operation of the machine in order to test the balance of the cutters, the danger of the operator coming into contact with the cutters was still very great, but the danger of injury from a fragment of a broken part of the machine flying out was remote. He held that reg. 17 of the Woodworking Machinery Regulations, 1922, was intended to prevent an employee from coming into contact with the cutters, that "the most efficient guard" which the regulations required to be provided was the most efficient guard for that purpose and that, therefore, no breach of the regulations had been proved. The plaintiff appealed.

The employer died before the trial of the action and the proceedings were continued against his personal representatives.

Beney, Q.C., and *F. Donald McIntyre* for the plaintiff.

Hylton-Foster, Q.C., and *Jukes* for the defendants, the personal representatives of the employer.

SINGLETON, L.J.: This appeal raises a question under the Woodworking Machinery Regulations, 1922, as amended by the Woodworking

(Amendment of Scope) Special Regulations, 1945, and, perhaps, too, a question under the Factories Act, 1937, s. 14 (1). The plaintiff was sixty-seven years of age when hurt in an accident in the employer's factory on Mar. 29, 1950. He was an experienced woodworker, having been on that kind of work all his working life, and he was employed by the defendants as a woodcutting machinist. On the day of the accident he was operating a vertical spindle moulding machine when a cutter was thrown off and a bolt and a nut were thrown out of the machine, and something—probably part of a nut or bolt—struck his eye, which he lost.

In the plaintiff's action against his employer it was said, first, that there was a breach by the employer of the Woodworking Machinery Regulations, 1922, reg. 17, and, further or alternatively, a breach of the Factories Act, 1937, s. 14 (1), and it was further said that the employer was negligent in that he had failed to perform the duty which he owed to his employees, a duty to take reasonable care that they were not subjected to unnecessary risk. We have not heard argument on the allegation of negligence at common law. I indicated to counsel for the plaintiff at an early stage of his argument that it would be very difficult for him, in view of the judge's findings of fact, to establish negligence against the employer, but he desired to keep that claim open. The main argument has developed on reg. 17. The plaintiff worked in front of a table. He had to pass a piece of wood along a fence so that it came into contact with the cutters, and a guard, known as the Shaw type of guard, was provided. The advantage of that guard is that it brings pressure to bear on the piece of wood which has to pass along the cutters from above and from the front, so that the hands of the operator do not approach the cutters. On the morning of the accident the plaintiff had not commenced to put wood through the machine. He had first to test the machine to see that the cutters were working properly and that the machine was running evenly, and he was doing the testing when he met with the accident. The suggestion was made by counsel for the plaintiff that there is a difference between testing time and working time, and that, even if it could be said that the Shaw type of guard was the best for ordinary working, which he did not admit, it was not the best for use during testing time, and that there ought to have been another guard for testing time. I do not think that there is any substance in this distinction. Testing time is very short. I do not think it could have been contemplated that there ought to be another type of guard for testing, i.e., a guard other than that used normally during the working of the machine, and I propose to approach this case on the basis that, if the most efficient guard was provided for working purposes, that, too, should be regarded as sufficient for the short period during which testing would take place.

The machine is described sufficiently by HAVERS, J. ([1953] 1 All E.R. 237). He described it as an old machine, but mechanically in very fair condition. The motive power is electric with flat-belt transmission, and the power controls are of the press-button type and conform to the regulations. The spindle head-piece unit dimensions are $1\frac{1}{4}$ inches and seven inches long, and on and, in a sense, below the spindle head-piece there is an interchangeable square cutter block, which revolves with a spindle unit at 4,500 revolutions a minute. Attached to the cutter block are two cutters which are fastened to the cutter block by means of bolts and nuts. As the cutter block revolves, there go with it the two cutters which do the necessary moulding of the piece of wood which is passed through the machine. The very high speed may mean that there is some loosening of bolts. That is not likely to happen in the ordinary course if the nuts have been properly tightened, but it may occur. Sometimes there occurs what is called drift, and a cutter may become loose. The danger of something being thrown from a machine of this type has been recognised for many years, and an examination of the evidence of the expert witnesses called

for the employer shows that they recognised it. I refer in particular to the evidence of Mr. Bevan when he was cross-examined. He was asked:

"It is recognised throughout that document [a pamphlet], as you fairly agreed yesterday, that this sort of machine is a dangerous machine? A.—It is recognised throughout this document and throughout the trade. Q.—And also that it is liable to shoot parts of it out at great speed. We are agreed about that? A.—I do not think this document deals particularly with parts of machines coming out."

It was pointed out to him later that the small pamphlet did deal with that matter. Other witnesses spoke of the danger of parts being thrown out of the machine. Fortunately, as far as the evidence showed, they had not known of a great number of accidents from that cause, but from the books which were before the judge one sees more of the danger which arises from a machine such as this. In 1928 the Home Office published "Safety Pamphlet No. 8. Fencing and other Safety Precautions for Woodworking Machinery", and at p. 51 there is an article under the heading "Spindle Moulders" in which it is said:

"The vertical spindle moulder or shaping machine is one of the most dangerous tools in common use. It causes a large number of accidents yearly, and a considerable proportion of these result in the loss of several fingers. As with circular saws and over-hand planers the reason lies mainly in the operative's hands being constantly in close proximity to rapidly moving edge tools. The fingers come into contact with the cutters, especially when the work is violently torn from the machinist's grasp in consequence of some irregularity catching in the cutters. The fatal accidents are caused by cutters breaking off or coming loose, and being hurled away with great velocity, due to the centrifugal force developed by their exceptionally high speed, one to seven thousand revolutions per minute. It is therefore of prime importance that suitable safeguards should be chosen for each operation and that cutters should be set with scrupulous care."

Another smaller pamphlet also before the judge was "Form No. 279", issued by the factory department of the Ministry of Labour and National Service. This was published in 1935 and reprinted in 1947. That pamphlet gives diagrams of various guards which can be used for this type of work, and on p. 14 it has this passage:

"The danger to workers at neighbouring machines or benches can be minimised by the provision of guards and screens which will intercept a flying cutter."

Thus, it is clear that the danger of parts flying out of a machine has been recognised by those responsible for safety precautions for a considerable number of years.

The Woodworking Machinery Regulations, made by the Secretary of State for Home Affairs in 1922, recognise the difficulty which arises in the use of certain machines. The definition clause provides:

"'Woodworking machine' means a circular saw, plain band saw, planing machine, vertical spindle moulding machine or chain mortising machine operating on wood."

Regulation 17 provides:

"The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed."

The machine which was being used by the plaintiff at the time of his accident was a vertical spindle moulding machine, so that the duty of the employer,

or occupier of the factory, was that that machine should, when practicable, be provided with the most efficient guard, having regard to the nature of the work which was being performed, but no specific guard is prescribed.

Regulation 18 also deals with a guard for the cutter, and it may be said to give some support for the submission made on behalf of the employer that the provision in reg. 17, as in reg. 18, is for a guard to the cutters, and thus something to prevent the hand or body of an employee coming into touch with the cutters. On the other hand, it is said on behalf of the plaintiff that the regulation is intended to provide, and does provide, that there shall be the most efficient guard, when practicable, having regard to the nature of the work which is being performed, and it is said that, when it is known that there is a risk of a part of machinery being flung out of the machine, the most efficient guard must be designed with that risk or danger in mind as one of the things against which protection must be given.

The regulations may be said to be additional, in one sense, to the provisions of s. 14 of the Factories Act, 1937, but probably the better way to look at it is that they take the place of the provisions of the Act to the extent to which they go. That question was before this court in *Benn v. Kamm & Co., Ltd.* (1), in which it was held that the Horizontal Milling Machines Regulations, 1928, reg. 3, did not define exhaustively the duty of the occupier of the factory to fence horizontal machines and the defendants were in breach of s. 14 of the Act, and, therefore, that the plaintiff was entitled to recover. *SOMERVELL, L.J.*, having referred to *Miller v. William Boothman & Sons, Ltd.* (2), said ([1952] 1 All E.R. 836):

"I cannot see why, if there is what I call a separate subject of danger which falls within the general words of s. 14 (1), the duty under that section should be regarded as removed by the words of this regulation. I think they are inapt to have that effect. For these reasons, in my opinion, this appeal should succeed . . . The case must depend on the construction of the regulations . . ."

It is submitted on behalf of the plaintiff in this appeal that he is entitled to succeed on a breach of reg. 17 by the employer, but that, if reg. 17 does not go so far as it is submitted it does go, the plaintiff is entitled to fall back on the provisions of s. 14 (1) of the Act of 1937, and to say that there was here a dangerous part of machinery which was not fenced as it should have been, and that in the circumstances the plaintiff is entitled to succeed under that sub-section.

In *Harrison v. Metropolitan Plywood Co.* (3), decided by *HILBERY, J.*, in 1946, the plaintiff, who was employed as a press operator at the defendants' wood-working factory, was at work at his machine when a piece of the cutter of the machine next to his, which was a spindle moulding machine, broke away, flew out of its holder, and struck and injured him. The spindle moulding machine had a guard of the type usually provided for such machines, but it was proved that it would have been possible to provide a guard which would probably have prevented the injury to the plaintiff. It was held that the defendants' duty was to fence the machines in their factory in accordance with the Wood-working Machinery Regulations, 1922, and that they had failed to discharge that duty, that those regulations ought not to be construed as made only for the protection of workers at their particular machines, and that the plaintiff was entitled to damages. That decision was given on reg. 17, with which we are now concerned, and *HILBERY, J.*'s view was that an obligation was created by the regulation to provide a guard against the risk, a known risk, of pieces of the machine flying out when the machine was revolving at great speed. It was not submitted in that case that the regulation did not cover the risk of something flying out from the machine, and so, in one sense, the point which has been argued in this case was not before the learned judge.

In 1948 *Carroll v. Andrew Barclay & Sons, Ltd.* (4) was decided by the House of Lords on s. 13 (1) of the Factories Act, 1937, by which:

“Every part of the transmission machinery shall be securely fenced . . .”

A A piece of belting, which was at a considerable height above working level, had broken, and as it fell it had caused injury to a workman. It was held that the obligation created by s. 13 (1) did not extend to cover that risk, though the belt was part of the transmission machinery. The question whether, in the case of a machine which might be expected to throw off loose or broken parts, there was an obligation to fence for the purpose of protecting workmen against that danger was left open, at least in some of the opinions which were delivered. LORD PORTER, in dealing with the Factories Act, 1937, s. 13 and s. 14 ([1948] 2 All E.R. 390), expressed the opinion that “fencing”

B “means the erection of a barricade to prevent any employee from making contact with the machine, not an enclosure to prevent broken machinery from flying out.”

C LORD PORTER was dealing with the Act itself, and not with the regulation which is a matter for the consideration of this court. LORD DU PARCQ, who agreed in the result in that case, said (*ibid.*, 391):

D “I wish to add, however, that, while I agree with LORD NORMAND that the words ‘securely fenced’ must be given the same meaning in each of the three sections (s. 12, s. 13 and s. 14), I think that they may well mean ‘so fenced as to give security from such dangers as may be reasonably expected.’ If machines exist, or are hereafter invented and used, which are dangerous because fragments or loose parts of the machinery are sometimes ejected from them, then I am not prepared to say that s. 14 does not require such machines to be fenced for the purpose of protecting workmen against that danger. If the dictum of my noble and learned friend LORD SIMONDS in *Nicholls v. Austin (Leyton), Ltd.* (5) ([1946] 2 All E.R. 98), is to be understood as meaning that such a machine need not be fenced, I respectfully doubt its accuracy, and must reserve my opinion on it.”

Much the same was said by LORD NORMAND (*ibid.*, 393):

F “It is possible, therefore, that, if a machine may be expected to throw off detachable or broken parts in working, these parts may fall to be treated as dangerous and subject to the requirements of secure fencing. That is, however, a question on which I express no opinion.”

LORD JOWITT, L.C., while agreeing with the general conclusion as to the result in that case, said (*ibid.*, 387):

G “At the same time I should desire to leave open for further consideration the question which LORD DU PARCQ raises in his opinion.”

H It was held by the House of Lords, therefore, that there was no liability on the facts of *Carroll's* case (4), but that was a wholly different case from that which we have to consider. In the first place, there was no evidence of an accident, or a happening, such as took place in *Carroll's* case (4) having taken place before. It might have been said that, under the wording of the different sections, to all intents and purposes the position of the belt in that case was such that it was as secure as if it had been fenced, though it was not put in that way. In the present case it appears from pamphlet or booklet that serious accidents of the kind that happened in the present case have happened before, and the evidence of the defendants' witnesses shows that there is a risk of parts of the machinery breaking away when there is movement at the high speed that takes place inside this machine. So the circumstances are different, and it may well be that, if the facts of this case had to be considered under

s. 12, s. 13, or s. 14, the House of Lords would still be prepared to say that there was liability if it was shown that the machine is dangerous because fragments of loose parts of the machinery are sometimes ejected from it.

Regulation 17 provides that the cutter on every vertical spindle moulding machine shall, when practicable, be provided with the most efficient guard having regard to the nature of the work which is being performed. In my view, that is wide enough to cover the risk of a cutter, or part of the cutter, or some part of the machine to which the cutter is attached, breaking away so as to cause danger to the men working the machine, or to other men working in that part of the factory. I am prepared to follow on that the judgment of HILBERY, J., in *Harrison v. Metropolitan Plywood Co.* (3). It seems to me that, when a regulation of this type is made to prevent danger to workmen, and when it is well known that there are two types of danger, the guard ought not to be confined so as to meet only one type of danger. If it can be said that, as both reg. 17 and reg. 18 mention only the cutter, they extend only to prevent an employee making contact with the cutter, it seems to me that what SOMERVELL, L.J., said in *Benn v. Kamm & Co., Ltd.* (1) should be applied and other parts of the machine should be regarded as dangerous parts of machinery within the meaning of s. 14 (1), and thus they should be securely fenced unless it is shown that they are in such a position, or of such a construction, as to be as safe to every person employed or working on the premises as they would be if securely fenced. The evidence establishes beyond doubt that there were dangerous parts of machinery. The revolving head-piece, the block and the cutter were dangerous. Unless the regulation covers all those parts which I have mentioned, s. 14 (1) comes into play, and it is for the court to determine whether or not, in view of the known danger of this kind, what was said by LORD DU PARCQ ([1948] 2 All E.R. 391) applies in the circumstances of this case. I for myself would be prepared to hold that it does.

It has not been easy to determine precisely what the facts are in this case. Considerable evidence was given over five days, and the learned judge sets out his conclusions with great care, though I am inclined to think that there is something in the nature of an omission. HAVERS, J., considered the different types of guard which had been suggested. It rather appears from his judgment as though he thought he had to choose between that which is known as a Shaw guard and a cage guard. I cannot find from his judgment that he considered something in the nature of a combination of the two. He was of opinion that, for all ordinary straight working, such as the plaintiff would have to do when he had finished testing, the Shaw guard was an efficient guard by reason of the fact that it prevented the workman's fingers or hand coming near the cutters. He said that it afforded no protection against anything flying out of the machine as in this case. He thought that a cage guard would not have been a complete protection for the fingers. That would depend, I should say, on whether or not the guard was efficiently fitted and adjusted. The learned judge considered that the greater risk was the risk of the fingers or hand of the workman being caught, although, taking (as it were) the cage guard on the one side and the Shaw guard on the other side, he found that the Shaw guard was the most efficient guard, having regard to the nature of the work which had to be done.

I am not sure that he approached the matter on quite as wide a basis as he might have done. I recognise the difficulty of the judge who hears for days disputes between witnesses as to the best type of guard, and the most efficient guard for the work which has to be done. In the 1928 "Safety Pamphlet No. 8" there are diagrams of different guards, and on p. 54 there are two examples of the spindle-moulder guard made by J. Sagar & Co., Ltd., Halifax. It looks as though in the front, between the workman and where the cutters are, there is a complete guard which would protect the fingers, and above the cutters

A and the block there is a circular piece which must have the effect of preventing objects from being thrown out as a result of a break inside the machine. These matters are primarily for the trial judge, but I am bound to say that it looks to me from those diagrams as though for the work which was being done the Sagar guard is likely to be more efficient than the Shaw guard. One witness called on behalf of the defendants was in the employ of J. Sagar & Co., Ltd., of Halifax, but unfortunately, though his company makes the Sagar guard and the Shaw guard, he had never seen the 1935 (or 1947) pamphlet. That shows on pp. 11 and 12 diagrams of this type of machine with a guard in front, maybe not quite so complete a guard as the Shaw guard, and round the place where the cutters and the block are is an extra form of guard with something on the top of it. There is a page dealing with flying cutters, p. 13, and on p. 14 is the note which I have already read:

B "The danger to workers at neighbouring machines or benches can be minimised by the provision of guards and screens which will intercept a flying cutter."

C HAVERS, J., held that the Shaw guard was the most efficient for the work which was being done, and that, even if he had been in favour of the plaintiff on the construction of the regulation, the plaintiff would not have been entitled to succeed, because he was not satisfied that the defendants had not provided the most efficient guard. If he had come to that conclusion after considering the different guards suggested in the books, etc., and after considering the evidence, I should have found great difficulty in interfering with that which really is a question of fact for him. But it appears to me that he directed his attention only to the advantages of the Shaw guard as against a cage guard. [His LORDSHIP considered evidence given by Mr. Bevan, a witness for the employer, and continued:] One can see, as one looks at the photograph which shows the Shaw guard in position, the parts which are left uncovered at the front. A Shaw guard is doubtless a very good guard for the protection of the fingers and the hands, but if this photograph shows, as we are told it does, the position of the Shaw guard in use on the day of this accident, the Shaw guard did not go as high as the top of the block, and it was not a complete protection. Mr. Bevan, the witness for the employer, seems to have agreed. The question for consideration, therefore, was not which was the better for the type of work which was being done, the Shaw guard or some cage guard, but whether the employer on the occasion in question provided the most efficient form of guard. In my opinion, the guard shown in the photograph would have been more efficient had it come higher. I do not know whether it could have been so constructed or not, but I see no reason why it should not have been. Again, there is nothing whatever round the dangerous part. There is the Shaw guard in front, which does not provide complete protection. There is nothing at the side. There is nothing at the back. Was there any reason at all why there should not have been erected, or placed, a plate behind the Shaw guard a little higher than the Shaw guard? Was there some reason why the fence (as it is called) which runs across the table should not have been higher, or why any one of the covering types of guard shown in the little pamphlet on pp. 11 and 12 should not have been put on this machine? Would they have interfered with this type of guard? It may be that these questions were not all raised before HAVERS, J., when he came to the conclusion that the Shaw guard was the most efficient type of guard on a comparison between the Shaw guard and a cage guard.

H In order to form a view on the question whether the most efficient guard was provided, it is necessary to consider first the likelihood of accidents and the likelihood of injury. Those questions are referred to in both pamphlets before the court, and they were dealt with in the evidence. Assuming that reg. 17 calls for a guard which would prevent pieces, or help to prevent pieces

of any broken part, being thrown out, it is necessary to consider that danger as well as the danger to the fingers, and I think one must ask oneself: Is there any difficulty about combining in one guard two forms of guard, or in the placing in front, on the side, and behind the machine, of a sheet of the kind I have mentioned. This workman was seriously hurt through a piece of the machine being ejected from it when it was travelling at high speed. It is the kind of risk that has been considered for many years. The books show that, and if the guard ought to meet that type of risk, as I think it should, it was a sorry thing if, in 1950, no one could provide any sort of guard which would lessen that risk, and at the same time be a guard against hand injury. The publications to which I have referred show that there are guards which would do that, or which would help to minimise the risk, and without something of that sort having been done I am not prepared to say that the most efficient guard was provided, having regard to the nature of the work which was being performed. [His Lordship considered evidence given by Mr. Sullivan on behalf of the plaintiff, and continued:] That shows, at least, the witness had the view that the cage guard was better for all purposes. There was no reason why the judge should accept that view against another view, but the result on the facts is that the finding of HAVERS, J., means, if it stands, that in a case such as this, where there is a known risk of pieces being flung out of the machine, there is no obligation on the employers, the occupiers of the factory, to provide any guard above or round the machine to stop what the learned judge described as danger No. 2—to stop pieces being flung out. I cannot think that that is right. I am satisfied that, on the materials which were before the court, there were shown other guards, or other types of guards, to meet both dangers, and I do not think that it can be said that in the circumstances of this case, and having regard to the work which was being done (and in that I include the testing), the most efficient guard was provided.

HAVERS, J., having reached the conclusion that the employer was not at fault in that he had not on his finding committed any breach of reg. 17, went on to consider the law, and he appears to have thought that what the House of Lords said in *Carroll's* case (4) weakened the decision of HILBERY, J., in the case some eight years ago under reg. 17. I do not think that what was said in the House of Lords ought to be regarded as meaning that HILBERY, J.'s decision was wrong. Indeed, it would appear that, in the like circumstances, certainly LORD DU PARCQ would have taken a view of s. 14 of the Act similar to that which HILBERY, J., took of reg. 17. *Harrison v. Metropolitan Plywood Co.* (3), HILBERY, J.'s decision, was cited in argument in the House of Lords and was referred to in some of their Lordships' opinions. No one said it was wrong. I do not think that it was. I would say that, if it be shown that the defendants had not provided the most efficient guard, they were in breach of reg. 17, and the accident which was sustained by the plaintiff arose through that breach. If it can be said that reg. 17 does not go so far, I would be prepared to hold that there was a breach of s. 14 (1) with the like result, though I prefer to base my judgment on reg. 17. In my opinion, this appeal should be allowed, and judgment should be entered for the plaintiff for the amount of damages provisionally assessed by the learned judge.

DENNING, L.J.: There are two dangers from a vertical spindle moulding machine. One is the danger of a man's hand in the course of his work coming into contact with the cutters. The other is the danger of a cutter flying out. It seems to me that reg. 17 only deals with the first danger, the danger of a man's fingers at work coming into contact with the cutters. The evidence shows that several guards are available to deal with that particular danger, and that the efficiency of those guards varies according to the nature of the work. A different guard is necessary for curved work from that used for straight work, and even with straight work a different guard may be necessary

for small pieces of wood from that which is necessary for large pieces of wood. Accordingly, reg. 17 requires that the most efficient guard should be provided, "having regard to the nature of the work . . ." Regulation 17 is in terms confined to a guard for the "cutter", and reg. 18 shows that the guard in mind is a guard for the man's hands in holding the work. I do not find that reg. 17 deals with the second danger, the danger of a cutter flying out. That danger depends, not on the nature of the work, but on the nature of the machine itself. It is inherent in it that the cutter may work loose and fly out whatever kind of wood is being used, curved, straight, small or large. Inasmuch as that danger is not dealt with by reg. 17, in my judgment, it comes within s. 14 (1) of the Factories Act, 1937, itself.

This court quite recently in *Benn v. Kamm & Co., Ltd.* (1), held that the fact that a regulation requires a guard for one dangerous part in particular of a machine does not entail that there is no obligation in regard to other dangerous parts. In regard to other dangerous parts not covered by the regulation one has to go back to the Act itself. So here. The dangerous part provided for by reg. 17 is the part of the table where the man's hand is likely to come into contact with the cutters while he is doing his work. The regulation does not provide for the gap in the machine above the cutter where it may fly out and thus cause danger. That is another dangerous part. It falls within s. 14 (1) and must be securely fenced.

It is said that the decision of the House of Lords in *Carroll's* case (4) binds us to hold that the Factories Act, 1937, does not protect workmen from pieces which fly out of machines. That case does not warrant any such proposition. The decision turned on the fact that the belt was in such a position as to be as safe as it would be if it was securely fenced. That is one of the exceptions in the Act. It has no place in the case before us. The House of Lords distinctly kept open the case of a machine which ([1948] 2 All E.R. 393):

"may be expected to throw off detachable or broken parts in working . . ."

LORD NORMAND said (*ibid.*) that

"... these parts may fall to be treated as dangerous and subject to the requirements of secure fencing."

This, in my opinion, is such a case. I am of opinion that any part which may be expected to throw off a loose part is itself a dangerous part and ought to be securely fenced under s. 14 (1).

If, however, this view is wrong, that is to say, if reg. 17 is comprehensive and is intended to deal with both the dangers, then, in my judgment, it should be construed as requiring that a guard should be provided to protect the worker from both dangers. The guard which was provided in this case only protected him from one of the dangers, that of his hand coming into contact with the cutter; it did not protect him from the other danger, of a cutter flying out. I fail to see how a guard can be "the most efficient guard" when it does not make any attempt to deal with what is a palpable danger. If necessary there must be a combined guard or two guards.

It is said that our decision will involve a change in the practice hitherto adopted in the trade. That does not affect me in the least. A flying cutter is a serious danger, and it is recognised as such in all official publications. Those who for their own profit employ men on dangerous machines ought to devise some safeguard to protect the men from danger, and if our decision today encourages them to do so it will have done some good. I agree that the appeal should be allowed and judgment entered for the plaintiff, as my Lord has said.

MORRIS, L.J.: I agree. In regard to the construction of reg. 17 of the Woodworking Machinery Regulations, 1922, the conclusion of the learned judge was expressed in these words ([1953] 1 All E.R. 245):

"In considering, therefore, what is the most efficient guard I have to decide what is the most efficient guard for the purpose of preventing any employee from making contact with the cutters, having regard to the nature of the work which is being performed."

That view is not in accord with the view which was the basis of the decision of HILBERY, J., in *Harrison's* case (3), but it is said that in *Harrison's* case (3) (where a piece of a flying cutter hit a man who was working by an adjoining machine) HILBERY, J., did not have debated before him the points which were raised by counsel for the defendants before the learned judge in the present case. It is further said that, in the light of the later decision of the House of Lords in *Carroll v. Andrew Barclay & Sons, Ltd.* (4), HILBERY, J., would not have reached the same conclusion. HILBERY, J., said in *Harrison's* case (3) ([1946] 1 All E.R. 246):

"No doubt the primary consideration, where woodworking machinery is concerned, is the protection of the worker at the machine. The very fact that he works at the machine exposes him to particular risks. One would, therefore, expect, as the fact is, that the regulations would everywhere provide for securing as high a degree of safety for him as practicable. But it does not necessarily follow that the regulations must, therefore, be construed as only for the protection of the workers at the machines, and not for the benefit and protection of other workers in the factory as well."

He was there proceeding on the basis that, a fortiori, if the man at the particular machine had been hit by a piece of a flying cutter he would have been able to recover. I do not read the speeches in the House of Lords in *Carroll v. Andrew Barclay & Sons, Ltd.* (4) as negating the correctness of HILBERY, J.'s decision, and, as SINGLETON, L.J., has pointed out, although the case is referred to in some of the speeches in the House of Lords, doubt is not cast on it. In *Carroll v. Andrew Barclay & Sons, Ltd.* (4) it was held that the requirement in s. 13 (1) of the Factories Act, 1937, that every part of transmission machinery shall be securely fenced, imposes on occupiers of factories a duty to erect a barricade to prevent any employee from making contact with the machinery, but does not in ordinary cases oblige them to erect an inclosure to prevent broken machinery from flying out and injuring him. But it seems to me that, when considering that case, and the light which it throws on the construction of reg. 17 of the Woodworking Machinery Regulations, 1922, it is important to bear in mind that included in the words of s. 13 (1) are the words

"... unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced";

and it seems to me that that consideration had weighed with their Lordships in reaching their decision. LORD PORTER, for example, said ([1948] 2 All E.R. 389):

"For my own part, I find it difficult to envisage any set of circumstances in which unfenced machinery would be safe owing to its position, or, indeed, construction, if the risk of breakage is to be taken into consideration."

In reg. 17 there are no words comparable to those found in s. 13 (1), and also found in s. 12 (3) and s. 14 (1) of the Act. I do not read reg. 17 as being limited. It provides that the cutter shall, when practicable, be provided with the most efficient guard, having regard to the nature of the work which is being performed. It seems to me that the proof is overwhelming that, amongst the varieties of danger that relate to cutters, are the dangers that are involved

if anyone comes in contact with the cutter and also the dangers which are involved in working near a cutter which may, owing to the centrifugal force of the vertical spindle moulding machine, on occasion become detached and may hurt someone working at the machine or at a neighbouring machine. The pamphlet issued by the Ministry of Labour says (p. 13):

“From time to time accidents occur as a result of cutters flying; such accidents are generally severe and are sometimes fatal.”

A I think in this connection it is relevant to have in mind that the law reports have now included for some years the decision of HILBERY, J., which arose out of a case where a flying cutter did harm to someone at a neighbouring machine. I consider, therefore, that reg. 17 is not to be read in a limited way, and that it has to be considered here whether there was the most efficient guard for this cutter, and in considering that question I think it is relevant to have in
B mind one answer given by the witness, Mr. Sullivan, when he was asked this by counsel for the plaintiff:

“I hope this is not too obvious: Would the Shaw type of guard prevent part of the cutter from being ejected from the machine? A.—No.”

C It was said that the Shaw guard was in position, and that the fact that that guard was in position would provide some protection against a flying cutter or against a flying nut or bolt. The answer made by counsel for the plaintiff to that submission seems to me very powerful, for he said that it was small comfort to the plaintiff who was at this machine when it had a Shaw guard on, and who had the best reason for knowing that the Shaw guard did not prevent a flying nut or part of a bolt from striking him. The question, in my view,
D therefore, is whether there was in this case the most efficient guard. We have not the precise facts which were before HILBERY, J., in the case which he tried, but the report says ([1946] 1 All E.R. 246):

“It was proved that there was a known form of cage guard which would have fenced the major part of the circumference of a circle round the vertical spindle with a wire-mesh screen, and that the work in hand could
E have been performed with that guard in position. Such a guard is in fact the subject of an illustration in the Safety Pamphlet No. 8, issued by the Home Office.”

It seems to me that there was no real protection here in regard to the upper part of the machine, and no real or valid protection provided, or attempted
F to be provided, against the risk of a flying cutter or a flying nut, and I am in agreement with the way in which the facts have been dealt with by SINGLETON, L.J. I concur, therefore, in the view that this appeal should be allowed.

Appeal allowed.

Solicitors: *W. T. Donovan* (for the plaintiff); *J. F. Coules & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re LITTLE (*deceased*). BARCLAY'S BANK, LTD. *v.*
BOURNEMOUTH AND EAST DORSET HOSPITAL
MANAGEMENT COMMITTEE AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), July 28, 1953.]

National Health Service—Hospital—Gift of residue—"To the trustees for the time being" of the hospital "and by them to be appropriated for or towards the building funds" of the hospital—*Vesting of hospital and endowment funds in Minister of Health after date of will, but before death of testatrix*—*National Health Service Act, 1946 (c. 81), s. 6, s. 7 (4).*

By her will, dated Feb. 1, 1945, the testatrix, who died on June 27, 1951, directed her executor and trustee to stand possessed of her residuary estate on trust to pay the same "to the trustees for the time being of the Cornelia and East Dorset Hospital and by them to be appropriated for or towards the building funds of the said hospital." On July 5, 1948, under the National Health Service Act, 1946, s. 6 and s. 7 (4), the hospital and its endowments, including the building fund then in existence, vested in the Minister of Health. From that date the hospital was administered by the Bournemouth and East Dorset Hospital Management Committee, and there were no longer any trustees.

Held: the gift was a charitable gift for a genuine and ordinary purpose of a charitable organisation which previously existed; notwithstanding that it was for a particular purpose, and not for the general purposes, of the hospital, it did not fail by reason of the changes introduced by the Act of 1946; and the residue was to be handed over to the hospital management committee on their undertaking to use the gift for building fund purposes in connection with the particular hospital.

Re Morgan's Will Trusts ([1950] 1 All E.R. 1097) and *Re Glass* ([1950] 2 All E.R. 953 n.), applied.

AS TO EFFECT OF CHANGE OF CIRCUMSTANCES AT DEATH, see HALSBURY, Hailsham Edn., Vol. 34, p. 234, para. 290; and FOR CASES, see DIGEST, Vol. 8, pp. 308-312, Nos. 895-901, 911-927.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6, s. 7 and s. 11 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 339-344, and p. 348.

Cases referred to:

- (1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637; 2nd Digest Supp.
- (2) *Re Glass*, [1950] 2 All E.R. 953 n.; [1950] Ch. 643 n.; 2nd Digest Supp.
- (3) *Re Meyers*, [1951] 1 All E.R. 538; [1951] Ch. 534; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Susan Little, the gift thereby made of her residuary estate on trust "to pay the same to the trustees for the time being of the Cornelia and East Dorset Hospital and by them to be appropriated for or towards the building funds of the said hospital" took effect as a bequest to the first defendants, the Bournemouth and East Dorset Hospital Management Committee, subject to any, and, if so, what, undertakings by them as to its application, or whether the residuary estate was applicable on charitable trusts or was undisposed of by the will.

The testatrix made her will on Feb. 1, 1945, and died on June 27, 1951. On July 5, 1948, under the National Health Service Act, 1946, s. 6 and s. 7 (4), the hospital and its endowments, including the building fund then in existence, vested in the Minister of Health. The former trustees, who were not an incorporated body, were considered to have been relieved of their trust on that day by the effect of the Act, and a scheme was approved under s. 11 (3) of the Act under which the first defendants, the hospital management committee,

were appointed for the purpose of exercising functions with respect to the management and control of the hospital, which was now known as the Poole General Hospital.

Droop for the plaintiff bank, executor and trustee under the will.

Winterbotham for the first defendants, Bournemouth and East Dorset Hospital Management Committee.

A *Plowman* for the second, third, fourth and fifth defendants, interested under an intestacy.

Dewys B. Buckley and *Clauson* for the Attorney-General.

VAISEY, J.: The testatrix, Miss Susan Little, made her will on Feb. 1, 1945, and on Nov. 2, 1948, she made a codicil to the will whereby she brought her testamentary intentions up to date, but did not in terms confirm the will. B Between the date of the will and the date of the codicil, namely, on July 5, 1948, the National Health Service Act, 1946, came into effect. The testatrix died on June 27, 1951, and her will was proved on Sept. 21, 1951. By the will she appointed the plaintiff bank her executor and trustee, and she gave, among other legacies, £1,000 to the Cornelia and East Dorset Hospital, free of legacy duty, to endow a bed in her name in perpetuity in the women's medical ward C of the hospital. That legacy was paid over to the first defendants, the Bournemouth and East Dorset Hospital Management Committee, by whom the hospital is now administered under the Act of 1946, and they gave an undertaking to associate the name of the testatrix with a bed in the women's medical ward of the hospital. The testatrix gave her residuary estate to the bank on the usual trusts for sale and conversion and directed that, after the payment of D her debts and funeral and testamentary expenses and the legacies bequeathed by the will, the bank should stand possessed of the ultimate residue

"Upon trust to pay the same to the trustees for the time being of the Cornelia and East Dorset Hospital and by them to be appropriated for or towards the building funds of the said hospital."

E As the hospital vested in the Minister of Health on July 5, 1948, there were no trustees or acting trustees of the hospital at the time of the testatrix's death, and the endowments of the hospital, including the building fund then in existence, were transferred, under s. 7 (4) of the Act of 1946, to the Minister of Health.

F The question which has been raised is: Does the gift of residue to the trustees of the hospital for the building funds of the hospital go to the first defendants, the hospital management committee, as, undoubtedly, it would have done if the testatrix had directed that the gift should be applied to the general purposes of the hospital, or does the fact that she has given the gift, not only to a particular hospital, but to a particular purpose of a particular hospital, make any difference? On the whole, I do not think that it does make any difference. Counsel for the G Attorney-General pointed out that this is a charitable gift, and it is no less charitable now than it was before the vesting date under the National Health Service Act, 1946. It is a gift, not for the general purposes of an independent charity, which previously existed, but for a genuine and ordinary purpose of a charitable organisation which previously existed, and I think that I should be introducing differences where there is no difference in principle if I held that the gift failed H because of the admitted fundamental change of circumstances and conditions introduced by the Act of 1946. As the gift is to trustees who no longer exist and is to be appropriated for or towards funds which do not exist, it is obvious that the form of the gift has been transformed by the Act if one allows it to go to the hospital management committee, and I think that one has to move carefully before assuming that the testatrix's directions go for nothing and that the overriding charitable intention prevails. Having regard, however, to the effect which the Act has had on trusts of this kind, and, in particular, to

the fact that, under s. 7 (4), all the funds of individual hospitals were transferred to the Minister of Health, or to the appropriate hospital management committee, on July 5, 1948, free of any trust existing immediately before that day, it does not seem to me that one is taking any further step if one allows this gift, although it is for a particular purpose, to be taken over and used for the purposes and under the authority of the Act. Counsel for the next of kin contended that the gift failed by reason of the change in circumstances which has arisen, but I think that *Re Morgan's Will Trusts* (1) and *Re Glass* (2) govern this case, and I cannot see any sound reason for distinguishing it from them.

As a rule, the direction is, as I understand it, to pay the fund given to a particular hospital over to the appropriate hospital committee on an undertaking (which, I believe, is now common form) to use that fund for the benefit of the named object. I think in this case I should desire to go a little further, and, the Attorney-General not objecting, I should direct that the testatrix's residue should be handed over to the Bournemouth and East Dorset Hospital Management Committee on their undertaking to use the fund for building fund purposes in connection with the Cornelia and East Dorset Hospital.

Order accordingly.

Solicitors: *Peacock & Goddard*, agents for *Trevanion & Curtis*, Poole (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *J. S. Tapsfield*, solicitor, South-West Metropolitan Regional Hospital Board (for the first defendants); *Taylor, Jelf & Co.*, agents for *R. S. Hawkins*, Poole (for the second, third, fourth and fifth defendants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SWAN v. SWAN.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), July 13, 14, 15, 30, 1953.]

Divorce—Cruelty—Defence—Insanity—Husband unable to understand nature and quality of his acts.

Divorce—Condonation—Condonation of acts of insane person.

For several periods during the married life the husband had been a voluntary patient in a mental hospital. During the intervals in which he had returned to the matrimonial home he had committed acts of cruelty towards his wife. On the hearing of the wife's petition for divorce on the ground of her husband's cruelty there was medical evidence which was accepted by the court that at the material times the husband did not know the nature and quality of his acts.

HELD: in these circumstances the husband was not capable of being guilty of cruelty to the wife.

Quaere, whether the husband could be found to be guilty of cruelty if, while knowing the nature and quality of his acts, by reason of disease of the mind he did not know they were wrong.

Per HODSON, L.J. (with regard to condonation of cruelty committed by a person suffering from disease of the mind): I feel that the conception of forgiveness, which is always a necessary element in condonation, difficult, if not impossible, where the object of the forgiveness is not capable of receiving it by reason of the fact that he is out of his mind.

M'Naghten's Case (1843) (10 Cl. & Fin. 200), applied.

Lissack v. Lissack ([1950] 2 All E.R. 233), overruled.

Kirkman v. Kirkman (1807) (1 Hag. Con. 409), explained.

AS TO INSANITY AS A DEFENCE TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 652, para. 958; and FOR CASES, see DIGEST, Replacement Vol. 27, p. 374, Nos. 3082-3087.

Cases referred to:

- (1) *Henderson v. Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 2nd Digest Supp.
- (2) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (3) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; Digest Supp.
- (4) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; 14 Digest 56, 229.
- (5) *Hanbury v. Hanbury*, [1892] P. 222; 61 L.J.P. 115; *affd.*, C.A., (1892), 8 T.L.R. 559; 27 Digest, Replacement, 374, 3086.
- (6) *White v. White*, [1949] 2 All E.R. 339; [1950] P. 39; 113 J.P. 474; 2nd Digest Supp.
- (7) *M'Lachlan v. M'Lachlan*, 1945 S.C. 382; 2nd Digest Supp.
- (8) *Kirkman v. Kirkman*, (1807), 1 Hag. Con. 409; 161 E.R. 598; 27 Digest, Replacement, 301, 2465.
- (9) *Lissack v. Lissack*, [1950] 2 All E.R. 233; [1951] P. 1; 114 J.P. 393; 2nd Digest Supp.
- (10) *Hall v. Hall*, (1864), 3 Sw. & Tr. 347; 33 L.J.P.M. & A. 65; 9 L.T. 810; 164 E.R. 1309; 27 Digest, Replacement, 374, 3084.
- (11) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 2nd Digest Supp.

APPEAL by the wife from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Apr. 24, 1953, dismissing her petition for a decree of dissolution of marriage on the ground of her husband's cruelty.

Ifor Lloyd, Q.C., and *T. Dewar* for the wife.
Horner and Stranger-Jones for the husband.

Cur. adv. vult.

July 30. The following judgments were read.

HODSON, L.J.: This appeal is against an order of Mr. Commissioner GRAZEBROOK, Q.C., dismissing a petition presented by the wife on the ground of the cruelty of the husband. The husband, by the Official Solicitor, his guardian ad litem, denied the cruelty, and further said that, if he had been guilty of any uncondoned act of cruelty, he did not know the nature or the quality of the act and did not know the act was wrong and was not responsible for the act. The learned commissioner found that the husband had been guilty of cruelty up to and including August, 1947, but that such cruelty was condoned. He further found that later acts of violence inflicted on the wife and threats used by the husband against her took place at a time when the husband had proved that he did not know the nature of the acts and did not know they were wrong. Accordingly, he found that the cruelty proved had not been revived since the later acts and threats did not amount to cruelty in law, and dismissed the petition.

The case was conducted on the footing that no question arises as to the responsibility of the husband for his acts prior to and including August, 1947, and, although the history of the husband, as disclosed by the evidence, shows marked mental instability over a long period of his life, the evidence relied upon on his behalf is concentrated on the period beginning in August, 1949. During this period alone it was alleged and proved that he did not know the nature of his acts and did not know whether they were right or wrong. On Aug. 6, 1927, before the marriage, the husband had been certified and he was detained until Jan. 28, 1928, in a mental institution. The parties were married on Apr. 12, 1935. A son was born in 1936 and a daughter in 1940. In 1941 the wife for the first time learned that the husband had had either a nervous breakdown or something of the sort before marriage. Between Jan. 21 and Mar. 9, 1941, the husband was a voluntary patient at St. Ebba's Hospital.

He was then at home with the wife until July, 1943, when he was suffering from tuberculosis. From that time until April, 1944, he was at a Bournemouth sanatorium. Between April, 1944, and August, 1947, he was at home when he again entered a tuberculosis hospital, this time at Headington, where he remained until some time in August, 1949. He then returned home where he remained until Sept. 20, 1949, when he was taken to the mental institution at Littlemore. On Oct. 6 he became a voluntary patient there until Nov. 10, when he discharged himself as recovered and went back to the tuberculosis hospital at Headington for further treatment. While at Headington he was visited by the wife on occasions and on Dec. 6, 1949, he returned as a voluntary patient to Littlemore where he has since remained. A

Cruelty having been proved down to August, 1947, the first question is whether or not the cruelty was condoned. The violence of the husband continued until he went into hospital in August, 1947, when the wife called in medical aid, and I do not think it could be said that such cruelty was condoned up to that time. Everything, therefore, turns on the circumstances which existed during the short period from August, 1949, until Sept. 20, 1949, when the parties were together for the last time. This period was very short. There was no sexual intercourse; this had ceased many years before. The husband was ill and in common humanity it was natural and reasonable for the wife to take him in. She and the children had nowhere else to go. She said in evidence: B C

"In August, 1949, he came home unexpectedly. I think he was discharged rather quickly. He was in a very bad state. He was very violent and very hopeless to live with." D

She then described how he dug a hole in the garden to bury her in and said he was going to strip her and beat her through the village if she did not make him tea at one o'clock in the morning. Thereupon, she said she telephoned for the doctor who came and saw the husband. Admittedly, the wife did all she could for the husband during this period. She had welcomed him home as her husband although she was apprehensive of him, but I cannot see how her conduct in relation to this particular man, who did not know what he was doing, can be taken to be condonation. The element of forgiveness, albeit conditional forgiveness, is always present in condonation. VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Crellin* (1), taking a case where a wife had been guilty of a matrimonial offence, said ([1944] 1 All E.R. 45): E

"The essence of the matter is . . . that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife." F

I feel the conception of forgiveness difficult, if not impossible, where the object of the forgiveness is not capable of receiving it by reason of the fact that he is out of his mind. I would, therefore, hold that the cruelty up to August, 1947, had not been condoned. G

The learned commissioner, having decided that this cruelty had been condoned, was bound to consider the allegations of cruelty during the period beginning at some date in August, 1949, and ending on Sept. 20, when the husband was taken away for the last time, first to be kept under observation and later as a voluntary patient at Littlemore, where, apart from a short period in a hospital for tuberculosis at Headington, he has been ever since. During this period the husband was violent and behaved in a manner which can fairly be characterised as insane. I have already given some examples of his conduct. In addition, he threatened the wife with a razor blade under a delusion that there was an Indian outside the house who was in some way being encouraged by the wife. When he was at Littlemore he came under the care of Dr. Armstrong, physician H

superintendent of the hospital, who gave evidence that the husband was suffering from a schizophrenic illness of a paranoid type. He stated that, in his opinion, from the beginning of August it was probable that he did not know the nature of his acts and during the same period he would not have known whether they were right or wrong. In cross-examination, speaking of November, 1949, when he took his discharge, Dr. Armstrong said:

A "I do not think any man whose mind is biased by the sort of ideas that were in his mind at that time is capable entirely of distinguishing between right and wrong."

Dr. Armstrong adhered to this opinion, and, so far as the period when the husband was under the observation of this doctor is concerned, the latter was not contradicted by the expert who, not having seen the husband, was called B to give medical evidence in support of the contention that the husband was responsible for his actions. After his discharge from Littlemore hospital, while he was in the tuberculosis hospital the delusions persisted on the occasions when the wife visited him. He threatened her with a razor blade, hinted at drowning her in a bath of water, and made an attempt to get her into the bathroom, made her sit in a chair, and talked of a man next door having a C gun with a silencer. On Dec. 6 when he returned to Littlemore, he was hearing voices which told him to mutilate his wife with a razor. On this evidence the learned commissioner came to the conclusion, rightly as I think, that from the beginning of August, 1949, up to and including the occasions of the visits paid by the wife to him in November and December, 1949, the husband neither D knew what he was doing nor whether what he was doing was right or wrong. Since the learned commissioner dismissed the petition for this reason and that ground has been challenged, it is, I think, right for this court to express its view on it.

It is to be observed that the learned commissioner found that the husband did not know what he was doing, thus bringing into play the first branch of the so-called M'Naghten rules. Apart from authority, I should have thought E it was a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing. The word "cruel" carries with it implications of guilt which can no more be imputed to such a person than to a sleep walker. In this connection, I would cite the words of EVERSHED, L.J., in *Squire v. Squire* (2) ([1948] 2 All E.R. 55):

F "I do not attempt any definition of the words 'cruel' or 'cruelty' save to say that the conduct complained of must at least satisfy the ordinary acceptance of those English words, and that, on well settled authority, it must be such as to have injured, in fact, the complainant's mental or physical health or be such as to cause real apprehension of such injury."

G The Matrimonial Causes Act, 1857, s. 27, uses the phrase "guilty of cruelty". The Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) employs the phrase "treated . . . with cruelty", and this language is reproduced in the Matrimonial Causes Act, 1950. The word "guilt" carries with it the sense of wrong-doing, and, as HENN COLLINS, J., pointed out in *Astle v. Astle* (3) ([1939] 3 All E.R. 971), the word "treated" seems to connote a conscious action. In that case a decree was granted and the statement of law was obiter. H It was to the effect that the rule in *M'Naghten's Case* (4) applied so that the husband, in resisting a charge of cruelty, must prove that he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. This dictum was consistent with the judgment of the Court of Appeal in *Hanbury v. Hanbury* (5), cited by ASQUITH, L.J., in *White v. White* (6) ([1949] 2 All E.R. 348). LORD ESHER,

M.R., is reported to have expressed himself to the following effect (8 T.L.R. 560):

"The jury found that the respondent knew what he was doing when he committed the acts, and understood their nature and consequences . . . The jury were perfectly entitled to come to the conclusion they did, and he thought that it was the only sensible conclusion at which they could have arrived. There remained a question of law. Assuming a diseased mind, and that the diseased mind gave him certain impulses—he would not call it an uncontrollable impulse, as he did not know what that meant in such a case as this—the respondent knew what he was doing, and that he was doing wrong. An act of adultery was a culpable act against the wife. He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased."

LORD ESHER, M.R., however, left open the question whether the converse proposition was correct. He said (*ibid.*):

"There was a larger question which the President touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce."

The question was debated in the Scottish case of *M'Lachlan v. M'Lachlan* (7). There the cruelty founded on in a suit for separation was the defender's violent and threatening behaviour on an isolated occasion when, in consequence of a seizure, he was temporarily irresponsible. The defender contended that he could not be guilty of cruelty at a time when he was not responsible for his actions. It was argued that guilt required volition and that the court would be legislating if it extended the definition of cruelty so as to include involuntary conduct. LORD MONCRIEFF delivered the leading judgment of the First Division of the court. He stated the argument as follows (1945 S.C. 388):

"Seeing that the remedy is only given by our law on the ground *eo nomine* of cruelty, it was however courageously maintained by the appellant's counsel as their principal argument that this consequence must be affirmed in every case where the danger against which protection was asked had been occasioned by conduct for which the party charged with cruelty had not been responsible. Cruelty and guilt necessitated, to constitute either of them, both intention and malice; unconscious cruelty was indeed a contradiction in terms; and a man who was insane could thus not be guilty of cruelty."

Having stated the argument LORD MONCRIEFF went on to say (*ibid.*):

"The proposition is entirely logical and, as regards certifiable insanity, may be affirmed without hesitation or difficulty."

He then went on to point out that in such a case a spouse had another remedy, but refused to accept the argument in the case in question where no such remedy existed. Regarding a decree of separation as the exact obverse of a decree of adherence, he declined to accept the proposition, regarding it as intolerable to do so where certification was not available as a remedy. This view, deliberately discarding logic, lays emphasis on the protective element in a decree of

separation. In the Court of Appeal in *White v. White* (6), where the majority of the court decided the case against a respondent who was accused of cruelty on the ground that he knew the nature and quality of his acts, DENNING, L.J., took his stand on this very ground, saying ([1949] 2 All E.R. 351):

A " . . . it seems to me that, in divorce cases, if such a man has treated his wife with cruelty, she will be entitled to maintenance, judicial separation, or a divorce, because there again it is not a question of punishing him but only of giving her relief from a situation which has been rendered intolerable by his conduct. The presence of mental disease makes this relief more, and not less, necessary."

B He cited (*ibid.*, 352) the observations of LORD STOWELL in *Kirkman v. Kirkman* (8) (1 Hag. Con. 410) where he said that in cruelty cases if safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone. DENNING, L.J., continued ([1949] 2 All E.R. 352):

" . . . on the strength of his authority I say that a violent and disorderly affection of the mind, i.e., insanity, is of itself no answer to a petition for divorce on the ground of cruelty."

C This judgment was not adopted by the other members of the court and ASQUITH, L.J., gave powerful reasons for taking a contrary view. It was, however, followed by PEARCE, J., in *Lissack v. Lissack* (9).

D For my part, with all respect to those who think otherwise, I think that LORD STOWELL was far from saying that insanity in the sense covered by the M'Naghten rules will not relieve a person from legal responsibility for his acts in a suit founded on cruelty. Indeed, it can be said that all cruelty derives from violent and disorderly affection of the mind. LORD STOWELL's phrase was considered by the Judge Ordinary (SIR CRESSWELL CRESSWELL) in *Hall v. Hall* (10) where he said (3 Sw. & Tr. 349):

E "With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from 'violent and disorderly affections' as said in one case, or from 'violence of disposition, want of moral control, or eccentricity', as said in another, or 'from a liability to become excited in controversy', in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter."

F This passage was cited as authoritative by TUCKER, L.J., in *Squire v. Squire* (2), to which I have already referred, and EVERSLED, L.J., in the same case used these words ([1948] 2 All E.R. 56):

G "If it be conceded, as, in my view, it must, that, in such a case as the present, proof of malevolent design is unnecessary, all, or almost all, acts of cruelty, not, in fact, malevolent, must proceed from some sickness or disorder of the mind, though in many cases falling short of insanity."

H I respectfully agree with these observations and suggest that LORD STOWELL's dictum in *Kirkman v. Kirkman* (8) does not lend support to the view that insanity can be no defence to a charge of cruelty. Moreover, I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim, as PEARCE, J., appears to have thought.

In *Hall v. Hall* (10) SIR CRESSWELL CRESSWELL said (3 Sw. & Tr. 349) that, although the object of the court's interference was safety for the future, its sentence carried with it retribution for the past. The charge of SIR CHARLES BUTT, P., to the jury in *Hanbury v. Hanbury* (5), is often quoted in support of the "protection" view. He, however, used language which, although laying

emphasis on protection, did not exclude the attribute of remedy for wrongdoing. He said ([1892] P. 224):

"I conceive that the object of the Divorce Act is not so much, or nearly so much, the punishment or retribution for a marital offence as the protection of the party who is in peril."

I think, therefore, that PEARCE, J., went too far when he stated in *Lissack v. Lissack* (9) ([1950] 2 All E.R. 237):

"Since in petitions based on cruelty the duty of the court to interfere is intended, not to punish the husband for the past, but to protect the wife for the future, the question for the court is whether the wife can with safety to life and health live with the husband now."

In so far, therefore, as PEARCE, J., based himself on the proposition that, insanity could not be a defence to a petition based on cruelty, I am of opinion that *Lissack v. Lissack* (9) was wrongly decided.

To treat cruelty in the light only of need for protection would be to take it out of the realm of matrimonial offences altogether, which is not, to my mind, consistent with the language of the legislature nor with the decisions of the ecclesiastical courts which have laid the foundations of the law on this topic. Moreover, I confess that to me it seems that over emphasis on the need for protection of the victim tends to lose sight of realities. No effective protection is, in fact, provided by decree of the court from the violence of an insane spouse. The petitioner can only be protected in the same way as other members of the public, by the incarceration of the insane partner. If the insane spouse is not certifiable and cannot be incarcerated, it may well be that it is not only the other spouse who is in need of protection. If the respondent in *M'Lachlan v. M'Lachlan* (7) had been unmarried and looked after by a sister or a nurse the danger would have been the same. At least, where the insane person is unaware of the nature and quality of his acts—in other words, does not know what he is doing—I think it is not open to the courts to pronounce a decree of divorce or judicial separation on the ground of the cruelty of that person. If the violence of such a person is to be the ground of such a decree it is for the legislature so to provide. There are already grounds for divorce such as insanity (with certain limitations) and presumption of death which are outside the sphere of remedies for a wrong done by one spouse to another, but I cannot think that the courts can properly, by an extended interpretation of the phrase "treated with cruelty", add another ground to this class. The second limb of the M'Naghten rules does not, therefore, arise in this case and would, perhaps, arise but seldom. In *White v. White* (6) ASQUITH, L.J., thought it would be appropriate to apply it to a cruelty case where a person knew the nature of his acts, but, by reason of disease of mind, did not know they were wrong. SOMERVELL, L.J., and JENKINS, L.J., doubt whether this second limb applies to cruelty cases, having regard to the decisions in *Squire v. Squire* (2) and *Kaslefsky v. Kaslefsky* (11). It is not necessary to express a final opinion on this point, but I myself would incline to the opinion expressed by ASQUITH, L.J. The two branches of the rule have hitherto always been treated together and I am not satisfied that in civil as opposed to criminal matters they can properly be treated in isolation from one another.

In my opinion, therefore, the learned commissioner was right in refusing to make a finding of cruelty against the husband in respect of the acts done by him in 1949 and I would allow the appeal on the ground that there was no condonation of the earlier cruelty.

SOMERVELL, L.J., stated the facts and continued: The first point raised before the commissioner was whether the fact that the husband did not know the nature of his acts constituted a defence. Whether, in other words, to establish treatment with cruelty it is necessary that the nature of

the acts should be known. Both sides relied on *Squire v. Squire* (2). That case decided that there could be a treating with cruelty within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) although there was no intention to harm or hurt. On the other hand, reliance was placed in the judgments on the fact that the respondent knew perfectly well the nature of what she was doing. TUCKER, L.J., there quoted with approval ([1948] 2 All E.R. 53) the passage from *Hall v. Hall* (10) (3 Sw. & Tr. 349) which HODSON,

- A L.J., has already read. In a later passage on the same page he clearly distinguished from the case with which he was dealing a case in which the respondent did not know the nature and quality of the acts committed by her and relied on as cruelty. EVERSHED, L.J., at the outset of his judgment emphasised that the respondent remained at all material times responsible for her actions. In *Kaslefsky v. Kaslefsky* (11) the principle laid down in *Squire v. Squire* (2) was considered, and it was held that the conduct complained of must be aimed at or actually physically directed at the petitioner or done with intent to injure him or to inflict misery on him. BUCKNILL, L.J., in his judgment, emphasised the importance of the word "treated" in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) which deals with this matter. In *White v. White* (6), although it was unnecessary to decide the point which we have to decide, observations were made on it both by ASQUITH and DENNING, L.JJ. C ASQUITH, L.J., referred to the earlier cases in which the problem was referred to, and he inclined to the view that, if the respondent did not know what he was doing or did not know it was wrong, this would be a defence. DENNING, L.J., took the opposite view, at any rate in certain circumstances. He thought it would make a difference if the petitioner realised that the respondent was of D unsound mind. He said ([1949] 2 All E.R. 352):

"I can well understand that a point might be reached when the conduct was so irrational that it was obvious to the injured party that the conduct was not cruelty, but was due to mental disease."

- E I do not wish to base too much on the precise wording of this sentence, but its wording seems to assume that conduct due to mental disease cannot be cruelty.

- The question came before the Court of Session in *M'Lachlan v. M'Lachlan* (7), where the acts complained of were done in an epileptic seizure. LORD MONCRIEFF admitted the logic of the proposition that unconscious cruelty is a contradiction in terms, and affirmed that proposition with regard to certifiable insanity. Where, however, the condition is not certifiable, the wife—so the argument runs—needs protection, and the logic, or as I would respectfully put it, the ordinary meaning of the words used in s. 176 (c) of the Act of 1925, must give way. In the present case the husband may have been certifiable. F The meaning of s. 176 (c) of the Act of 1925 cannot depend on whether the husband is certified or is a voluntary patient. I have come myself to a clear conclusion that if a respondent does not know the nature of the acts they cannot be relied on as establishing a "treating with cruelty". I agree that G *Lissack v. Lissack* (9) was wrong so far as it decided that insanity could not be a defence.

- In the observations in *White v. White* (6) it was assumed that the relevant test in a case of this kind was that applied in criminal cases and referred to as the M'Naghten rules. Applying *Squire's* case (2) and *Kaslefsky's* case (11), H I doubt whether this is right. I would have thought that, if the husband knew the nature of his acts, it would be no defence for him to say that he did not know they were wrong: *Squire v. Squire* (2). On the other hand, it might be a defence if it could be established that he did not know they were directed against the wife. It may be difficult to think of circumstances in which a man would know the nature of his acts, but would not know against whom they were aimed.

The wife, therefore, being unable to rely, in my opinion, on the acts in 1949 has an alternative in the acts prior to 1947. The learned commissioner found that they had been condoned, and that is the only defence suggested. The first question is whether they were condoned prior to the husband's departure for hospital in 1947. I do not think they were. Sexual intercourse had ceased between these parties in 1941. Notwithstanding this, the wife might de die in diem condone acts of cruelty, and it is not, of course, a case in which she left the home. When, however, one considers the evidence as to the circumstances in which the husband went to hospital, I am of the opinion that she had not condoned the acts complained of. The material answers are as follows:

"Q.—Take the month of August, 1947. In other words, the last, shall we say, few weeks before he went to the Osler Pavilion. If you can, throw your mind back to that for one moment. Were there any acts of violence during that period? A.—I believe so. I believe I wrote to the doctor and told him about my husband's behaviour and asked him if he could help me. He said he would take him into the Osler Pavilion. Q.—Can you tell my Lord when your husband went to the Osler Pavilion (I understand it to be in August, 1947), when was the last act of violence—how long before he went—that you complain of? A.—My husband was frequently violent. I cannot fix a date at all, except I knew I could not carry on as things were going. Q.—I appreciate that; but I wonder whether you could help my Lord as to how long before he went into the Osler Pavilion was the last act of violence? Was it one month, one week? A.—One week, perhaps. I cannot put it nearer than that. Q.—Try if you can. Consider the time from the last act of violence up to the time that he went to the Osler Pavilion. Were you then living a comparatively normal married life together during those last few days? A.—I believe so, yes. Q.—Were you looking after him like a wife would? A.—Yes. My husband was an invalid; I always looked after him. Q.—Can you give my Lord some idea—remembering that it was some time in August, 1947, that your husband went away to the Osler Pavilion? A.—It was probably just before that, because I was so afraid—getting so afraid of my husband—I was at my wits' end to know what to do. I wrote to the doctor. Q.—When you say 'just before that'—by 'that', do you mean about a week? A.—A day or two, I think. A week, may be. A day or two, probably. Q.—A week, may be; a day or two, probably. A.—Yes."

The next question is whether she condoned what had happened before 1947 by taking him back in August, 1949. According to her evidence, which was not challenged on this point, he came home unexpectedly, he was in a very bad state, he was very violent, and was very hopeless to live with. She then goes on to describe the distressing acts which he performed, which, as I have said, would have been cruelty if he had known what he was doing. She was, in fact, a trained nurse, although my decision is not affected by this fact. Condonation is defined as the re-instatement in his or her former marital position of the spouse who has committed a matrimonial wrong with the intention of forgiving and remitting on condition that the spouse whose wrong is so condoned does not henceforward commit any further matrimonial offence: see *RAYDEN ON DIVORCE*, 6th ed., p. 177. It would, of course, be absurd to suggest that the mere fact that she took him in when he was unexpectedly discharged amounted to condonation. Very shortly after that he started the acts complained of. She summoned the doctor and ultimately got a friend in the village to telephone and he was removed. Having cited the definition, I think it is unnecessary to elaborate the reasons which lead me to the conclusion that there was no condonation by reason of what happened in 1949. In those circumstances, I think the wife is entitled to a decree and that the appeal should be allowed.

JENKINS, L.J.: I agree, and only desire to add, with respect to insanity as a defence to a charge of cruelty, that in the present case the medical evidence accepted by the learned commissioner was, as I understand it, to the effect that the husband, during the final period, not merely did not know that what he was doing was wrong, but did not even know the nature and quality of his acts, or, in other words, did not know what he was doing. I am satisfied that for the reasons given by my Lords a man who does not know what he is doing cannot be held to be guilty of cruelty to his wife or to treat his wife with cruelty. But I am not satisfied that the position is necessarily the same if a man's state of mind is such that while he does know what he is doing he does not know that what he is doing is wrong, and I would prefer to reserve that question for further consideration in a case in which it is necessary to the decision.

B

Appeal allowed.

Solicitors: *A. M. V. Panton*, the Law Society (for the wife); *Official Solicitor*.
[Reported by *MISS PHILIPPA PRICE*, Barrister-at-Law.]

PERRINS v. DRAPER.

C

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Morris, L.J.J.), July 23, 1953.]

Rates—Agricultural buildings—Use “solely in connection with agricultural operations thereon”—Dairy—Treatment of milk from neighbouring farm—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2 (2).

D

The ratepayer occupied sixty-four acres of agricultural land from which he produced fifty gallons of milk a day. In 1950 he built on that land a dairy in which he cooled, pasteurised, and bottled those fifty gallons together with two hundred gallons which he acquired each day from his brother's adjoining farm. The question for the decision of the court was whether the dairy was an agricultural building within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), which provides: “ ‘Agricultural buildings’ means buildings (other than dwelling-houses) occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon ”.

E

HELD: the production of milk and not the more limited operation of cooling, pasteurising and bottling, was the “agricultural operation” in question; since, of the total production of two hundred and fifty gallons, only about one-fifth was produced on the ratepayer's land, the dairy was not used “solely in connection with agricultural operations” on his land; and, therefore, the dairy was not an agricultural building within the meaning of the sub-section.

F

Thompson v. Milk Marketing Board ([1952] 2 All E.R. 344), considered.

G

FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 2 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 174.

Case referred to:

(1) *Thompson v. Milk Marketing Board*, [1952] 2 All E.R. 344; [1952] 2 Q.B. 817; 116 J.P. 473; 3rd Digest Supp.

H

CASE STATED by the Lands Tribunal.

The local valuation court for Dorset determined that the assessment relating to a hereditament comprising an agricultural dwelling-house, dairy, and premises situate at Stourpaine, in the county of Dorset, be altered from gross value £50 and rateable value £40 to gross value £20 and rateable value £12 on the ground that the dairy was an agricultural building within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), and was not rateable. The valuation officer appealed against that decision to the Lands Tribunal.

It was proved before the tribunal that the hereditament, the subject of the appeal, comprised sixty-four acres of agricultural land together with a dwelling-house and outbuilding and a detached dairy; that the hereditament was formerly part of Havelins Farm which had an area of about three hundred and sixty-four acres, and had been occupied by the ratepayer's father who produced milk thereon which he retailed locally; that, in 1937, Havelins Farm was divided between the ratepayer and his brother, the ratepayer taking over the retail milk business and the sixty-four acres of land, the subject of the appeal; that, in 1950, the ratepayer built a dairy in which he cooled and bottled all the milk sold through his retail business, and pasteurised some of it; that the ratepayer produced about fifty gallons of milk per day on the hereditament in question and also bought from his brother about two hundred gallons per day produced on Havelins Farm, and in times of shortage he purchased milk in bulk from United Dairies, Ltd., to make up his daily delivery; that the dairy building was occupied together with the agricultural land comprising the hereditaments; that the sole use of the building was the cooling, pasteurising and bottling of milk; that the use of the building for milk purchased from sources other than Havelins Farm was occasional only and for brief periods.

For the valuation officer it was contended that on the facts as found the dairy building was rateable in that it was not an agricultural building within the meaning of s. 2 (2) of the Act of 1928, since it was not used solely in connection with agricultural operations on the land occupied therewith, but also, and to a greater extent, in connection with agricultural operations on other land.

For the ratepayer it was contended that the dairy building was not rateable in that it was an agricultural building, since it was occupied together with agricultural land and the use to which it was solely put consisted of agricultural operations thereon, and that such use and operations were not connected with agricultural or any operations on any other hereditament. The parties agreed that, if the valuation officer's contention was correct, the assessment should be gross value £50, rateable value £40, but, if the ratepayer's contention was correct the figure should be £20 and £12 respectively.

The tribunal came to the conclusion that the building was used solely for an agricultural purpose, but that that use was in connection, not only with the associated hereditament, but also, and to a greater extent, with another hereditament altogether, viz., Havelins Farm. In the opinion of the tribunal, the decision rested on the construction of the words "used solely in connection with agricultural operations thereon" in the definition of agricultural buildings in s. 2 (2) of the Act of 1928, and, subject to the de minimis rule, these words must be interpreted as meaning on the agricultural land occupied with the building in question and on that land alone. They further concluded that the de minimis rule could not apply seeing that some seventy-five per cent. of the milk treated in the building was produced elsewhere than on the agricultural land occupied by the ratepayer. Accordingly, the tribunal allowed the appeal and ordered that the assessment be restored to gross value £50 and rateable value £40. The ratepayer appealed.

Huntley for the ratepayer.

Maurice Lyell for the valuation officer.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued: The sole question in the appeal is whether this dairy is an "agricultural building" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), which provides:

" 'Agricultural buildings' means buildings (other than dwelling-houses) occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon."

It seems to me that so far as is relevant that definition is plain in its terms

and meaning. The word "thereon" at the end of the definition must mean the agricultural land together with which the building is occupied, and the only question, therefore, is whether this dairy is being used solely in connection with some agricultural operations on the land with which the building is occupied. It is not, of course, open to doubt that maintaining a herd of dairy cattle is an agricultural operation, and it is, therefore, plain that, if this dairy were used exclusively for cooling, etc., the milk which the ratepayer produced on his sixty-four acres of land, it would be properly described as being used solely in connection with the agricultural operations on that land. In truth and in fact, as it seems to me, this building is used in connection with the agricultural operation of the production of milk, but that operation is not confined to the land occupied with the building: the milk produced is produced only as to about one-fifth on that land and as to the rest on the ratepayer's brother's land. If, therefore, I am right in saying that the production of milk is the "agricultural operation" in question, then, the milk produced not being exclusively produced on the ratepayer's land, it seems to me plainly to follow that the building is not an "agricultural building" within the definition.

It was, however, said by counsel for the ratepayer that the true agricultural operation which is here in question is not that of milk production but the more limited operation of cooling, pasteurising and bottling milk. If that is the agricultural operation, then it seems to me that it is exclusively carried on in the building and not at all on the adjoining land; alternatively, it is an operation connected with milk which is certainly not produced exclusively on the land occupied by the ratepayer. In my judgment, however, the true agricultural operation here in question is that of the production of milk, not that merely of cooling. The case, therefore, seems to me to be distinct from *Thompson v. Milk Marketing Board* (1), and, save for the language of SOMERVELL, L.J. ([1952] 2 All E.R. 346) which supports the view I have taken of the meaning of the word "thereon" in the definition, that case does not, I think, assist in the solution of the present one. The question there related to a building which was part of a cattle breeding centre established by the Milk Marketing Board and used for the extraction of semen from bulls for the artificial insemination of cows. The agricultural land together with which the building in question was occupied was limited to some twenty-nine acres, on which the bulls were grazed and otherwise maintained. The semen, having been extracted from the bulls, was used for the purpose of the insemination of cows not brought on or kept on the twenty-nine acres but maintained on other farm lands in no sense occupied with the building in question—occupied, in fact, by farmers all round the neighbourhood. The argument for the valuation officer was that one could not treat the operation which consisted of and ended with the extraction of the semen as being a complete agricultural operation: the total operation was the insemination of the cows and that operation was not carried out on the land in question. This court, however, held that the keeping of these bulls and the extraction of the semen from them was an agricultural operation distinct in itself and that it did not matter that the product of that operation was not something sold in the market but was something which was thereafter used by way of service elsewhere. I have said that I find nothing in that case which can really assist in the problem now presented to us, and, for the reasons which I have given, it seems to me that the conclusion stated by the Lands Tribunal was correct. This appeal fails and must be dismissed.

BIRKETT, L.J.: I agree.

MORRIS, L.J.: I also agree. I think that the question in this case may be posed as follows: Is the dairy building which is occupied together with sixty-four acres of agricultural land used solely in connection with agricultural operations on that sixty-four acres of agricultural land? In my judgment, the answer to that question must be "No", for the reason that the dairy building is

considerably used in connection with agricultural operations on other land—that is to say, on the adjoining three hundred acres.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Burges, Salmon & Co.*, Bristol (for the ratepayer); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

LEVESLEY v. THOMAS FIRTH & JOHN BROWN, LTD.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), July 17, 20, 1953.]

Factory—Safe means of access—Maintenance—Temporary obstruction—Factories Act, 1937 (c. 67), s. 26 (1).

Inside a shop in a factory occupied by the defendants a space fifteen feet, three inches, wide was marked out with white lines on either side as a way along which employees might pass to and from their work. Returning from the factory canteen to work in another shop, the plaintiff, an employee at the factory, found the way partly blocked by a lorry. Passing the lorry, he tripped over a piece of steel packing, used to place heavy machinery on when it was being loaded, which was about two inches high and projected three or four inches into the marked way, and he fell and was injured.

HELD: in view of the transient and exceptional character of the obstruction caused by the steel packing, the defendants had not failed to maintain the safe means of access to work which they had provided, and, therefore, they were not liable for breach of their statutory duty to maintain such access (as defined in s. 152 (1) of the Factories Act, 1937) under s. 26 (1) of that Act.

Latimer v. A.E.C., Ltd. (ante, p. 449), applied.

FOR THE FACTORIES ACT, 1937, s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1018.

Cases referred to:

(1) *Street v. British Electricity Authority*, [1952] 1 All E.R. 679; [1952] 2 Q.B. 399; 3rd Digest Supp.

(2) *Latimer v. A.E.C., Ltd.*, ante, p. 449.

APPEAL by the defendants against an order of CASSELS, J., dated Mar. 3, 1953, awarding the plaintiff £1,095 10s. 7d. damages against the defendants, the occupiers of a factory at which he was employed, in an action in which he claimed damages for negligence and breach of the statutory duty of the defendants under s. 26 (1) of the Factories Act, 1937, to maintain a safe means of access to the place at which he had to work, there being an obstruction in the way caused by a piece of steel packing which extended three or four inches into it. CASSELS, J., held that the defendants were not guilty of negligence at common law, but were in breach of their statutory duty under the section.

Nelson, Q.C., and *D. H. Robson* for the defendants.

Elwyn Jones, Q.C., and *Castle-Miller* for the plaintiff.

SINGLETON, L.J.: This appeal must be allowed. The plaintiff, Mr. Charles Albert Levesley, worked for the defendants, Thomas Firth & John Brown, Ltd., as an engineer's turner. He was an experienced man, some fifty-years of age. He met with a most unfortunate accident and broke his leg.

"... J., decided that he was entitled to damages, and he gave judgment occupied £1,095 10s. 7d. Against that judgment the defendants appeal. connection of the plaintiff was put in two ways. It was said that the defendants It seems to me intelligent in that there was along the route which the plaintiff was

taking at the time of the accident an obstruction which had been left there negligently, and it was said further that there was a breach of s. 26 (1) of the Factories Act, 1937. The learned judge held that there was no negligence on the part of the defendants, but he decided in favour of the plaintiff on the ground that the defendants were in breach of their duty under s. 26 (1).

A The plaintiff and another man had decided they would work overtime on the night of May 29, 1951. Accordingly, they left their work about ten minutes to five to go to the canteen for a cup of tea. About five o'clock they were on their way back to work when a buzzer sounded, which was the signal for other people to leave work. The plaintiff worked in O.5 shop, and to get there from the canteen he had to pass through O.1 shop. Through that shop there is a space fifteen feet, three inches, wide, which is normally the way along which people pass to and from their work, and on each side of this space there is a white line.

B Inside the space there is a set of railway lines on which sometimes a truck is brought into the works where heavy engineering work is carried out. Sometimes, also, a lorry comes into the space. According to the evidence of the plaintiff, when he and the other man went to their tea there was no lorry in the space. It was free for them to walk up and down. When they returned at five o'clock a lorry was occupying part, perhaps half, of the space. It was not completely in the middle of the space; it was rather more to one side than the other. Furthermore, the people who had heard the buzzer were hurrying from work in the opposite direction to that in which the plaintiff was going. According to some of the evidence, the lorry had been loaded up by that time, but, if so, people must have worked more speedily than they sometimes do.

C When heavy machinery has to be loaded on a lorry in these works a piece of packing, usually a piece of steel, is often used on which to put the machinery. The packing makes it easier for the people who are doing the loading to get a chain or chains under the object to be loaded. It looks as if that practice had been followed on this occasion.

When the plaintiff was returning through shop O.1 towards shop O.5 he saw the lorry. There was more room on the right-hand side than on the left-hand side of it, but he chose the left-hand side, it may be because there were more people coming in the opposite direction on the right-hand side. As he was passing the lorry he stumbled, fell, and broke his leg. The inference which was drawn afterwards was that he had tripped over a piece of packing which was not far from the lorry and extended over the white line for some three or four inches. CASSELS, J., said in his judgment:

F "It is accepted that this was a means of access for the plaintiff to his work, although he had selected a slightly earlier time in minutes to go and get a cup of tea and to be returning to his work . . . An obstruction like this on the gangway or on the means of access—a thing that does not yield; it is not as if anybody could so easily kick it off—is a considerable obstruction, although it may only be two inches in height, when it is stretched over this white line. It is quite clear that the object of the white lines is to see that the space between the white lines shall be kept clear. If the means of access for workmen getting to and from their work is to be shared with lorries which are being loaded, then it is quite clear that it is up to the defendants to see that the place is clear, so that, if the workmen have to share the gangway with the lorries, they shall have a clear space in which to pass on their way to work or on their way from it."

H I am not sure that is not putting the duty a little too high. The judge continued:

"I think that this was a breach of the statute. I think that it was reasonably practicable for them to have provided that, if these packing pieces were used in the loading of a lorry, when they are finished with them, they should not be left in the gangway. It was unfortunate that an accident

like this did happen; and it may be that, if it had not been for the crowd going one way and the plaintiff going in the opposite direction, he would have seen what was on the gangway, but there it was."

To consider this appeal it is necessary to have regard to the words of s. 26 (1):

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The two white lines marked the place down which people went in the ordinary way. Their object was to ensure so far as possible that materials were not put over them to obstruct the way. The means of access for workers was also a means of access for lorries to be loaded. If lorries had to be loaded, from time to time it would occur that some object would be over the white line. So far as is reasonably practicable the defendants must maintain safe means of access. They had provided safe means of access, but it is said they had not maintained safe means of access. On the other side of the lorry there was some five feet of space down which the plaintiff could have passed. The lorry was only there temporarily. In a short time it would have gone. It may be that when the lorry had gone the piece of packing would have been moved back to the proper place, but there was safe means of access, and I find it difficult to see that there was any breach of the statutory duty laid on the defendants.

I recognise that a matter of this kind is very largely a question of fact, and for many reasons I should have liked to have agreed with the judgment of the learned judge, but I have looked again and again at s. 26 (1). My attention was called to what was said in *Street v. British Electricity Authority* (1) and, on full consideration, I find it impossible to say that in the circumstances of this case there was a breach of the terms of s. 26 (1). I asked learned counsel how an information under this section could be framed, and whether, if one was drawn in the terms of the section, there could be any possible chance on these facts of getting a conviction under this penal section. I do not think that there could be. Those are my reasons for saying that, in my opinion, this appeal should be allowed and judgment should be entered for the defendants, having regard to the findings of the learned judge that there was no negligence on their part.

DENNING, L.J.: The judge said that "it was up to the defendants to see that the place was clear," and, because it was not kept absolutely clear, he held the defendants liable. I can well understand the judge holding as he did, having regard to the state of the authorities at that time. Since his decision, however, we have the advantage of the decision of the House of Lords in *Latimer v. A.E.C., Ltd.* (2). It is true that that was a decision on s. 25 (1), but it gives an authoritative interpretation of the word "maintained" which is in each section. All previous decisions, not only on s. 25 (1) but also on s. 26 (1), need to be re-considered in the light of that decision. The difference between s. 25 (1) and s. 26 (1) is this. Section 25 (1) deals with specified things, some of which are themselves means of access, such as stairs, passages and gangways, whereas s. 26 (1) deals with unspecified things like scaffolding, staging and so forth, which are erected for the purpose of getting to or at a place of work. Section 25 (1), in regard to its specific means of access, imposes a higher obligation than s. 26 (1). It enacts that they *shall be properly maintained*, whereas s. 26 (1) only requires that the means provided under it shall be *maintained so far as is reasonably practicable*.

Section 26 (1) has given rise to some difficulty because of the close collocation of the words "maintain" and "safe". It has often been read as meaning that the occupier must maintain the safety of the access, or, in other words, must keep it safe. It seems to me that since *Latimer's* case (2) that is no longer

a correct reading of the section. The proper interpretation is to read "safe" with "provided" so that the section reads in this way: There shall be provided a safe means of access (such as a scaffolding, staging, or so forth) and, such a means having been provided, it must thereafter be "maintained", i.e., maintained in the way defined in s. 152 (1), viz., maintained in an efficient state, in efficient working order, and in good repair. *Latimer's* case (2) shows that this obligation to "maintain" should not be used so as to put an excessive obligation on the employer: see per LORD PORTER (ante, p. 452) and per LORD REID (ante, p. 454). The obligation is not an absolute obligation to maintain safety, but a relative obligation to maintain efficiently. Once a safe means of access is provided, such as a passage or gangway, the occupier is not responsible for every temporary obstruction (such as a patch of oil or slipperiness) which may, through some accident or mischance, occur in it. If he has an efficient system to keep it clean and free from obstruction, that is all that can be reasonably demanded of him. It is, indeed, all that is reasonably practicable. So regarded, s. 26 (1) adds very little to the common law obligation between employers and workmen, and it has been so said on several occasions in this court.

In the present case the defendants have "provided" a safe means of access. They have provided a roadway of sound construction marked out by white lines fifteen feet, three inches, wide. The only question is whether they have "maintained" it in an efficient state so far as is reasonably practicable. I think they have. It so happened that in the course of some loading operation a block of iron was left temporarily protruding three inches out into the gangway. It is not known whether it was done by the servants of the defendants or not. In my opinion, a transient and exceptional obstruction of that kind is not a breach of the obligation to maintain the means of access. I agree, therefore, that this appeal should be allowed.

MORRIS, L.J.: I also agree. On the facts it does not seem to me that it could be said that there was a failure to provide safe means of access. For the plaintiff to succeed, in my judgment, he had to show that there was a failure, so far as reasonably practicable, to maintain a safe means of access. The word "maintained" is defined in s. 152 (1) of the Act to mean

"maintained in an efficient state, in efficient working order, and in good repair."

In his speech in *Latimer's* case (2), in a passage in which he was dealing with s. 25, but which is applicable in a wider context, LORD PORTER said (ante, p. 452):

"To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation on the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation."

In the present case the lorry was only temporarily in position, and in all probability the packing piece was also only temporarily in the place where it was. The time involved was very short, and a consideration of the facts in this case leads me to the view that it was not shown that, so far as reasonably practicable, there was a failure to maintain or to provide safe means of access.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the defendants); *W. H. Thompson* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CEYLON MOTOR INSURANCE ASSOCIATION, LTD. v. THAMBUGALA.

[PRIVY COUNCIL (Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, the Chief Justice of Canada (Rt. Hon. T. Rinfret) and Mr. L. M. D. de Silva), June 8, 9, July 21, 1953.]

Street Traffic—Motor insurance—Action against insurance company to satisfy judgment against insured—Notice of proceedings—Sufficiency of letter to insurers—Motor Car Ordinance of Ceylon (No. 45 of 1938), s. 134 (a).

By the Motor Car Ordinance of Ceylon (No. 45 of 1938), s. 134: "No sum shall be payable by an insurer under the provisions of s. 133—(a) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action . . ."

On Sept. 1, 1945, the respondent was injured by a car which had been insured with the appellants against third-party risks in accordance with the requirements of the Motor Car Ordinance, s. 128. On May 21, 1946, his proctors wrote to the appellants saying that an action would be filed against the owner of the car unless his claim for Rs.15,000 damages was settled before May 31, 1946. The claim not having been settled, the respondent instituted proceedings against the owner of the car and was awarded Rs.10,000 damages, and, on the appellants' refusal to pay this sum, he instituted proceedings against them. The appellants contended that the letter of May 21, 1946, was not a sufficient notice of action under s. 134 (a).

HELD: the notice, in setting out the name and address of the proposed plaintiff, the name of the owner and the number of the car which caused the injuries, the date of the accident, and the sum being claimed as damages, was a sufficient notice of action under s. 134 (a), it not being necessary that it should contain the name of the court in which it was proposed to file action, and, accordingly, the appellants were liable to pay the sum claimed as damages.

Lewis v. Smith (1815) (Holt, N.P. 27), distinguished.

EDITORIAL NOTE. The Motor Car Ordinance of Ceylon (No. 45 of 1938), s. 134 (a), is in substantially the same terms as the Road Traffic Act, 1934, s. 10 (2) (a), for which, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 718.

AS TO NOTICE OF PROCEEDINGS NECESSARY IN CLAIMS BY THIRD PARTIES AGAINST INSURERS, see HALSBURY, Hailsham Edn., Vol. 18, p. 564, para. 914.

Cases referred to:

- (1) *Weldrich v. Essex & Suffolk Equitable Insurance Society, Ltd.*, (1949), 83 Lloyd L.R. 91.
- (2) *Lewis v. Smith*, (1815), Holt, N.P. 27; 171 E.R. 147.

APPEAL from a decree of the Supreme Court of Ceylon, dated May 20, 1952.

On Sept. 1, 1945, the respondent, P. P. Thambugala, was knocked down and injured in a street in Colombo by a motor car owned by one K. S. Perera while it was being driven by his driver in the course of and within the scope of his employment. At that date Perera was insured by the appellants, the Ceylon Motor Insurance Association, Ltd., against third-party risks as required by the Motor Car Ordinance (No. 45 of 1938), s. 128. On May 21, 1946, the respondent's proctors wrote a letter to the appellants claiming Rs.15,000 as damages for the accident, and saying that, if the claim was not settled before May 31, 1946, an action would be begun against Perera as the owner of the car. On May 23, 1946, the appellants replied that Perera had not reported the accident to them and advised the respondent to communicate direct with

Perera. On June 10, 1946, without any further communication to the appellants, the respondent instituted proceedings in the District Court of Colombo against Perera for Rs.15,000 damages for personal injuries, and on June 25, 1948, he was awarded Rs.10,000 damages. On Nov. 11, 1949, an appeal by Perera to the Supreme Court of Ceylon was dismissed. The appellants were then called on to pay the Rs.10,000, but they refused to do so, and, on Apr. 5, 1950, the respondent instituted proceedings against them in the District Court of Colombo.

- A The appellants claimed that a "notice of action", as required by the Motor Car Ordinance, s. 134 (a), had not been given them. On Oct. 24, 1950, the District Court held that the letter of May 21, 1946, sent by the respondent's proctors to the appellants was a sufficient notice under s. 134 (a), and that, therefore, the appellants were liable to pay the respondent Rs.13,881.22, being the amount due when he instituted the proceedings on Apr. 5, 1950. The B appellants appealed to the Supreme Court of Ceylon, who, on May 20, 1952, affirmed the decision of the District Court.

Cross, Q.C., and Handoo for the appellants.

Stephen Chapman for the respondent.

- C July 21. **Mr. L. M. D. de SILVA:** This is an appeal from a decree of the Supreme Court of Ceylon dated May 20, 1952, dismissing an appeal from a decree of the District Court of Colombo dated Oct. 24, 1950, in favour of the respondent. The respondent had been injured by a car belonging to one K. Stephen Perera who had been duly insured against third-party risks with the appellant company in accordance with the requirements of the Motor Car Ordinance (No. 45 of 1938). In an earlier action in the District Court of Colombo, D the respondent obtained a decree against Perera for Rs.10,000 with legal interest and costs. The amount due on that decree on Apr. 5, 1950, was Rs. 13,881.22. The respondent, availing himself of the provisions of s. 133 of the Motor Car Ordinance, brought this action on that day for the recovery of the said sum from the appellant company. Section 133 of the ordinance says:

- E " (1) If after a certificate of insurance has been issued under s. 128 (4) to the person by whom a policy has been effected, a decree in respect of any such liability as is required by s. 128 (1) (b) to be covered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of ss. 134 to 137, pay F to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree. (2) In this section, 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, G or has avoided or cancelled, the policy."

Section 134 is to the following effect:

- " No sum shall be payable by an insurer under the provisions of s. 133—
(a) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of H the action had been given to the insurer by a party to the action; or (b) in respect of any decree, so long as execution thereof is stayed pending appeal."

It will be seen that no sum is payable by the appellant unless the respondent has given the notice of action provided for by s. 134 (a). The only ground on which the appellant company seeks to avoid liability is that notice under the section has not been duly given. Sections 136 and 137 of the ordinance enable the insurer to obtain a declaration of non-liability on certain grounds

in legal proceedings instituted for the purpose, provided that they are instituted before the expiration of a specified period and provided, in certain circumstances, notice is given of the proceedings by the insurer to the injured party within a prescribed time. Their Lordships are of the opinion that one of the objects, but not the sole object, of the notice of action required by s. 134 is to enable the insurer to institute within time proceedings under ss. 136 and 137.

On May 21, 1946, the respondent's proctors wrote the following letter to the appellant company:

(Re Car No. X—4851. We are instructed by Mr. P. P. Thambugala . . . to file an action for the recovery of Rs.15,000 against Mr. Kodituwakku Aratchige Stephen Perera . . . being damages sustained by our client as a result of the above car knocking down our client on Sept. 1, 1945, by reason of the negligent and careless driving on the part of his driver. We are given to understand that the above car has been insured with your company. Our client is still under treatment and unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car."

The only question for decision by their Lordships is whether this letter is a sufficient notice of action under s. 134 of the ordinance.

The Motor Car Ordinance (No. 45 of 1938) follows to a large extent the English legislation on the subject of the liability of an insurer to a third party. Section 134 (a) bears a resemblance to s. 10 (2) (a) of the English Road Traffic Act, 1934, which reads:

"No sum shall be payable by an insurer under the foregoing provisions of this section—(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings."

In *Weldrich v. Essex & Suffolk Equitable Insurance Society, Ltd.* (1) the question arose whether a notice in the following terms was a sufficient compliance with its provisions (83 Lloyd L.R. 102):

"We understand your society has repudiated liability, and we shall be grateful to have your confirmation thereof in writing, because, you will appreciate, we shall have to take proceedings as against Mohamed, and as against the owner of the other vehicle, and at the same time give notice to the Motor Insurers Bureau of your repudiation of liability."

It was held that it was not. But their Lordships are of the view that this decision does not help the appellants. They agree with the learned district judge "that the main purport of this letter was to obtain confirmation of an alleged repudiation of liability," and that it was not possible to say that it was a proper notice complying with the provisions of s. 10 (2) (a) of the Road Traffic Act, 1934. Other English cases have been cited to their Lordships which are distinguishable from the present case on a variety of grounds. They involve the interpretation of the words "notice of action" in various statutes, and their Lordships would observe about them generally that the interpretation of such a set of words in a particular statute does not always greatly assist the interpretation of the same words in another. Their Lordships think it necessary to refer to only one of these cases, namely, *Lewis v. Smith* (2). In that case an Act of Parliament incorporating the West India Dock Company was under consideration. It enacted that no action could be brought against the company unless fourteen days' notice of such action had been given. A letter on which the plaintiff in that case relied as giving notice bears in some respects a resemblance to the letter under consideration by their Lordships, but was thought by SIR VICARY GIBBS, C.J. (Holt, N.P. 29) to leave "it open to

conjecture what legal proceedings were in contemplation . . . and against whom they were to be brought." He held that the letter under consideration in that case was not a proper notice of action under the Act. The letter sent by the respondent to the appellants, however, in the present case says that the proceedings were to be for the recovery of damages and that they were to be brought against Perera, the owner of the car. It was, consequently, free from the defects referred to by SIR VICARY GIBBS, C.J.

- A It has been argued that the letter which is challenged should have contained the name of the court in which it was proposed to file action. An action cannot be specified with precision without reference to its number and to the name of the court in which it is filed. It is to be noticed, however, that s. 134 contemplates the possibility of giving notice before the action is filed. In that event no number could be given. It follows that the section contemplates something
- B containing less than a precise specification of the action. The name of the court could, no doubt, be given, but their Lordships do not think that the section requires that this should be done. It does not do so expressly and there is nothing from which it can be said to do so by implication. Then it was said that the words "unless our clients' claim is settled" reduced the notice to one which was conditional and insufficient for the purposes of s. 134.
- C Their Lordships agree with the view of the Supreme Court that the words must be taken to mean "settled by you", namely, by the appellant company. But they are of opinion that, even if they meant "settled by you or someone else", the words do not vitiate the notice. A notice of action without such words necessarily carries with it the implication that action will be filed only if the claim is not settled, and the addition of the express statement does not
- D alter its meaning or its effect. The notice which has been sent in this case sets out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident, and the sum which was being claimed from the owner as damages. Their Lordships are of the opinion that these elements, taken together, constitute a sufficient notice of action under s. 134 (a) and that there are no elements in it which in
- E any way reduce it to something less than a sufficient notice.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant company will pay the respondent's costs of appeal.

Appeal dismissed.

Solicitors: *Smiles & Co.* (for the appellants); *Darley, Cumberland & Co.* (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

EDWARDS v. GRIFFITHS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Parker and Donovan, JJ.), July 30, 1953.]

Street Traffic—Driving uninsured motor vehicle—Disqualification—Driver mental defective—Road Traffic Act, 1930 (c. 43), s. 35 (1).

Street Traffic—Driving uninsured motor vehicle—Need to produce insurance policy—Road Traffic Act, 1930 (c. 43), s. 35 (1).

In 1951 the respondent passed a driving test and was granted a driver's licence for twelve months. After the expiration of the licence he applied for a new licence which was refused because he was under the supervision of the local health authority under the provisions of the Mental Deficiency Acts, 1913 to 1938. In February, 1953, he drove a motor tractor belonging to his employer and was charged with driving a motor vehicle without a policy of insurance being in force. The certificate of insurance of his employer contained a proviso that the driver must hold a licence to drive the vehicle or that he must have held one and not be disqualified for holding or obtaining such a licence.

HELD: the words "disqualified for holding or obtaining a licence" in the proviso in the certificate of insurance must be construed as meaning a disqualification of the driver by an order of the court under s. 4 (6) of the Road Traffic Act, 1930; the respondent was not so disqualified; and, therefore, he was covered by the certificate and no offence was committed.

PER LORD GODDARD, C.J.: It would be better in all these cases, and I desire police authorities to take notice of this, always to take the precaution of having the policy before the court. That can be done by issuing a subpoena requiring the assured to produce the policy to the court.

FOR THE ROAD TRAFFIC ACT, 1930, s. 4 (6) (b) and s. 35, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 576 and p. 602.

CASE STATED by Wiltshire justices.

At a court of summary jurisdiction sitting at Chippenham, on Apr. 9, 1953, the appellant, Henry Edwards, preferred an information against the respondent, Herbert Griffiths, charging that he used a motor tractor when there was not in force in relation to such user of the vehicle by him such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act.

It was proved or admitted that on Feb. 22, 1953, the respondent drove an agricultural tractor on a public highway; that the tractor was the property of D. O. Cooper, a farmer, by whom the respondent was employed, and the respondent was driving with Cooper's permission; that the respondent was not the holder of a current driving licence; that in October, 1951, he had passed a driving test and been granted a driving licence for twelve months, enabling him to drive motor cycles and tractors, but that in 1952 he was verbally informed by an official of the Wiltshire County Council that, as he was then under the supervision of the local health authority under the provisions of the Mental Deficiency Acts, 1913 to 1938, he must not drive his motor cycle; that no formal notice revoking the licence had been received by the respondent under s. 5 (4) of the Road Traffic Act, 1930; that since the expiration of his licence the respondent had applied for a licence and his application had been refused by the licensing authority, the respondent being informed that the authority had received notice that he, the respondent, was under the supervision of the local health authority under the Mental Deficiency Acts, 1913 to 1938; the certificate of insurance held by the respondent's employer provided for use of the vehicle by (a) the policy holder, (b) any other person with

the permission of the policy holder, provided that the person driving held a licence to drive the vehicle or had held and was not disqualified for holding or obtaining such a licence.

For the respondent it was contended that, as he had previously held a driving licence and had not been disqualified for holding or obtaining a licence, he was insured in respect of third-party risks under the employer's certificate of insurance. For the appellant it was contended that, as the respondent was prohibited from holding or obtaining a licence by virtue of his being under statutory supervision, he was automatically disqualified for holding or obtaining a licence within the meaning of the Road Traffic Act, 1930.

The justices were of opinion that "disqualified" in the insurance certificate meant disqualified by an order of the court in accordance with s. 4 (6) (b) of the Road Traffic Act, 1930, and not prohibited from obtaining a licence by reason of mental or physical disability, and they dismissed the information. The appellant now appealed.

McGougan for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This case is a good illustration of the inconvenience of having to decide, in the absence of the insurance company, whether a policy covers a particular person at a particular time, but there is no provision in the Road Traffic Act, 1930, by which an insurance company can be brought in to take part in the argument on these matters. If the insurance company is, or would regard itself as being, on risk, the mischief which the compulsory insurance sections is intended to guard against does not arise, and it was for that reason that two years ago, with the sanction of the Home Office, it was arranged that police authorities who were in doubt whether a particular policy covered a particular driver at a particular time might consult the committee of underwriters at Lloyd's to find out whether or not in the particular circumstances they would regard themselves on risk. This course was not taken by the police authorities in this case. We have, therefore, in the absence of the insurance company, to decide whether the insurers would have been on risk if there had been an accident.

The facts show that the respondent was in the employment of a farmer who held a policy of insurance. If the master holds a policy of insurance, an employee who drives on his instructions is covered, provided the policy is not by its terms confined to the holder of the policy. It would be better in all these cases, and I desire police authorities to take notice of this, always to take the precaution of having the policy before the court. That can be done by issuing a subpoena requiring the assured to produce the policy to the court. According to the certificate, the persons covered by this policy were the policy holder and any other person driving with his permission. Therefore, *prima facie*, the respondent was covered. The certificate goes on to provide:

"Provided the person driving holds a licence to drive the vehicle or has held and is not disqualified for holding or obtaining such a licence."

[His LORDSHIP stated the facts and continued:] Section 4 of the Road Traffic Act, 1930, provides:

"(2) Subject to the provisions of this Part of this Act as to the physical fitness of applicants for licences, the licensing authority, except in the case of an applicant who is disqualified as hereinafter mentioned, shall on payment of a fee of 5s. grant a licence to any person who applies for it in the prescribed manner and makes a declaration in the prescribed form that he is not, under the provisions of this Part of this Act, disqualified by reason of age or otherwise for obtaining the licence for which he is applying . . . (6) A person shall be disqualified for obtaining a licence—
(a) while another licence granted to him is in force whether the licence

is suspended or not; (b) if he is by a conviction under this Part of this Act or by an order of a court thereunder disqualified for holding or obtaining a licence."

The justices held that the words in the certificate of insurance "not disqualified for holding or obtaining such a licence" meant a disqualification by order of the court under s. 4 (6). In my opinion, they were right. It is true that, by reference to s. 4 (2) and s. 5, it may be argued that under the provisions of the Act relating to physical fitness and age a person may be said to be disqualified for obtaining a licence, but what we have to decide is whether or not as between the assured and the insurers these words "not disqualified for holding or obtaining such a licence" refer merely to the provision of disqualification by order of the court on conviction. Prima facie, the person who is driving with the permission of the policy holder is covered. It is further provided by the certificate that the person who is driving, whether he is the policy holder or a person driving with permission, must hold or must have held a licence to drive. The words "and is not disqualified for holding or obtaining such a licence" following immediately after the words "has held" seem to me to indicate clearly that the insurers are contemplating the case of a man who has held a licence, but has been disqualified for holding it, meaning disqualified for getting a new one or holding his current licence by reason of an order of the court. It is clear, as it seems to me, that as between the assured and the insurers we have to construe the certificate against the insurers, that is to say, if there is an ambiguity or a doubt as to its extent and the question were to arise as to the liability of the insurers, we should have to put the construction on the certificate most favourable to the assured, but I have come to the conclusion that the justices were right in the interpretation they put on this certificate of insurance, and, therefore, this appeal fails.

PARKER, J.: I agree.

DONOVAN, J.: Like LORD GODDARD, C.J., I have not found this an easy case, but when I read in s. 9 (5) of the Act of 1930 that a person prohibited by reason of his age from driving shall be deemed to be disqualified, I think it is clear that "disqualification" in the Act has the restricted meaning given to it in s. 4 (6) (b) which is not the same as "prohibited". Then, when I find a certificate of insurance using in its language the language of the Act, I think "disqualified" in the certificate should receive the same restricted meaning. Therefore, I agree with the judgment proposed.

Appeal dismissed.

Solicitors: *Drury, Hopgood & Co.*, agents for *B. T. Ford*, Marlborough (for the appellant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BARNARD v. TOWERS.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), July 29, 30, 1953.]

Rent Restriction—"Suitable alternative accommodation"—*Offer of share of house to tenant of whole house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (b).*

A The landlord claimed possession of a dwelling-house to which the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, applied and of which the tenant had sole and exclusive possession, and contended that suitable alternative accommodation was available to the tenant. The alternative accommodation consisted of a dwelling-house of which the tenant was joint owner and which she would be obliged to share with her sister who was already in occupation thereof.

B HELD: the offer of a share of a house was not an offer of suitable alternative accommodation within s. 3 (1) (b) of the Act of 1933 to a tenant who had exclusive occupation of a house, and, therefore, no order for possession would be made.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1048.

C APPEAL by the plaintiff from an order of His Honour JUDGE WRANGHAM, at Market Harborough County Court, dated May 11, 1953.

D The landlord of a dwelling-house to which the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, applied, sought possession of the premises and contended that there was suitable alternative accommodation available to the tenant. The alternative accommodation consisted of a dwelling-house, No. 21, Charles Street, Mayfair, of which the tenant was joint owner with her sister and which was occupied at the date of the proceedings by the sister. The house of which possession was sought by the landlord was in the sole and exclusive occupation of the tenant. The county court judge refused to make the order for possession on the ground that the security of tenure afforded by joint ownership was not reasonably equivalent to the security which the tenant had as a protected tenant within s. 3 (3) (b) of the Act of 1933.

E *Harvey, Q.C., and Stable* for the landlord.

Plume for the tenant.

F SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE WRANGHAM in a case arising under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The landlord sought an order for possession of the dwelling-house known as 52, Lubenham Hill, and the case proceeded on the basis that to succeed he had to show that there was available suitable alternative accommodation under s. 3 (1) of the Act of 1933 which provides:

G "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts [i.e., the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925] apply or for the ejection of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment and . . . (b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

H Section 3 (3) provides:

" . . . accommodation shall be deemed to be suitable if it consists either—(a) of a dwelling-house to which the principal Acts apply; or (b) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably

equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply, and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—(i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.”

It was pointed out that the form of that sub-section is that accommodation shall be deemed to be suitable if it consists of the premises mentioned. There have been some observations in the cases to which we were referred as to how far it is exhaustive. In my view, that point does not affect this case, but I think it is right to say a word about it. If the tenant sought to be evicted had a house of his own which was empty, to which he could go, and to which it was reasonable he should go, but which happened, owing to its rateable value to be outside the application of the Acts, it would clearly not be within s. 3 (3), but it is difficult to believe that the court would be precluded from considering it as alternative accommodation. However, in my opinion, those points do not arise in the present case for reasons which I will indicate in a moment.

The tenant, Miss Towers, had lived with her father and two sisters at 21, Charles Street. The father had died and one of the sisters remained at 21, Charles Street, and for some time before the tenant took a lease of the house of which possession is sought she was living there with her sister. The alternative accommodation on which the landlord seeks to rely is 21, Charles Street, which is at present occupied and lived in by the sister, but of which the tenant is the joint owner. It is clear that, if this were a question of fact, the learned judge would have found on the facts that it was reasonable for the tenant to go and live there with her sister. I think he would have found as a fact, although the sisters gave contrary evidence, that the sisters were on such terms that, if they had nowhere else to go, they would live together. He took the view that the tenant was being unreasonable because of family disputes, but that is not a matter with which we are concerned. He decided that the landlord could not recover possession because he applied the provisions of s. 3 (3) (b) and took the view that the facts did not enable him to say that the security of tenure, afforded to the tenant if she went into this house with her sister, was that required by the sub-section. He said:

“Security of tenure of joint owners is nothing like equivalent to the security which a protected tenant has. Either joint owner can take the security away and force a sale at any moment.”

I think there is great force in that.

That was the sub-section under which this case was argued below, but, we having had the advantage of a second argument, it seems to me, first, that s. 3 (3) (b) cannot apply because these premises were not premises to be let as a separate dwelling. The reference to security of tenure there might give guidance to the meaning of suitable alternative accommodation. This case does not fall under that sub-section. I think that the landlord's case fails in limine. I do not think that the offer of a share in a house is an offer of suitable alternative accommodation to a tenant who under a tenancy has a house of his own. It seems to me that accommodation in a house of one's own differs in kind from sharing a house with someone else. When this section speaks of suitable alternative accommodation it means suitable alternative accommodation of the kind, although it may not be in all respects so good, as that which the tenant is enjoying, namely, in this case a house of which she has

exclusive occupation. For these reasons I think the learned judge came to the right conclusion, although my reasons are different, and I would dismiss the appeal.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

A Solicitors: *Alfred Hurner* (for the landlord); *Vizard, Oldham, Crowder & Cash*, agents for *Wartnaby & Co.*, Market Harborough (for the tenant).
[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

B

PRACTICE NOTE.

C

BONE v. BONE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), July 28, 1953.]

Divorce—Insanity—Guardian ad litem—Extension of duties to ancillary matters—Maintenance.

D Since 1947 the wife had been receiving medical attention. In 1948 she underwent two frontal leuchotomy operations, and since 1949 she had been considered unable to look after her children and had been living with her parents. In May, 1952, the husband filed a petition for the dissolution of his marriage on the grounds of the wife's cruelty and adultery, and asked for the exercise of the discretion of the court in his favour. By her answer the wife
E cross-prayed for dissolution of the marriage on the ground of the husband's adultery. By his reply the husband admitted the adultery, but alleged that the wife had condoned to it. A draft deed of maintenance was drawn up and agreed to by the parties before the hearing. At the hearing of the suit one Head was appointed and joined as guardian ad litem of the wife. The husband then withdrew the prayer of his petition and gave evidence of his own adultery.
F The wife was given leave to amend her answer by including a prayer for maintenance.

Hollins for the husband.

Ormrod for the wife.

G LORD MERRIMAN, P., dismissed the prayer of the husband's petition and granted a decree nisi on the prayer of the wife's answer. HIS LORDSHIP approved the substance of the draft deed and said: It should be plainly understood that it was with reference to this deed that I thought it necessary that the duties of the guardian ad litem should be extended to ancillary matters, including, of course, maintenance. The application for maintenance was thereupon adjourned generally.

Solicitors: *E. P. Hanney*, Pinner (for the husband); *Bower, Cotton & Bower* (for the wife).

A.T.H.

SPALENKOVA v. SPALENKOVA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 27, 1953.]

Divorce—Practice—Petition—Service—Dispensing with service—Avoidance of irremediable hardship—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 9 (5).

The wife filed a petition for divorce on the ground of the husband's desertion and applied, under the Matrimonial Causes Rules, 1950, r. 9 (5), for leave to dispense with service of it on the husband. In her affidavit in support of the application the wife stated that she and the husband (who was of Czechoslovak origin) lived together for a short time after the war, mostly in Czechoslovakia; that in 1947 she left him there and came to England and that there was an understanding between them that after a few months he should join her in England; that he had never done so and had ignored her letters to him; that she had communicated with his sister-in-law, who lived in Czechoslovakia and from her had learned that in 1950 he had been arrested, apparently as a political prisoner, and had remained under restraint ever since. The wife had sent one copy of the petition by post to the husband at his place of detention, another to him through the Czechoslovak embassy, and a third to the address of his sister-in-law, but she had received no answer from him.

HELD: while there was ground for thinking that the husband might have received a copy of the petition, it was not established that he had, and no effective method of substituted service could be suggested; if the court gave leave for service to be dispensed with, a decree absolute, which might be irrevocable, would probably be pronounced within a few weeks, whereas, if leave were refused, the husband's position might change and he might be able to acknowledge service of the petition and indicate whether or not he wished to defend, or some form of substituted service might become possible; and, therefore, leave would be refused.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 9 (5), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 203; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 473, 474, Nos. 4097-4103.

Cases referred to:

- (1) *Read v. Read*, [1942] 1 All E.R. 226; [1942] P. 87; 111 L.J.P. 41; 166 L.T. 153; 27 Digest, Replacement, 473, 4099.
- (2) *Luccioni v. Luccioni*, [1943] 1 All E.R. 260, 384; [1943] P. 49; 112 L.J.P. 51; 168 L.T. 263; 27 Digest, Replacement, 473, 4101.
- (3) *Weighman v. Weighman*, [1947] 2 All E.R. 852; 27 Digest, Replacement, 470, 4056.
- (4) *Heath v. Heath*, [1950] 1 All E.R. 877; [1950] P. 193; 27 Digest, Replacement, 473, 4103.
- (5) *Paolantonio v. Paolantonio*, [1950] 2 All E.R. 404; 27 Digest, Replacement, 473, 4102.

SUMMONS adjourned into court.

Picard for the wife.

Colin Duncan for the Queen's Proctor.

WILLMER, J.: The wife asks the leave of the court to dispense with service on the husband of her petition for dissolution of the marriage on the ground of his desertion. The case came before me in chambers, but when I heard the facts I felt that it raised difficult problems on which I should welcome the assistance of argument on behalf of the Queen's Proctor. I, therefore, adjourned the matter into court.

The case arises under the Matrimonial Causes Rules, 1950, r. 9 (5), whereby it is provided:

“Service may be dispensed with altogether in any case in which it may appear necessary or expedient to do so.”

A The rule substantially re-enacts the proviso to s. 42 of the Matrimonial Causes Act, 1857, which has now been repealed. That section, after providing that a petition was to be served on the party to be affected thereby, contained a proviso that the court might dispense with such service altogether if it should seem necessary or expedient so to do. The wife is a woman of English origin, and has been resident in this country for a number of years. The husband is of Czechoslovak origin. The petition is presented in pursuance of the rights conferred by s. 18 (1) (b) of the Matrimonial Causes Act, 1950.

B According to the wife's affidavit the relevant facts, so far as they can be ascertained, are that the parties lived together for a short time after the war, mostly in Czechoslovakia, and that some time in 1947 the wife came to England, leaving the husband still residing in Czechoslovakia. It is said by the wife that there was some sort of understanding between them that the husband was to leave Czechoslovakia and come to England to join the wife after the lapse of a few months. However, the husband did not come, and the wife says that when she wrote to him he ignored her letters. She remained in correspondence, and, indeed, is still in correspondence, with the husband's sister-in-law, who lives in Czechoslovakia, and from information derived from that source it appears that some time in 1950 the husband was arrested and has remained under some form of restraint ever since. There is no evidence to show that the husband has been guilty of any criminal offence. The inference which, I think, must be drawn is that he has been put under restraint as a political prisoner and for political reasons. That inference is supported by a recent letter from the husband's sister-in-law, in which, after commenting on the release of certain political prisoners in Czechoslovakia, she went on to say that C unhappily the husband had not so far obtained his release. The wife has, I am satisfied, made every reasonable attempt to serve this petition. A copy has been sent through the post to the address where the husband is known to be detained. Another copy has been sent through the Czechoslovak embassy in London. A third attempt was made to serve him by sending a copy to the address at which his sister-in-law resides and which had been his home before D his arrest. But there has been no answer. The high-water mark of the case for the wife is reached in the most recent of all the letters received from the husband's sister-in-law, a letter of June 15, 1953, received actually since the previous hearing of the case in chambers. I do not propose to read the letter, but it is sufficient to say that it does, at any rate, give some ground for thinking that the husband may possibly have received one or other of these copies of E the petition.

F That, however, to my mind, is not the whole of the difficulty, because, even if one were to assume that in all probability the husband has received a copy, or that the petition has been brought to his attention in some way, there are, it seems to me, good grounds for drawing the inference that during his present detention he would not in any case be allowed by the responsible authorities G to take any part in the case, and by that I mean that, not only would he not be allowed to defend it, but it may be that he is not even allowed to send off the acknowledgment of service enclosed with the petition. Further, for reasons which I have given, there is no means of knowing what, if any, answer the husband may have to the charge made against him. He may, for all that is known, wish to deny that he ever had any animus deserendi, or to set up that he had just cause for not rejoining his wife. It seems clear that three years had not elapsed by the time this husband was placed under restraint. Those H

are the facts in relation to which I have to decide whether or not leave to dispense with further service should be granted.

I have, I believe, been referred to all the relevant authorities where similar questions have arisen, but it has been forcefully, and rightly, pointed out to me by both counsel that, in the end, the matter is entirely one for my unfettered discretion. It is, however, useful to look at the reports of some of the cases that have arisen, especially as several of them have reached the Court of Appeal. One cannot help but receive some guidance from such authority even on a matter of the exercise of discretion. A

I have already referred to the provisions of s. 42 of the Act of 1857, now substantially re-enacted in the Matrimonial Causes Rules, 1950, r. 9 (5). I think I am right in saying that until recent times the power conferred by the section was a power which the court was seldom called on to exercise. No doubt, this was due to the natural reluctance of any court in this country to allow any proceedings, particularly proceedings affecting status, to continue against a party who had no opportunity of being heard. That attitude is well summed-up in the words of LORD GREENE, M.R., in *Read v. Read* (1), where he says ([1942] 1 All E.R. 228, 229): B

"The system of constructive service, where a defendant can have judgment recovered against him without his ever having any opportunity of knowing that the proceedings are on foot is a thing against which English jurisprudence has always set its face . . ."

However, such cases did arise during the recent war, of which *Read v. Read* (1) was one. Another was *Luccioni v. Luccioni* (2). Both those cases arose out of applications to dispense with service on a respondent who was either an alien enemy or at any rate resident in enemy territory, and in both cases the ultimate decision was against granting leave to dispense with service. In *Luccioni v. Luccioni* (2) LORD MERRIMAN, P., said ([1943] 1 All E.R. 262): D

"In my opinion, in the case of petitions which involve a change of status, and where any form of substituted service is impossible, the court, before dispensing with service, should require to be satisfied that the respondent spouse has become aware of the fact that the petition is being prosecuted, or, at the very least, of the intention to prosecute it, and in either case has had time and opportunity to indicate whether he or she desires to defend." E

In the Court of Appeal (*ibid.*, 384) some criticism was directed in argument to those words of the learned President, and it was suggested that he was going some way towards fettering the discretion which the court, undoubtedly, has. The Court of Appeal, however, rejected that argument, and, I think, accepted and indorsed what was said by the learned President to the extent that circumstances such as those referred to were properly to be taken into consideration when the court was called on to exercise its discretion on this matter. There is, it seems to me, a marked similarity between the case of a respondent who is in enemy territory and for that reason unable to communicate, and a respondent who is detained in a foreign country as a political prisoner and for that reason equally unable to communicate. Undoubtedly, it seems to me, the present is a case in which the considerations referred to by the learned President in the passage which I have just read apply with the fullest possible force. F

It is proper, however, to refer to the fact that since those decisions there have been three further cases which have gone to the Court of Appeal, in each case on appeal from the refusal of a judge of this Division to grant leave to dispense with further service, and in each of those cases the Court of Appeal, for various reasons, have thought it right to allow the appeal and to grant the leave that was asked. The first was *Weighman v. Weighman* (3), where the G H

husband had emigrated to Canada many years before, leaving his wife in this country. She sought to institute proceedings on the ground of desertion, but when it was attempted to serve the petition it proved impossible to find the husband. He had, however, written to the wife some time before the attempt to serve the petition a letter in which he informed her that he had left his old address, but he gave no new address and he further informed her that he never intended to return to England. That letter, it became clear, was in response to a letter from the wife asking him what he proposed to do about rejoining her. The Court of Appeal thought that leave to dispense with service ought to be granted on the basis that it was a fair inference on the facts that the husband recognised not only that he was in desertion, but also that there was at least a likelihood of proceedings being taken. That consideration had been specifically dealt with in those words of LORD MERRIMAN, P., which I quoted from *Luccioni v. Luccioni* (2). In other words, in *Weighman v. Weighman* (3), the Court of Appeal acted in accordance with one of the possibilities envisaged by the learned President. I do not think I can derive much assistance from the view which the Court of Appeal took of the special facts in *Weighman v. Weighman* (3).

The second case, *Heath v. Heath* (4), was an appeal from my own refusal to grant leave to dispense with further service. The facts were very different. The ground on which the Court of Appeal eventually decided the matter was that all the probabilities went to show that the husband, who was being proceeded against for desertion, had received the petition, although he had not taken the step of sending back the acknowledgment of service. That case was relied on by counsel for the wife in the present case because of certain remarks made by BUCKNILL, L.J., and DENNING, L.J., in the course of their judgments. BUCKNILL, L.J., said ([1950] 1 All E.R. 880):

"It is difficult, however, to lay down any principle in a case of this kind, except the principles I have tried to indicate. One is that all reasonable steps should be taken to see that a respondent has knowledge of the proceedings, and the other is that an unreasonable burden should not be put on an innocent petitioner before she can be released from a marriage which is no marriage now except in its legal aspects, and from a man who has deserted her and her child in the way that this man has left this woman."

DENNING, L.J., sums the matter up briefly by saying (*ibid.*):

"If the probabilities are that the respondent has received the petition and simply declined or omitted to sign the acknowledgment, then the court can dispense with further service."

It will be observed from what I have said that in that case there was no question of the respondent being under any form of restraint. What the Court of Appeal were concerned with was the question whether or not he had probably received the petition, and the further question whether, if he had, he had had any reasonable opportunity either of acknowledging its receipt or of indicating what course he wished to take did not arise and was not present to the minds of the learned lords justices when giving their judgments. That seems to me to be a feature which distinguishes the present case from that decision of the Court of Appeal.

The last and most recent case in the Court of Appeal to which I was referred was *Paolantonio v. Paolantonio* (5). That was again a case of a wife's petition which she was endeavouring to serve on a husband whose last known address was in the United States. The facts really amounted to this, that the respondent had been completely lost and nobody had the faintest idea where he had gone although it was thought he might have returned to Europe. In those circumstances there was no address at which he could be served either personally or

by post, and it was impossible to conceive of any satisfactory means of substituted service which would be likely to be effective. There was no particular newspaper the advertisements in which it might be expected the respondent would see. In those circumstances the Court of Appeal thought it right to make an order dispensing with further service of the petition. That case is remote from the present one, and I should not have thought it necessary to refer to it but for some remarks made in the concluding sentences in the judgment of TUCKER, L.J. Those remarks might, it seems to me, be read as amounting to a statement of some rigid rule, which would have the effect of fettering the discretion of the court. TUCKER, L.J., referring to the judgment of WALLINGTON, J., below, said ([1950] 2 All E.R. 407):

“Not being able to bring the case within the four corners of *Weighman v. Weighman* (3), he [WALLINGTON, J.] appears to me to have regarded himself as precluded from dispensing with service. Otherwise there could be no ground for refusing the order. I think there must be cases of which the present is one, although they will necessarily be few, where once the court is satisfied, as I am in the present case, that the only suggested method of substituted service is not only beyond the means of the applicant, but will be ineffective, justice requires that the court should exercise its discretion to dispense with service of the petition.”

It may be said that those rather wide words might be applied in this case, for I cannot help being satisfied that no suggested method of substituted service would be in the least effective here. It might be thought that the learned lord justice was enjoining any judge finding himself in that position to decide the case in a particular way. Bearing in mind that it has been laid down so often that this is a matter for the unfettered discretion of the judge, I cannot read those observations of TUCKER, L.J., as being intended in any way to fetter my discretion, any more than the words of LORD MERRIMAN, P., in *Luccioni v. Luccioni* (2). Having mentioned those three cases, all of which went to the Court of Appeal, and in all of which leave to dispense with further service was granted, I leave them with the observation that the facts of each of the three seems to me to be very remote from those of the present case which, as I have already indicated, much more nearly resemble the war-time cases of *Read v. Read* (1) and *Luccioni v. Luccioni* (2).

In this case, although, as I have said, there is ground for thinking that the husband may have received a copy of the petition, I cannot be satisfied that in all probability he has. Certainly it seems to me there is no ground for thinking that he has had any opportunity either of presenting his defence, if he has one, or even of indicating whether or not he wishes to defend. For all I know, if I grant leave in this case to dispense with service, I may be causing him a grave injustice. I say that because, if leave is granted, it seems clear that the wife would have every opportunity of obtaining a decree in an undefended suit, and, within a few weeks from now, if service is to be dispensed with, there may be a decree absolute in respect of which this husband will have had no opportunity of being heard. Against that it is forcibly and properly said, that, if I do not grant leave to dispense with service, I may be inflicting a grave hardship on the wife. The wife, at any rate so far as her own story goes, is an innocent victim of her husband's wrongdoing. It has been pressed on me that not only would I be inflicting hardship on her by leaving her notionally married to the husband, but that I might be depriving her of the opportunity of finding happiness by marriage with another man.

I am conscious that, if I refuse leave, the wife may suffer grievous hardship. I have to balance the possible hardships on the one side against those on the other. I do not think it is possible to make any order either way in this case without incurring at least the risk of causing grievous hardship to one side or the other. What has finally influenced me as to the way I should exercise

my discretion is the fact that, if I act in one way, the damage may be irrevocable, whereas, if I act in the other way, no irrevocable damage will have been done. If I allow service to be dispensed with, it seems almost certain that within a few weeks a decree absolute will be pronounced, as to which the husband will never have been heard, which may cause him grievous hardship, and which may be irrevocable. If, on the other hand, I decline to exercise my discretion in that way, there is no finality. The wife may have to wait, but, perhaps, not for long, before she can proceed. The situation in Czechoslovakia may change. There may be a release of further political prisoners which may result in the husband obtaining his freedom. There may be a change of policy which will enable the husband to acknowledge service of the petition and to indicate whether or not he desires to defend. Again, with the passage of time, further and different opportunities may arise of devising some other form of service on the husband. It would, I think, be unwise to prophesy what may happen. I do not wish to raise the hopes of the wife too high, but the possibility exists that what I refuse today may readily be granted tomorrow, but in the circumstances as they exist today I cannot exercise my discretion in her favour, and I feel I ought to refuse the leave which is asked for.

Summons dismissed.

Solicitors: *Amphlett & Co.* (for the wife); *Treasury Solicitor.*

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

ROSENFELD v. NEWMAN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Morris, L.JJ.), July 28, 29, 1953.]

Estoppel—Res judicata—Possession claim—Claim in county court on ground of trespass by defendants, and, alternatively, assignment to them without landlord's consent—Claim in trespass beyond jurisdiction of county court—Election to proceed on alternative ground—Defendants found not to be "tenants"—Order for possession refused for lack of jurisdiction—Subsequent claim in trespass in High Court.

In 1940 the plaintiff, who was the owner of a dwelling-house, let it on separate tenancies to B. and T. Thereafter the defendants came to live on the premises with B. and T. By 1946 both B. and T. had left the premises, leaving in possession the defendants who continued to pay the rent. On discovering the position in 1951 the plaintiff brought an action in the county court for possession. By his particulars of claim, he alleged (i) that the defendants were trespassers, and, alternatively, (ii) that, if they were within the protection of the Rent and Mortgage Interest Restrictions Acts, he relied on the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (d), as the premises had been unlawfully sub-let or assigned to them by the original tenants without his consent. On the trial of the action it was found that the annual value of the property was over £100, and, accordingly, the county court judge had no jurisdiction so far as the action was based in trespass. According to the judge's notes, the plaintiff then elected "to proceed on the alternative ground". The county court judge found that the defendants were not contractual or statutory tenants, and he held that he was unable to make an order for possession owing to lack of jurisdiction. In a subsequent action in the High Court for possession on the ground of trespass, the defendants contended that the plaintiff was estopped from alleging that they were trespassers as his abandonment of the claim for trespass in the county court amounted to a final election to treat them as tenants.

Held: by his alternative claim the plaintiff alleged, not that the defendants were in occupation of the premises under a contract, but that they had obtained possession by an unlawful sub-letting or assignment and had no right to remain there, and, therefore, the alternative claim, which was merely made by way of anticipation of a defence under the Rent Restrictions Acts, was not inconsistent with the claim based in trespass; the election to proceed with the alternative claim did not amount to a final election to abandon the claim in trespass; and, therefore, the plaintiff was not estopped from alleging in the High Court that the defendants were trespassers, and, as the defendants had no right or title to the premises, the plaintiff was entitled to an order for possession.

Decision of PARKER, J. ([1953] 1 All E.R. 840), reversed.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I, para. (d), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1060; and for THE COUNTY COURTS ACT, 1934, s. 40, s. 42, and s. 48, see *ibid.*, Vol. 5, pp. 35-37, and 44.

Cases referred to:

- (1) *Scarf v. Jardine*, (1882), 7 App. Cas. 345; 51 L.J.Q.B. 612; 47 L.T. 258; 21 Digest 224, 577.
- (2) *Morel Brothers & Co. v. Westmorland (Earl)*, [1904] A.C. 11; 73 L.J.K.B. 93; 89 L.T. 702; 21 Digest 224, 579.

APPEAL by the plaintiff from an order of PARKER, J., dated Mar. 12, 1953, and reported [1953] 1 All E.R. 840.

The plaintiff was the owner of residential premises at 149, Parnell Road, Bow, and in 1940 he let them on separate tenancies to two tenants named Ball and Tracey who came to live in the premises with their families. In 1941 the first two defendants, Mr. and Mrs. Newman (senior), came to the premises and at first occupied one room on the ground floor with the Ball family. Later, the Newmans' daughter-in-law came to live with the Traceys upstairs. In 1942 the Ball family left the premises, but the Newmans continued to reside there. After the war, the Newmans' son, Albert Newman, came to join his wife. In 1946 the Traceys, except for the mother, who stayed till she died in January, 1951, left the premises. Rent continued to be paid in respect of the whole premises by the Newmans and was accepted till June, 1951. In November, 1951, the plaintiff brought an action in the Bow County Court for possession of the premises. By his particulars of claim he claimed possession on the ground that the defendants were trespassers, and, alternatively, he said that, if the defendants were protected by the Rent Restrictions Acts, he relied on para. (d) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as the premises had been unlawfully sub-let or assigned to the defendants by one of the original tenants without his knowledge. At the trial of the action it was found that the county court judge had no jurisdiction to deal with the claim in trespass as the annual value of the premises exceeded £100, and, according to the judge's notes, counsel for the plaintiff elected "to proceed on the alternative ground." On the alternative claim the county court judge found that the defendants were not contractual or statutory tenants and he held that he was unable to make an order for possession "owing to lack of jurisdiction". The plaintiff then brought an action in the High Court for possession on the ground of trespass. PARKER, J., held that the abandonment of the claim for trespass in the county court amounted, in the circumstances, to a final election by the plaintiff to treat the defendants as tenants, and that, therefore, the plaintiff was estopped from alleging in the High Court that they were trespassers.

Khambatta, Q.C., S. W. Magnus and Merriton for the plaintiff.
Buckee for the defendants.

SIR RAYMOND EVERSHED, M.R.: There has been a considerable confusion, not only in this case, but in the previous litigation in the county court which occurred in 1951, and, in my opinion, the whole difficulty has been occasioned by the fact that the true nature of the claim in the county court, and, in particular, in para. 4, as finally amended, of the plaintiff's particulars of claim, was never clearly apprehended when the case was tried in the county court. I should be the last person to suggest that the parties to an action should

A not try to limit the issues to be fought in the action, but, if there be a moral in this case, it is that, when parties do attempt to limit the issues and to confine themselves to one issue of several, it is highly desirable that the counsel concerned, and the judge as well, should first have clearly defined and, if necessary, recorded what is the issue which the court is called on to decide.

B The appeal which is before us comes from a judgment and order of PARKER, J., in an action in the Queen's Bench Division in which the plaintiff, as owner of a house known as 149, Parnell Road, Bow, sought an order for possession against the defendants (who were a man and his wife and the man's son and his wife) on the footing that they had no right, title or interest in the premises, and were, therefore, trespassers. The nature of the defence (and it was substantially the same defence which had been raised in the previous proceedings)

C was that the defendants, or, at any rate, two of them, had a right, title or interest justifying their possession, namely, that they were there as tenants, either as assignees of the previous tenants or otherwise. The result of the decision of PARKER, J., is at first sight remarkable, for, on the question whether the defendants had any right, title or interest, the judge intimated quite plainly that his view on the evidence was that the defendants at no time had such a

D right, title or interest, but he held that the plaintiff was estopped from alleging in these proceedings that the defendants were trespassers, so that the action failed. The effect of the judgment, therefore, appears to be that, at one and the same time, the judge has said that the defendants have never been tenants and have no right or title to the premises, and that the plaintiff has no right to eject them on the footing that they are not tenants. Thus, a position of stalemate is achieved. The ground on which the learned judge so decided was,

E briefly, that, in the previous proceedings in the Bow County Court (which were also ejectment proceedings), the plaintiff, by his counsel, deliberately and clearly elected to abandon any claim based on the allegation of no title in the defendants, and, therefore, as counsel for the defendants contended, he could not retract his election because, in the event, his choice has turned out to be unsuccessful.

F There is no doubt that that contention would be correct if the election were made clearly and unequivocally.

Counsel for the defendants cited a number of cases, but I do not think that the law is in doubt. PARKER, J., referred to *Scarf v. Jardine* (1), in which the plaintiff, who claimed as a creditor of a firm, had the choice of saying either

G that the debt was a debt of the firm (which had been newly constituted), or that the debt was owed to him by a previous partner. The House of Lords held that the two claims were inconsistent, and that the plaintiff could not sue both the new firm and the retired partner at the same time. Similarly, in *Morel Brothers & Co. v. Earl of Westmorland* (2), the Court of Appeal held that, if a creditor had a claim against a wife or a husband in respect of necessities supplied to the wife, he could choose which of the two, husband or wife,

H he sued, but, if he recovered judgment against the wife, he could not then sue the husband.

If those principles were applicable in this case, a similar result, no doubt, would follow, but the question is: Are they applicable? With all respect to the learned judge, my view is that, on the facts, they plainly are not. To make good that conclusion I will turn to the first proceedings, the county court action. The defendants on that occasion were only the first two of the

defendants now before the court, but no point has been made of that, and, in substance, the nature of the action was the same as that now before the court, namely, an action in ejectment in respect of 149, Parnell Road. By his particulars of claim the plaintiff said that he was entitled to, and claimed possession of, the dwelling-house "in which property the defendants are without any right or title". He then alleged (as it turned out erroneously) that the annual value of the property did not exceed £100. There was an informal answer to that claim by the first defendant, Mr. Newman, and then the plaintiff amended his claim. He amended it twice, and I cannot help thinking that the second amendment may have had something to do with the unfortunate consequences which followed. Paragraph 4, as first amended, was:

"If, contrary to the plaintiff's contention, the defendants are protected by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the plaintiff reasonably required possession of the said dwelling-house as a residence for himself."

Having seen that alternative claim, the defendants then put in a formal defence in which, having denied the right of possession generally, they proceeded as follows:

"The defendants admit that they are tenants of the property protected by virtue of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, but they deny that the plaintiff reasonably requires possession of the said dwelling-house as a residence for himself and maintain that greater hardship . . ."

would flow from the order than if no order were made. Strictly, there was no allegation of tenancy which the defendants could admit, but that I pass by. The allegation that the plaintiff wanted the house reasonably for his own occupation was without foundation because at the trial or at some late stage (by leave, I take it), the claim was again amended and the former assertion of reasonable requirement for the plaintiff was abandoned altogether, and, therefore, it can be disregarded as though it had never been made. What eventually was alleged in para. 4 was this:

"If, contrary to the plaintiff's contention, the defendants are protected by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the plaintiff relies on sched. I [to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933]. On a date unknown to the plaintiff one of the original tenants without the consent of the plaintiff sub-let or assigned the whole of the premises to the defendants or one of them."

The reference to sched. I to the Act of 1933 was, obviously, a reference to para. (d) in that schedule. The manner of working of s. 3 of the Act of 1933 and the schedule is too well known to need any exposition on my part. It is sufficient to say that the court is thereby given power, if it thinks it reasonable so to do, to make an order for possession against a tenant if

"(d) the tenant without the consent of the landlord has at any time after [a named period] assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let."

Bearing that in mind, let us see what para. 4 alleges. In the first place, I think it is quite obvious that, if this action had been brought in the nineteenth century under the old rules of pleadings which are enshrined in BULLEN AND LEAKE'S PRECEDENTS OF PLEADING, 2nd ed., para. 4, as finally amended, would not have appeared in the statement of claim, which would have stood, broadly, as originally drawn. The defendants would then have raised a plea that they were tenants or entitled to the protection of the Rent Restrictions Acts, and this paragraph would have come in by way of replication (or so I should have thought), for it is not, in truth, anything other than a plea in anticipation

of a defence. Nor is it (on one view of the proper conclusion, which happens to be the view of the judge who tried the case) inconsistent with the first plea, viz., that the defendants were trespassers. What I think that para. 4 is saying is: "If the defendants are not, as I say they are, mere trespassers, and if they say they are entitled for any reason to the protection of the Rent Restrictions Acts, then my answer to that defence is that they acquired their interest, if any, by a letting or an assignment to them without authority, without the consent of the landlord, of the whole of the premises, and, therefore, if they are not mere trespassers an order for possession under the Act ought to be made by the judge." Observe that the allegation is not that the defendants themselves were ever, directly, tenants of the plaintiff (the landlord) in the sense that the plaintiff had made a contract of tenancy with them. What is alleged is that at some date unknown one of the original tenants, without the consent of the plaintiff, sub-let or assigned to the defendants the whole of the premises.

When the case came before the learned county court judge, the point was taken by counsel for the defendants—rightly, on the facts, as is now conceded—that the allegation, in para. 2 of the statement of claim, that the annual value did not exceed £100 was wrong. The result of that submission was to deprive the county court of jurisdiction save in so far as the case could be treated as falling within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2), namely, as being a proceeding "arising out of" the Act. Since this matter has been fully argued and may be of some significance to more persons than the parties, I will venture to take a few minutes of time in referring to the County Courts Act, 1934. The joint effect of s. 40 (1) and s. 48 (1) of the Act of 1934 is, plainly, that the county court's jurisdiction to try an ejectment action is strictly limited to cases where the value of the land in question or the rent payable in respect thereof does not exceed £100 per annum. It is to be noted, however, that for other classes of action, videlicet actions in contract or tort, though there is again a strict limit of jurisdiction, which cannot be exceeded even with the consent of the parties, provision is made by s. 42, as substituted by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1), and sched. II, for the case where a plaintiff, who is suing, let us say, in contract for a sum in excess of the limit of the jurisdiction, may abandon the excess. He is then deemed to be suing only for the amount of the statutory limit. Section 42 (3) is, I think, important, for it provides:

"Where any action, in which the plaintiff has abandoned part of his claim under this section, is heard in a county court, the plaintiff shall not recover an amount exceeding £200 or £100, as the case may be, and the judgment of the court in the action shall be in full discharge of all demands in respect of the cause of action . . ."

It follows, therefore, by the terms of the statute, that, in the case of a contract, if, to give jurisdiction, a plaintiff abandons the excess, he abandons it for good and all, and the amount adjudged is a full discharge of the total claim. There is no similar provision in regard to ejectment actions, and, obviously, there could not be under the framework of the Act, but it may be that the presence of s. 42 and the provision in s. 42 (3) about an abandonment affected the minds of learned counsel and of the judge when he came to deal with the point taken by counsel for the defendants, namely, that the claim for ejectment was beyond the jurisdiction of the county court because of the value of the land. There is some dispute as to what occurred when that point was raised, and, to throw light on the matter, we were permitted by counsel for the defendants to look at the indorsement made by counsel for the plaintiff in the county court on his brief in that case, but I do not think that this additional piece of evidence assists the court. In view of certain further correspondence with the judge

which was also put in (as secondary evidence, presumably, of the same fact) the result leaves the matter wrapped in the same obscurity as that in which it first started. It only remains to say that, whatever may have been in the mind of counsel for the plaintiff, is, of course, far less important than what was the reasonable apprehension, by the judge and the counsel opposed to him, of the words he used, but I think I may safely take it that the effect of what he had done is necessarily reflected in and recorded by the notes that the judge made at the trial. I use that phrase deliberately because this matter is not solved merely by looking at the judge's notes of what happened when the objection was taken by counsel for the defendants. The note is:

"On [the] objection [of counsel for the defendants] that the rent exceeds £100 a year and that I have no jurisdiction, [counsel for the plaintiff] elects to proceed on the alternative ground set out in para. 4 (as amended) of the amended particulars of claim."

The whole burden of the defendants' case is that the so-called "alternative ground" was the allegation that, the defendants being treated as in occupation of the house by right of contract, the question for the county court judge was whether one of the terms of sched. I to the Act of 1933 had been brought into play so as to give him power, if he thought it reasonable to exercise it, to make an order for possession. But para. 4 of the amended statement of claim, did not, at any rate primarily, make any such allegation. As an alternative to the plaintiff's first claim and by way of anticipation of a defence under the Rent Restrictions Acts, para. 4 alleged, I think, that the defendants had obtained possession of the premises by an unlawful sub-letting or assignment by someone else, and, therefore, that they had no right to remain there, and, in any event, an order could be made against them accordingly. If the learned county court judge had then and there said: "Now, let us see what is the issue you want me to try", and counsel had agreed on it and had had it all written down and clearly stated, no further trouble could have arisen. But the significant thing is that, so far from the issue being what counsel for the defendants said was the only issue that remained to be tried, the action then proceeded, and the question debated was whether, as a matter of fact, the defendants ever had any contract of tenancy or right to a contract of tenancy, i.e., whether they ever became, by assignment, sub-letting, or otherwise, "tenants" of the premises, which was the one thing which had to be admitted so as to found the jurisdiction under the Rent Restrictions Acts. After the trial had lasted some time, the learned county court judge came to this conclusion:

"Owing to lack of jurisdiction I am compelled to hold that the plaintiff's claim fails, as there is no evidence that the defendants are contractual or statutory tenants."

Therefore, the end of the matter was that the case stood as it had started. The judge found as a fact that there never was any contract of tenancy to which the defendants were entitled—in other words, that they were trespassers, having no right or title. Accordingly, he held that he was unable to make the order asked—not, observe, "because counsel for the plaintiff has elected not to sue on that ground", but "owing to lack of jurisdiction". That was the end of the county court proceedings. The plaintiff, not unnaturally, then issued his proceedings in the High Court and merely claimed ejectment against the defendants on the footing that they were trespassers. The point was taken by the defendants that he was estopped by what occurred in the county court, and that he had elected to abandon for ever the claim that the defendants were trespassers and were not there by right of contract. It is, indeed, a Gilbertian situation, if I may so, because the allegation is that the plaintiff abandoned the right to assert that which the judge in the county court action (where the plaintiff is supposed to have made his abandonment) found as a fact. PARKER,

J., was persuaded that that plea was well-founded and that the plaintiff had abandoned any claim to allege as a fact that the defendants were trespassers.

A This is a matter which may be capable of a great deal of exposition, but the case really falls within a small compass, and I think that the clue is to be found in the proper interpretation of para. 4 of the particulars of claim in the county court action. Once the true significance of that paragraph is understood, it seems to me to follow that, not only in justice, but in common sense, no such abandonment can be taken to have been made. I repeat that it is not a case within the authorities to which counsel for the defendants referred, where there are inconsistent rights or claims, or where a man, in the well-known phrase, basing himself on assumpsit "God-like waives the tort". That follows, in my judgment, (i) from the nature of para. 4; (ii) from the fact that, as recorded by the county court judge, what counsel for the plaintiff elected to do was to proceed on his para. 4 as pleaded; (iii) from the fact that the case thereupon was tried out by the county court judge to discover whether, as a fact, there was any such tenancy; and (iv) by the nature of the judge's conclusions, refusing relief to the plaintiff, not on the ground of the plaintiff's election, but on the ground of his own want of jurisdiction.

C In the High Court the evidence was again gone into, and, although it was not, in the circumstances, necessary to express a conclusion, PARKER, J., said ([1953] 1 All E.R. 842):

" . . . if I am wrong [on the point about the estoppel], I should be forced to hold on the evidence that the defendants at no time have become tenants of the plaintiff . . . "

D The long and confusing proceedings which have occurred have, at any rate, made one fact doubly clear. Two judges have found, in two actions, that the defendants at no time were tenants of the plaintiff, and the county court judge also found that the defendants never had a tenancy of the premises. The result, is, I think, that the conclusion of PARKER, J., cannot be sustained. I think that the appeal should be allowed, and that the plaintiff is, in the circumstances, entitled to an order for possession.

F BIRKETT, L.J.: I agree with the judgment delivered by the Master of the Rolls, and, as he has dealt fully and lucidly with all the points, it would be idle to repeat them. It is clear that, when the defendants took the point in the county court that the claim for ejectment was beyond the jurisdiction of the court, there was considerable confusion and misunderstanding as to what occurred and what was intended by counsel for the plaintiff. It was contended, on the one side, that there was a complete abandonment of the claim that the defendants were trespassers, and, on the other side, that no such abandonment was intended or occurred. In the decision under appeal, G PARKER, J., took the view that the claim had been abandoned. I should like to emphasise the point that, if the matter had been dealt with in the county court with greater precision in regard to the issue which was being contested, many of the subsequent difficulties would have been avoided. I think that the case turns, not on the law of election, but on the true construction of para. 4 of the amended statement of claim in the county court, and I heartily agree with the interpretation which the Master of the Rolls has given to the paragraph.

H MORRIS, L.J.: I also entirely agree. PARKER, J., proceeded on the basis that in the county court action the plaintiff had abandoned his claim in trespass and had finally elected to treat the defendants as tenants. If that basis had been established, I think that PARKER, J., would have arrived at a correct conclusion, but, when the proceedings in the court court are fully analysed, I think it appears that there was no final election by the plaintiff to treat the defendants as tenants. When it was decided to proceed to consider para. 4 of the particulars of claim in the county court action, there was, I think,

no real appreciation of what was involved in the plea in that paragraph. I agree fully with the analysis of the matter that has been made by SIR RAYMOND EVERSHED, M.R., and I could not in any way add to what has been said. The result was that at the end of the hearing in the county court, after the learned judge had heard the evidence and heard much argument, the parties, so to speak, "came out by that same door wherein they went". They found themselves exactly where they started. They found that what had been advanced by the evidence and in argument on behalf of the plaintiff was really in support of a claim to possession on the ground that the defendants were trespassers. The result, therefore, in my judgment, is that nothing that took place at the county court amounted to an election to treat the defendants as tenants. That being so, it seems to me that the claim of the plaintiff in the High Court was not defeated as has been submitted by the defendants.

Appeal allowed.

Solicitors: *Bennett, Hobson & Co.* (for the plaintiff); *Breeze, Benton & Co.* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MARTINALI *v.* RAMUZ AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), July 30, 1953.]

Landlord and Tenant—Shop—Renewal of tenancy—Tenancy at will—Tenancy coming "to an end . . . by the expiration of a notice to quit"—Determination by service of writ in action for possession—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1).

Landlords served on a tenant a writ claiming possession of shop premises which the tenant held under tenancies at will. The tenant thereupon applied, under the Leasehold Property (Temporary Provisions) Act, 1951, for the renewal of the tenancies.

HELD: the service of the writ in the possession action did not constitute a "notice to quit given by the landlord" by the expiration of which the tenancies had come to an end within s. 10 (1) of the Act of 1951, and, therefore, the sub-section did not apply and the tenant's applications failed.

Semble: section 10 (1) did not apply to a tenancy at will.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 (1), see **HALSBURY'S STATUTES**, Second Edn., Vol. 30, p. 206.

APPEALS by the tenant against orders of His Honour JUDGE HOWARD in the Southend County Court dated May 13, 1953, dismissing applications for the renewal of the tenancies of shop premises under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1).

The tenant alleged that the tenancies were tenancies at will and had been determined by the service of a writ in an action by the landlords for possession, which service constituted a notice to quit within the sub-section. The landlords contended that the service of the writ did not amount to a notice to quit, and, therefore, that the tenancies had not "come to an end . . . by the expiration of a notice to quit given by the landlord" within the meaning of the sub-section, which, accordingly, did not apply. They also contended that the sub-section did not apply to a tenancy at will.

N. N. McKinnon for the tenant.

Croom-Johnson for the landlords.

SINGLETON, L.J.: These appeals arise out of certain applications under the Leasehold Property (Temporary Provisions) Act, 1951. The tenant, Mr. Martinali, was in occupation of various properties which belonged to the landlords, who were the personal representatives of Mr. Frederic Francis Ramuz,

deceased. There had been six leases in respect of the properties, which leases had expired, four on June 24, 1950, and the last two on Mar. 25, 1951. There had been applications by the tenant under the Landlord and Tenant Act, 1927, which failed. On Dec. 5, 1951, the landlords issued a writ claiming possession of all the premises. That was followed by applications by the tenant under the Leasehold Property (Temporary Provisions) Act, 1951, for new leases. In each of those applications, one in respect of each property, it was said that the date of the termination of the tenancy was Dec. 8, 1951, and that the mode of termination was by service of a writ in a High Court action by the landlords claiming possession.

The learned county court judge had these applications for new leases before him, and the whole question, as I see it, depended on the view which he took of s. 10 (1) of the Act of 1951, which is in these terms:

"(1) The provisions of this Part of this Act shall have effect for enabling the occupier of a shop under a tenancy to which this section applies (hereinafter referred to as 'the expiring tenancy') to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy where apart from the next following section the expiring tenancy would come to an end immediately before the date of the commencement of this Act or within the period of two years beginning with that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit given by the landlord, whether before or after the commencement of this Act."

It is said by counsel for the tenant that, after the terms granted by the leases had expired, there arose in each case a tenancy at will, and for the purposes of this case, and for no other purpose, it is assumed there was in each case a tenancy at will. Counsel then submitted that each tenancy at will was brought to an end by the service of the writ in December, 1951, which service he claimed was (within the definition in the Act) a notice to quit. So far as I know a writ has never been held to be a notice to quit. A notice to quit is a well-recognised term. In order to bring the case within s. 10 (1) it has to be shown that the tenancy within the stipulated time came to an end either by effluxion of time (which does not arise) or by the expiration of a notice to quit given by the landlord. There was no notice to quit given by these landlords. There were at the most tenancies at will. The learned county court judge did not think that s. 10 (1) of the Act of 1951 covered a tenancy at will. Counsel for the landlords desires to keep that point open and no good purpose would be served by my considering it, but for what it is worth I would say that I share the view of the learned county court judge having regard to the wording of the section. But, assuming that it could be said that a tenancy at will was within the contemplation of s. 10 (1), still there was in this case no notice to quit, so that it cannot be said that the tenancies were brought to an end by the expiration of a notice to quit. That is sufficient to dispose of this appeal. I agree with the judgment of the learned county court judge, and I am satisfied that the appeals ought to be dismissed.

DENNING, L.J.: I agree. It is elementary that a tenancy at will is determined by a demand for possession, not by a notice to quit. These tenancies at will were determined by the issue of a writ claiming possession, which is itself a demand for possession. The tenancies were not determined by a notice to quit at all, and the case, therefore, does not come within the extension provisions of the Act of 1951.

MORRIS, L.J.: I agree.

Appeals dismissed.

Solicitors: *Emanuel, Round & Nathan* (for the tenant); *Carpenter, Wilson & Smith* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SHELDON v. BROWN BAYLEY'S STEELWORKS, LTD. AND ANOTHER.

[COURT OF APPEAL (Singleton and Denning, L.JJ.), July 10, 22, 1953.]

Writ—Service—Service more than twelve months from date of issue—Unconditional appearance by defendants—Waiver of irregularity—R.S.C., Ord. 8, r. 1; Ord. 64, r. 7.

A plaintiff in an action under the Fatal Accidents Act, 1846, issued a writ within twelve months of the death as required by s. 3 of that Act, but only effected service of it more than twelve months after its date, when, by virtue of R.S.C., Ord. 8, r. 1, it had ceased to be in force. The defendants entered an unconditional appearance to the writ, and later applied to have the service set aside on the ground that the writ had become a nullity.

HELD: failure to serve the writ within the prescribed time did not render it a nullity, but was an irregularity which had been waived by the defendants' unconditional appearance, and, therefore, service of the writ would not be set aside.

Dictum of LORD GODDARD in *Battersby v. Anglo-American Oil Co., Ltd.* ([1944] 2 All E.R. 389), dissented from.

Decision of BARRY, J. (ante, p. 382), reversed.

AS TO SETTING ASIDE SERVICE OF A WRIT, see HALSBURY, Hailsham Edn., Vol. 26, p. 36, para. 52, and p. 40, para. 60; and FOR CASES, see DIGEST, Practice, pp. 380-384, Nos. 875-917.

Cases referred to:

- (1) *Re Kerly, Son & Verden*, [1901] 1 Ch. 467; 70 L.J.Ch. 189; 83 L.T. 699; Digest, Practice, 312, 371.
- (2) *Battersby v. Anglo-American Oil Co., Ltd.*, [1944] 2 All E.R. 387; [1945] K.B. 23; 114 L.J.K.B. 49; 171 L.T. 300; 2nd Digest Supp.
- (3) *Re Jones*, (1877), 46 L.J.Ch. 316; Digest, Practice, 311, 359.
- (4) *Holman v. Elliott (George) & Co., Ltd.*, [1944] 1 All E.R. 639; [1944] K.B. 591; 113 L.J.K.B. 459; 170 L.T. 373; 2nd Digest Supp.

APPEAL by the plaintiff against an order of BARRY, J., dated June 15, 1953, and reported ante, p. 382, affirming an order of a master setting aside the service of a writ on the ground that it was out of time. The plaintiff contended that failure to serve the writ until more than twelve months after its date, Oct. 3, 1951, i.e., on Oct. 7, 1952, when, under R.S.C., Ord. 8, r. 1, it had ceased to be in force, did not render the writ a nullity, but was an irregularity which had been waived by the second defendants' entering an unconditional appearance to the writ. The first defendants had entered a conditional appearance only and had successfully applied to have the service on them set aside.

Lloyd-Jones, Q.C., and *Croom-Johnson* for the plaintiff.

N. Lawson for the second defendants.

Cur. adv. vult.

July 22. SINGLETON, L.J.: The writ in the action was issued on Oct. 3, 1951, just within the twelve months' limit prescribed by s. 3 of the Fatal Accidents Act, 1846. There were two defendants, neither of whom was served with the writ within twelve months from the day of its date. We are only concerned with the second defendants, Dawnays, Ltd. The first defendants entered a conditional appearance and successfully applied to have service on them set aside. The second defendants entered an unconditional appearance. The affidavit of their secretary shows that they heard of the first defendants' successful application. Thereafter they made an application of the like kind. The summons is dated Nov. 25, 1952. The master granted the application and set aside the service of the writ. On appeal, BARRY, J., upheld the order of

the master. He said that it was a difficult case, and he granted leave to appeal to this court. On the facts as to service, I am in complete agreement with the master and the judge. Indeed, there was no appeal as to this.

Under R.S.C., Ord. 8, r. 1, the writ of summons ceases to be in force after twelve months from the day of the date thereof. A note in the ANNUAL PRACTICE, 1953, at p. 59, says:

A "This means shall be in force for *the purpose of service* for twelve months, not that the writ ceases to be efficacious for any purpose whatever. And after an undertaking by solicitors to accept service and appear (see Ord. 9, r. 1), it would require a very strong case to induce the court to refuse renewal."

B Support for that statement is to be found in *Re Kerly, Son & Verden* (1): see the judgment of FARWELL, J., in the court of first instance ([1901] 1 Ch. 471), and that of STIRLING, L.J., in the Court of Appeal (*ibid.*, 478).

Order 64, r. 7, provides:

C "A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these rules or by any direction on or under the summons for directions or by any order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the court or a judge shall otherwise order."

D It has been held over a long period of years that this rule enables the court to renew a writ even though application is not made until after the expiration of the twelve months laid down in Ord. 8, r. 1. The court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued. In the present case, if the order of BARRY, J., is right, the second defendants are free, for it is too late for the issue of another writ, having regard to the terms of s. 3 of the Fatal Accidents Act, 1846.

E The position was considered by the Court of Appeal in *Battersby v. Anglo-American Oil Co., Ltd.* (2), in which the court would not exercise its discretion in favour of the renewal of a writ after the period allowed for service had expired, nor allow an amendment of the pleadings to be made the effect of which would be to deprive the defendants of the benefit of a limitation which had accrued. Learned counsel for the defendants who appealed argued ([1945] K.B. 24):

H "Where an original writ of summons has been in force for more than twelve months without being renewed it is no longer in force and is a nullity: R.S.C., Ord. 8, r. 1; but by virtue of what is now Ord. 64, r. 7, there is normally power to renew it after the expiration of that period of twelve months: *Re Jones* (3). The court, however, will never exercise this discretion when its exercise will defeat the vested rights of a defendant to plead a statute of limitations."

The court accepted that submission. The judgment of the Court of Appeal was delivered by LORD GODDARD, who said ([1944] 2 All E.R. 389):

"Before dealing with the authorities on this point we think we ought to refer to one matter dealt with in the judgment of MACKINNON, L.J.,

in *Holman v. George Elliott & Co., Ltd.* (4), which was not strictly necessary for the decision, but from which we feel constrained to differ. That, also, was a case under the Fatal Accidents Act; and, as in the present action, a writ was issued within twelve months of the death, but was not served, and application for renewal was not made within twelve months of the date of issue. Acceding to an argument advanced by the plaintiff, MacKINNON, L.J., is reported as saying ([1944] 1 All E.R. 640): 'Counsel for the plaintiff points out, and I think with reason, that this is not a case where the order of the judge in extending the period for the delivery of the writ deprives the defendants of an accrued right of defence . . . under Lord Campbell's Act. The right of defence by the limitations section . . . would arise if the writ had not been issued before Oct. 9, 1942. It was, in fact, issued on Oct. 7, 1942, two days before the expiry of the twelve months.' With all respect, we are unable to agree that the issue of a writ which has become a nullity by reason of non-service within the prescribed time satisfies the section. If the writ has ceased to be in force the position is the same as if it had never been issued; otherwise we see no reason for the concluding words of Ord. 8, r. 1, which provides for a renewed writ preventing the operation of statutes of limitation. These words would be unnecessary if a writ which had expired and had not been renewed would answer that purpose. A new writ issued more than twelve months after the date, would clearly be out of time, so either the writ originally issued must be renewed or the action is barred."

I do not regard it as strictly accurate to describe a writ which has not been served within twelve months as a nullity. It is not as though it had never been issued. It is something which can be renewed. A nullity cannot be renewed. The court can grant an application which results in making it just as effective as it was before the twelve months' period had elapsed. I do not think that the court had in mind what had been said in *Kerly's* case (1) ([1901] 1 Ch. 471, 478), to which I have referred. Moreover, it was not necessary for the decision of the court in *Battersby's* case (2) to consider this. The question was whether the court would exercise the discretion which it had under Ord. 64, r. 7, to renew a writ when the renewal would deprive a defendant of the benefit of a limitation which had accrued, and the judgment was to the effect that the discretion ought not to be exercised in such circumstances. If the writ had been a nullity, there would have been no point in considering whether the court should exercise its discretion to renew it. The position under Ord. 8, r. 1, is that the writ is not in force for the purpose of service after the twelve months' period had run. It is still a writ. The unconditional appearance by the second defendants is a step in the action. It amounts to a waiver with regard to service. It prevents the second defendants' being able to contend successfully that the service on them is bad.

It does not appear that the attention of BARRY, J., was drawn to Ord. 12, r. 30, which is in these terms:

"A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons in the Queen's Bench Division and in any other Division take out a summons or serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorising such service."

That rule provides the procedure for setting aside service of the writ. See the note in the ANNUAL PRACTICE, 1953, p. 144, under the order, "Before appearing". The rule gives support for the view which I have stated above.

Counsel for the second defendants submitted that there was still an inherent jurisdiction in the court to set aside service of the writ. I do not see why we should be asked to act on any such assumption when there is a practice rule which is clear in its terms, and appears to recognise the entering of an

unconditional appearance as a step in the action. In my opinion, the appeal should be allowed.

DENNING, L.J.: It is enacted that every action for damages under the Fatal Accidents Act, 1846,

“shall be commenced within twelve calendar months after the death”

A of the deceased person. This action was commenced within that time. The death was on Oct. 12, 1950. The writ was issued on Oct. 3, 1951. That writ should have been served within the next twelve months, because under R.S.C., Ord. 8, r. 1, a writ does not remain in force for more than twelve months unless the court gives leave to renew it, and the court does not, as a rule, give leave to renew a writ if the effect of so doing would be to deprive the defendant of the benefit of a statute of limitation: see *Battersby v. Anglo-American Oil Co., Ltd.* (2).

B This writ was not served within the twelve months permitted by the rule. It was served three or four days out of time. The first defendants thereupon entered a conditional appearance and got the service on them set aside. That meant that they obtained the benefit of the statutory limitation, because all C that the plaintiff could then do, as against them, was to issue a new writ which would be statute-barred. The second defendants, however, did not notice that the writ was served out of time. On Oct. 13, 1952, they entered an unconditional appearance, but they soon afterwards got to know what the first defendants had done, and then they also applied to get the service of the writ set aside. The question is whether they are prevented from so doing by reason of their D unconditional appearance. This depends on whether the service of a writ after the twelve months permitted by the rule has expired is a nullity or an irregularity. If it was an irregularity, then the irregularity was waived by the unconditional appearance. But if it was a nullity, then it could not be waived at all. It was not only bad, but incurably bad.

E In determining the question, it is important to notice that, even after twelve months have expired, the writ can be renewed. This is not done under Ord. 8, r. 1, for that only permits renewal before the twelve months have expired. It is done under Ord. 64, r. 7, which is the general rule permitting enlargement of time. It was first done in 1877 by SIR GEORGE JESSEL, M.R., in *Re Jones* (3), which has been accepted as good law ever since. Now, if a writ can be renewed after the twelve months have expired, that must mean that it is not then a F nullity.

There are other reasons, too, why the writ cannot be considered a nullity. Suppose a defendant, who is served after the twelve months, deliberately enters an unconditional appearance and goes to trial. It may be that it is a case in which no statute of limitation avails him and he does not think it worth while to object to the service of the writ, because he knows that it would only mean G the issue of a fresh one. Could he thereafter turn round and say that all the proceedings were void on the ground that the writ was a nullity? Clearly not. That shows that the service out of time was only an irregularity which could be waived.

H The judge likened this case to one where a mere form of writ (which had never been issued out of the Central Office) was served. Such a form would, I agree, be a nullity. No waiver could give effect to it or to any subsequent proceedings founded on it. I cannot regard that as anything like this case. If we accept the plaintiff's evidence, the writ was served by post on Oct. 1, 1952, and should have reached the second defendants on Oct. 2, 1952, before the twelve months had expired. It was delayed in the post and did not in fact reach them until Oct. 7, 1952, after the twelve months had expired. The delay was a matter known to them and not to the plaintiff. If they chose to waive any objection to it, they should be held bound by their waiver. They

should not be allowed to turn round and say that the writ itself was a nullity. If they could say so now, they could also say so at a much later stage, even after the trial. I cannot believe that to be the law.

It follows that I think that the dictum in *Battersby's case* (2) ([1944] 2 All E.R. 389) is incorrect. When the rule says that after twelve months the writ is no longer in force, it only means that it is no longer in force for the purpose of service: see *Re Kerly, Son & Verden* (1) ([1901] 1 Ch. 479). In my opinion, the service of the writ after the twelve months was not a nullity but an irregularity which was waived by the unconditional appearance. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *W. H. Thompson* (for the plaintiff); *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the second defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re ALLEN (deceased). FAITH v. ALLEN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), July 2, 6, 30, 1953.]

Will—Condition—Condition precedent or qualification—Certainty—Devise to person “who shall be a member of the Church of England and an adherent to the doctrine of that church.”

By a codicil dated Nov. 10, 1907, to his will, dated Nov. 4, 1906, a testator, who died on Nov. 25, 1908, devised real property, subject to prior limited interests which determined in 1952, to the eldest son of F. “who shall be a member of the Church of England and an adherent to the doctrine of that church”, and, in case there should be no son of the said F. “who shall be a member of the Church of England or an adherent to the doctrines of that church”, then the testator devised the property to W.

HELD: having regard to the fact that the words of the codicil comprised a qualification or limitation or condition precedent and not a condition subsequent, the first requirement was not void for uncertainty and it was open to a son of F. to prove that he was a member of the Church of England; similarly (ROMER, L.J., dissentiente), it could not be said that no one could prove adherence to the doctrine of the church; and, therefore, a claimant under the codicil ought to have the opportunity of satisfying the court by evidence that he had substantially complied with the requirements which the testator intended to impose.

Re Perry Almshouses. Re Ross' Charity ([1899] 1 Ch. 21), applied.

Clayton v. Ramsden ([1943] 1 All E.R. 16), distinguished.

Re Biggs ([1945] N.Z.L.R. 303), considered.

Decision of VAISEY, J. ([1953] 1 All E.R. 308), reversed.

AS TO UNCERTAINTY IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 109, 219-222, paras. 143, 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, 609-611, 612, 613, Nos. 2667-2687, 4366-4385, 4393-4400.

Cases referred to:

- (1) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (2) *Re Biggs*, [1945] N.Z.L.R. 303.
- (3) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.
- (4) *Re Piper*, [1946] 2 All E.R. 503; 175 L.T. 426; 2nd Digest Supp.
- (5) *Re Wilkinson*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
- (6) *Re Wolfe's Will Trusts*, [1953] 2 All E.R. 697.

(7) *Re Perry Almshouses*, [1898] 1 Ch. 391; 67 L.J.Ch. 206; 78 L.T. 103; 63 J.P. 52; *affd.*, C.A., *sub nom. Re Perry Almshouses. Re Ross' Charity*, [1899] 1 Ch. 21; 68 L.J.Ch. 66; 79 L.T. 366; 63 J.P. 52; 8 Digest 371, 1781.

(8) *Patton (W. R.) v. Toronto General Trusts Corpn.*, [1930] A.C. 629; 143 L.T. 572; *sub nom. Re Patton, Patton v. Toronto General Trusts Corpn.*, 99 L.J.P.C. 213; Digest Supp.

A (9) *Re Tegg*, [1936] 2 All E.R. 878; Digest Supp.

(10) *Re Lockie*, [1945] N.Z.L.R. 230.

(11) *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 2nd Digest Supp.

B APPEAL by the third defendant, the legal personal representative of Reginald Seymour Allen, from an order of VAISEY, J., dated Mar. 4, 1953, and reported [1953] 1 All E.R. 308.

C On an originating summons to determine, inter alia, whether the devise by Henry George Allen of his dwelling-house "Paskeston" and of other hereditaments referred to in the third codicil to his will to the eldest of the sons of Francis Seymour Allen (excepting his son Hugh) who should be a member of the Church of England and an adherent to the doctrine of that church was valid or void for uncertainty, VAISEY, J., held that the terms "member of the Church of England" and "adherent to the doctrine of that church" were incapable of exact definition, and, therefore, the condition was void for uncertainty, and it followed that the devise failed.

D *Hunter-Brown* for the third defendant.

Elles for the second, sixth and seventh defendants, who were interested if the devise were void.

R. O. Wilberforce for the plaintiff, one of the trustees of the will.

Cur. adv. vult.

July 30. The following judgments were read.

E SIR RAYMOND EVERSHED, M.R.: By a third codicil dated Nov. 10, 1907, to his will made in the previous year the testator, Henry George Allen, gave and devised his dwelling-house "Paskeston" in Pembrokeshire and certain other property, subject to certain prior limited interests which determined in 1952, "to the eldest of the sons of" his nephew Francis S. Allen

F "who shall be a member of the Church of England and an adherent to the doctrine of that church."

The codicil further provided that

"in case there shall be no son of the said Francis . . . who shall be a member of the Church of England or an adherent to the doctrines [sic] of that church I devise and bequeath the said dwelling-house and other property"

G in the events which have happened to Wilfred Baugh Allen, in the codicil called Judge Wilfred Allen, and his heirs. The testator died in November, 1908.

The present proceedings were begun by way of originating summons, one of the present personal representatives of the testator being the plaintiff. The defendants, in addition to a life tenant of the premises in question who has since died, consisted of the personal representatives of two of the sons of Francis S. Allen, the third of his sons, the personal representative of Wilfred Baugh Allen, and the personal representative of the testator's heir-at-law. The first question asked by the summons was whether the devise in favour of the eldest of the sons of Francis S. Allen, already recited, was valid or void for uncertainty. The second and third questions arose only on an answer being given to the first in favour of the validity of the devise. The fourth question asked whether, in the event that the devise was held void, the subject-matter of the devise

devolved on Wilfred Baugh Allen or his estate by virtue of the later direction in the codicil which I have also quoted or devolved as on the testator's intestacy. The remaining questions related to matters not relevant to this appeal.

By his order of Mar. 4, 1953, VAISEY, J., declared in answer to the first question that the devise in favour of the eldest of the sons of Francis S. Allen was void for uncertainty. He answered the fourth question in a sense favourable to the personal representatives of Wilfred Baugh Allen. In the view which the judge took, nothing turned on the difference in language in the two references in the codicil to membership of the Church of England and adherence to its doctrine or doctrines, for he held both references to be too uncertain to be capable of being effective. The personal representative of the eldest of the sons of Francis Allen, who was the third defendant (but neither of her co-defendants in a similar interest) has appealed to this court against VAISEY, J.'s answer to the first question in the summons and the only respondents before us (apart from the plaintiff) are the personal representatives of Wilfred Baugh Allen. The representative of the testator's heir-at-law has not himself appealed and was not represented before us.

At the beginning of his judgment, containing a considerable analysis of the significance of membership of the Church of England and of the character of the doctrines of that church (matters on which the learned judge has notably great knowledge and experience) VAISEY, J., referred ([1953] 1 All E.R. 309) to the relevant formula as a "description, qualification or condition", but it is, I think, clear from later passages (see, for example, *ibid.*, 313) that he regarded it as either a condition precedent or a qualification distinct in either case from a condition subsequent. The judge was, in my opinion, plainly right in his view that the formula here in question is not a condition subsequent. In my judgment, the effect of such a formula as part of a condition subsequent differs from its effect in a condition precedent or as part of a qualification or limitation. I understand from the passage in his judgment referring to *Clayton v. Ramsden* (1) that the judge was also of that opinion, and I agree with him in differing from the New Zealand case of *Re Biggs* (2) in so far as the judge in that case expressed the contrary view.

A condition subsequent operates to divest or determine a gift or estate previously or otherwise vested, so that if the condition be void the gift or estate remains. It has been long established that the courts (which are inclined against the divesting of gifts or estates already vested) will hold a condition subsequent void if its terms are such that (apart from mere difficulties of construction of the language or of the ascertainment of the facts) it cannot be clearly known in advance or from the beginning what are the circumstances the happening of which will cause the divesting or determination of the gift or estate. The strictness of the special rule as to conditions subsequent was the basis of all the opinions of the noble Lords in *Clayton v. Ramsden* (1) and was thus expressed by LORD RUSSELL OF KILLOWEN ([1943] 1 All E.R. 18):

"The courts have always insisted that conditions of defeasance, in order to be valid, should be so framed that the persons affected (or the court if they seek its guidance) can from the outset know with certainty the exact event upon the happening of which their interests are to be divested. The principle was enunciated many years ago by LORD CRANWORTH in *Clavering v. Ellison* (3) in the following words (7 H.L. Cas. 725): '... where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine'."

I feel, therefore, no doubt that if the present formula constituted a condition subsequent it would, for the reasons fully set out by VAISEY, J., be held to be void—its second part falls clearly, I think, within the reasoning and language

of LORD RUSSELL and LORD ROMER in *Clayton v. Ramsden* (1) (*ibid.*, 18, 20) to which I shall later again refer.

A It appears that the avoidance of a condition precedent may or may not (in the case of personality) carry with it the avoidance of the gift according as the condition is the sole motive of the gift: see *Re Piper* (4). In the present case, if the formula constitutes a condition precedent, I will assume that failure to satisfy the condition will involve failure to take the benefit of the devise. The same result is equally (if not more) clear if the formula is not a condition at all but part of the description of the devisee (as though it were to the eldest son who should have red hair)—in other words, if it is a limitation or qualification, as I think it is: see, for example, per TOMLIN, J., in *Re Wilkinson* (5) and *Re Wolfe's Will Trusts* (6), decided by HARMAN, J., in May, 1953. In any case, and whether the formula be a condition precedent or a qualification, it seems to me that no such general or academic test is called for as a condition subsequent requires. All that the claiming devisee has to do is at the relevant date to establish, if he can, that he satisfies the condition or qualification whatever be the appropriate test. If the formula is such as to involve questions of degree (as *prima facie* is implicit in any requirement of "adherence" or "attachment" to a particular faith or creed) the uncertainty of the test contemplated may well invalidate the formula as a condition subsequent, but will not, in my judgment, necessarily do so in the case of a condition precedent, for if the claimant be able to satisfy any or at least any reasonable test, is he disentitled to the benefit of the gift? The essential difference which, I think, exists, and to which I have alluded, was well illustrated by counsel for the third defendant in the course of argument. A condition subsequent divesting an estate vested in A. if A. at some relevant date should not be a tall man would, as it seems to me, be held void for uncertainty. For tallness being a matter of degree, by what standard is it, for the supposed purposes, to be judged? If "tallness" is achieved by being above the "average" height, then what average is contemplated? The average of A.'s town or neighbourhood, the average of Englishmen, the average of all mankind? And would a man in height above the average, say, of all Englishmen by however small a fraction of an inch, be called "tall" in any ordinary sense? But questions of this kind, which might be fatal to the supposed formula as a condition subsequent, might have no application in the case of a condition precedent or qualification, for a claimant who was six feet six inches tall might fairly say that he satisfied the testator's requirement judged by any reasonable standard.

F It may well be that, in a case such as I have supposed, very difficult questions might arise, e.g., if the claimant proved that he was a man very slightly above the average height of Englishmen. The court would then have to decide on the facts and on the construction of the bequest (e.g., that by "tall" the testator had meant "lofty") whether the claimant satisfied the requirements of the testator and had established his claim to the gift. But I am not persuaded that where a formula constitutes a condition precedent or a qualification it is right for the court to declare the condition or qualification void for uncertainty so as thereby to defeat all possible claimants to the gift, unless the terms of the condition or qualification are such that it is impossible to give them any meaning at all or such that they involve repugnancies or inconsistencies in the possible tests which they postulate as distinct, for example, from mere problems of degree.

H If I have correctly stated the relevant principles, I now try to apply them to the formula here in question. As regards the qualification of membership of the Church of England it seems to me that notwithstanding the differences in degree which the language contemplates they do not suffice to render void for uncertainty this part of a formula regarded as a qualification. Thus, if it so happened that the eldest of the sons of Francis Allen was at the relevant

date (whatever that date may be) a prelate or dignitary of the church, he would fairly claim to satisfy any reasonable test implicit in the words—the contrary view might at least, to my mind, be said to shock common sense. Indeed, I venture, on my part, to think that if membership of the Church of England be regarded as a qualification, the language of STIRLING, J., in *Re Perry Almshouses* (7) is fairly appropriate ([1898] 1 Ch. 400):

“Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptised, has been confirmed, or is ready and desirous to be confirmed, and is an actual communicant, does hold the status of a member of that church, and would be ordinarily regarded and spoken of as such.”

For if a trust for the benefit of members of the Church of England be a good charitable trust, then members of the Church of England must be a definable class or section of the public and membership of the church an intelligible qualification for membership of the class of possible beneficiaries. On this part of the case, I respectfully adopt the reasoning of ROMER, L.J., whose judgment I have had the advantage of reading in advance.

The second part of the formula is, however, in my view, very much more difficult. The testator clearly intended that the devisee should not only outwardly “belong to” the Church of England but that his membership should be in some sense conscientious as well. So much it is easy to state, but the references to “adherence” and to the “doctrine” of the church raise inevitably the problems of uncertainty and degree to which LORD RUSSELL and LORD ROMER drew attention in their opinions in *Clayton v. Ramsden* (1), which are illustrated in the judgment of VAISEY, J., and which would clearly, in my view, be fatal in any event to the validity of the formula if it were part of the terms of a condition subsequent. But are the words when used as part of a qualification so uncertain as necessarily to vitiate the gift? With considerable hesitation I have come to the conclusion that they are not. On the evidence so far before the court, it does not seem to me that the words are shown to involve any insoluble inconsistency or that they are incapable of any reasonably clear meaning or any sensible definition at all—as might, for example, be the case if the devisee were required to be “a pure-blooded Englishman”. If the supposition again be made that the eldest of the sons of Francis Allen were a prelate or dignitary of the Church of England it seems to me liable to offend against common sense if the court were compelled to say that he was none the less incapable of taking because he was incapable of qualifying as “an adherent of the doctrine” of the church.

No case was cited to us—nor have I been able to discover a case—in which the validity of a comparable formula, constituting a condition precedent or a qualification, has been considered by the court. In *W. R. Patton v. Toronto General Trusts Corp'n.* (8) part of a condition precedent to enjoyment of an annuity was that the annuitant should “be of the Lutheran religion” and its validity was assumed (and acted on) by the Judicial Committee of the Privy Council in a judgment delivered by LORD BLANESBURGH. I have already expressed my view that all the speeches in *Clayton v. Ramsden* (1) proceeded from the basis that the condition there under review was a condition subsequent requiring that the persons affected (or the court) should

“from the outset know with certainty the exact event upon the happening of which their interests”

were to be divested (per LORD RUSSELL ([1943] 1 All E.R. 18)). It is, therefore, in that context that LORD RUSSELL’s later sentence should, in my judgment, be interpreted (*ibid.*, 19):

“The requirement that a person shall be of the Jewish faith seems to

me too vague to enable it to be said with certainty that a particular individual complies with the requirement."

LORD ROMER in the same case says (*ibid.*, 23):

A " . . . in the Court of Appeal they answered this question [i.e., whether a man was of the Jewish faith,] by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence . . . I should agree entirely with the Court of Appeal . . . if only I knew what was the meaning of the words 'of the Jewish faith'. Until I know that, I do not know to what the evidence is to be directed."

This language must again, in my view, be interpreted in its application to a provision for forfeiture. In his next sentence LORD ROMER states:

B "There are, of course, an enormous number of people who accept every tenet of and observe every rule of practice and conduct prescribed by the Jewish religion."

C If this be so, as I assume that it is, would not such persons be fairly described on any view as "adherents to the doctrine of the Jewish faith"? And if such adherence were the qualification required for beneficiaries under a trust, would not they at least be entitled to qualify?

D Of the other cases referred to by VAISEY, J., both the decision of FARWELL, J., in *Re Tegg* (9) and that of SMITH, J., in *Re Lockie* (10) related to conditions subsequent. The second New Zealand case, *Re Biggs* (2), may, on the other hand, have been a case of a condition precedent, the relevant words of which were, moreover, comparable to those in the present case. The relevant words of the gift were:

"To stand possessed of the residue . . . upon trust for my . . . grandson . . . absolutely should he survive me and attain the age of twenty-five years and at the date of my death or the attainment by him of the age of twenty-five years whichever last occurs be an adherent of the Church of the Province of New Zealand otherwise known as the Church of England."

E I have already stated my view that (with all respect to CALLAN, J.) the principles applicable to a condition precedent differ from those applicable to a condition subsequent. Moreover, on the facts of the case the result was the same if the condition was void for uncertainty whether it was a condition subsequent or a condition precedent, for, if the former, the grandson took free from the condition, and, if the latter, he took as the testatrix's sole next of kin. The learned F judge found it, therefore, unnecessary to decide whether the condition was precedent or subsequent.

In my view, therefore, it would not be right to say that the third defendant could not seek to establish as a matter of fact that Reginald Seymour Allen was, at whatever may be held to be the relevant date, an adherent of the doctrine of the church. It may be that the third defendant will fail in her proof, G for the onus will be on her, and the court will have to reach some conclusion at least as to the test to be applied. Counsel for the third defendant suggested in argument that an adherent of the doctrine of the Church of England meant "one who accepts in general the teaching of the Church of England as opposed to the teaching of any other church or denomination." Although we were not referred to the details of the evidence, I understand that R. S. Allen's mother

H was a Roman Catholic and that he was himself, at any rate at one time, a member of the Roman Catholic Church. It does not appear (though it would *prima facie* be relevant and admissible if it were the fact) that at the date of the codicil the testator was aware of Mr. Francis Allen's faith and that he held anti-Catholic views. If so, proof that R. S. Allen had genuinely forsaken the Catholic Church for the Church of England might be held to amount to substantial compliance with the requirement and, therefore, to satisfy the qualification. It also seems to me that the required degree of "adherence" would be

that appropriate to a lay member of the church rather than to a priest. My present inclination, on the facts now before the court, is to think that by his double qualification the testator intended that at the material date the designated beneficiary should not only have (formally) joined the Church of England and, therefore, (formally) left any other church or denomination to which he had belonged, but that he should also have to prove to the satisfaction of the trustees (or, if necessary, the court) that his membership of the church was conscientious; that is to say, it at least involved, if he had left some other church or denomination, that he had, in general or substantially, renounced the distinct doctrines or tenets of that other church in favour of the distinct doctrines or tenets of the Church of England. But unless I am wrong in the principles which I have sought to apply, it is not, I think, useful or possible, to attempt further exposition in the absence of the evidence. If the third defendant desires to prosecute her claim, she must place such evidence of the relevant facts as she can before the court, and the court must then decide whether, on the facts so proved, R. S. Allen can fairly be said to have substantially complied with the requirement which the testator intended to impose.

I think it follows from what I have said that, had the language of the condition in *Clayton v. Ramsden* (1) relating to the Jewish faith formed part of a qualification or condition precedent, it is probable (at least) that the decision of the House would have been in a sense opposite to that in the case which was decided. It follows also, I think, that the principles applicable to a condition precedent must be taken materially to differ from those applicable to a condition subsequent (and it is not always easy to determine whether a condition is of the one kind or the other). Right or wrong, I accept these consequences, and I am able to do so with somewhat less misgiving for these reasons. First, because, on the matter of principle, I think VAISEY, J., was also of that opinion: secondly, because in the case of a will it is in general the function and duty of a court to construe the testator's language with reasonable liberality and to try, if it can, to give sensible effect to the intention he has expressed. To this general rule, conditions subsequent seem to me to be an exception. The requirement that it must be known with certainty from the outset what are the exact events which will cause a forfeiture or divesting (to borrow once again the language of LORD RUSSELL) seems to me to be founded on principles well established by authority, but peculiarly applicable to provisions for forfeiting or divesting an estate or interest previously conferred. For these reasons, I think the appeal should be allowed.

BIRKETT, L.J.: If the question which calls for an answer in this appeal were being asked for the first time in the courts, I should have thought that the answer could be given without very much doubt or hesitation. "Is this man a member of the Church of England?", would seem to me to be a question that could be answered quite simply "Yes" or "No". It would certainly be surprising to be met with the reply that the words were so vague and uncertain that no reply could be given. Similarly, if the question were asked: "Is this man an adherent to the doctrine of the Church of England?", I should have thought that it would be possible to answer the question with equal ease. It is quite true that the apparent simplicity of the questions may be made to look extremely deceptive by saying: "It all depends on what you mean by 'member' or 'adherent' or 'doctrine'", and widely varying definitions of the words may be given, so that what at first sight seemed simple and quite straightforward, becomes clouded and difficult and obscure. But when a testator uses the words "a member of the Church of England", he must not be assumed to be speaking as a learned theologian or an ecclesiastical historian, with special meanings in his mind, or with refinements and reservations. He must be assumed to be an ordinary man using ordinary language.

Millions of people today use precisely the same words when they say with complete assurance: "I am a member of the Church of England." The words have a clear and definite meaning and are understood to mean exactly what they say. If those people are called on to make some formal acknowledgment of the religion they profess, they reply with the same confident assurance: "Church of England." If a poll were taken in this country and the question asked was: "What is your religion?", millions of people would answer: "Church of England", just as others would answer, "Methodist", "Baptist", "Congregationalist", "Member of the Society of Friends", "Roman Catholic", or some other designation. The word "religion" would be used here in its meaning of some particular system of faith and worship, in distinction to the wider and truer meaning of religion as the recognition of some higher power in the world and the acceptance of the standards of spiritual and practical life that this recognition involves. Almshouses for aged poor persons who are members of the Church of England have long been established and recognised; scholarships for sons of members of the Church of England have presented no difficulty; and instances of this kind could be multiplied. In a word, in practice, the use of the words "a member of the Church of England" has long been understood as conveying a clear and definite meaning.

To say, therefore, as it is said in the present appeal, that when a testator speaks of a "member of the Church of England" he has used words that are not capable of any certain meaning, is at first sight extremely surprising. It is, no doubt, true that, if the persons who confidently assert that they are members of the Church of England were asked to define what they regard as the qualifications for membership, they would make answers that differed widely from each other. Some would say that they had been brought up in the Church of England from their infancy, and had never given allegiance to any other church or denomination; some would rely on the fact that they attended the services of the church with regularity and never attended any other; some would rely on having been baptised in the parish church, on having been confirmed, and on being regular communicants at the church; but in one way or another, they would all unite in saying that they were members of the Church of England. So far as I know, they would all be members of the Church of England, and in practice certainly, they would all be so regarded.

I am not unmindful of the fact that it was this wide diversity of view which led VAISEY, J., to say ([1953] 1 All E.R. 313):

"There are so many views as to what 'member of the Church of England' means that I should have thought that those words, even alone, were incapable of having attached to them a definite meaning."

It might, perhaps, be said that there are so many ways of becoming a member of the Church of England that uniformity is not to be expected, but, in the absence of any precise and rigid test of membership, it seems to me that the words "a member of the Church of England" have a definite meaning. Quite apart from the clergy, to whom, perhaps, different considerations apply, does anybody doubt that distinguished and devout laymen, who proclaim themselves to be members of the Church of England, could not be allowed to show why they were members of the Church of England?

Similarly, when a man says: "I am an adherent to the doctrine of the Church of England", I should have thought that he was only saying what millions of people who attend the services of the church, recite the creeds, use the book of common prayer, and sing the hymns of the church, and gather from these things the distinctive teaching of the Church of England, say with confidence and assurance, and what presumably the testator was accustomed to say, if one may judge from his use of the words in his testamentary dispositions. It is not to be supposed that one who was so anxious that those who benefited under his will should adhere to the doctrine of the Church of England

did not know what the doctrine was to which he desired his beneficiaries to adhere.

It is said that the testator has given no indication of what the doctrine of the Church of England was that he had in mind, and no guide as to the degree of adherence that he had in mind either; but as I say, if the matter was being discussed for the first time in the courts, I think that, giving plain words their plain meaning, and interpreting the testator's words to ascertain his intention, the question in the originating summons would not have presented the difficulty which it does in the circumstances of today. For the question does not come before the court for the first time, and has, indeed, been the subject of great and prolonged disputation and examination by many learned judges, and many judicial decisions have been given. It is, therefore, necessary to consider the question before us in this appeal in the light of that history, and the judicial decisions. A

Mr. Henry George Allen died in 1908, and by a codicil to his will dated Nov. 10, 1907, he devised his estate of "Paskeston" in Pembrokeshire, subject to life estates which expired in 1952, to the eldest of the sons of his nephew Francis "who shall be a member of the Church of England and an adherent to the doctrine of that church". The proceedings with which we are today concerned arise out of the answer made by VAISEY, J., to the first question asked in the originating summons. That question asked whether the devise made by the testator in the terms set out, was valid, or was void for uncertainty. VAISEY, J., answered that, in his view, it was void for uncertainty, and this appeal is brought against that decision. It seems particularly fitting for me, in discussing the judgment of VAISEY, J., to acknowledge the great learning and the wide experience of the learned judge in the Chancery Division, and also his special knowledge of things ecclesiastical, to which I can make no claim. But I think some of the problems are solved once it becomes clear that the words used by the testator are not to be regarded as a condition subsequent. VAISEY, J., was clearly of opinion that the words were not to be regarded as a condition subsequent, and, further, that there was a distinction to be observed in construing words when they formed a condition subsequent, as opposed to a condition precedent, when questions affecting the certainty of the meaning of the words were being considered. It was for this reason that he found *Clayton v. Ramsden* (1) of little help, and differed from the judgment of *CALLAN, J.*, in the New Zealand case of *Re Biggs* (2). B

The material words in *Re Biggs* (2) were "adherent of . . . the Church of England", and the learned judge had expressed the view that the standard of certainty required was the same, whether the words used formed a condition subsequent or a condition precedent. It was from this view that VAISEY, J., dissented. In my opinion, the words employed by the testator in the case before us should be considered as a description or qualification or a condition precedent and not as a condition subsequent. C

In the earlier part of his judgment VAISEY, J., discussed the various ways in which a man might claim to be a member of the Church of England, and in one passage he says ([1953] 1 All E.R. 310): D

"Another, and much narrower, meaning is that a member of the Church of England is a person who, having been baptised and confirmed, regularly attends the parish church, conforms, so far as he can, to the discipline which is laid down by the formularies and has his name on the electoral roll of the parish, and would describe himself as a member of the Church of England, or, at any rate, would say negatively: 'I am not a dissenter or a nonconformist. I am a churchman'." E

I should imagine that a high proportion of those calling themselves members of the Church of England, if called on to explain why they so called themselves, would (possibly with a little prompting) make this answer or one very like it, but, F

in my view, they are entitled to call themselves members of the Church of England, although other people may give different reasons why they so describe themselves. The testator did not say more than "a member of the Church of England", and once a man has shown himself to be such a member, the description is satisfied. The slightest acquaintance with the history of the Church of England makes it plain that within its borders are men and women who differ acutely from each other on questions of theology and procedure. Men may be described as High Churchmen, Broad Churchmen, Evangelicals, Tractarians, Ritualists, upholders of the Establishment or opposed to it; but they all claim to be members of the Church of England.

In *Re Tegg* (9) the words to be considered were: "should at all times conform to and be members of the Established Church of England". FARWELL, J., held the words to be a condition subsequent and held the condition void for uncertainty, but in the course of his judgment he said ([1936] 2 All E.R. 881):

"It may be—I am not deciding this—that if the testator had been content to say 'should be members of the Established Church of England', that might be a matter of some certainty, but that is not enough, because the lady and her children must 'at all times conform to'."

On the first part of the words we are considering it seems that FARWELL, J., did not think that they were incapable of a definite and certain meaning. In *Re Perry Almshouses* (7) STIRLING, J., said ([1898] 1 Ch. 400):

"Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptised, has been confirmed . . . and is an actual communicant, does hold the status of a member of that church, and would be ordinarily regarded and spoken of as such."

That judgment was upheld in the Court of Appeal, and it has declared that there was a charity for members of the Church of England. VAISEY, J., seemed to think that there was a different kind of test for admittance to an almshouse

as a member of the Church of England from that which is required to qualify a man to take benefits under a will as a member of the Church of England, but I confess to some difficulty in seeing where the distinction lies. In both cases, the essential thing seems to be that it should be made plain that the applicant in the one case, and the beneficiary in the other, is a member of the Church of England, and STIRLING, J., and the Court of Appeal both thought that qualification would be ascertained and established.

It is clear, I think, that a definite and certain meaning can be given to the words "a member of the Church of England," and if it be right that the words are a description or a qualification or a condition precedent, then a claimant to the gift ought not to be debarred from trying to show that he fulfils the qualification. The Church of England is an institution bound into the national life by a thousand links, legal and historical. It seems to me to be a very strange conclusion that when millions of people, drawn to that church by ties of piety or feeling or history, claim to be and are recognised to be members of that church, this court should say that the words employed by this testator are so uncertain in their meaning as to be void, and the beneficiary is not even entitled to try to show that he occupies a position that millions of his countrymen enjoy without any question being raised. With great respect, I venture to differ from VAISEY, J., on the first part of the words, and I would hold that the words "a member of the Church of England" are capable of having a definite certain meaning attached to them, and that R. S. Allen should be given the opportunity to show that he is a member of the Church of England.

The second part of the words used by the testator—"and an adherent to the doctrine of that church"—present much more difficulty. The problem is best seen, perhaps, by formulating two questions. The first question is: What is

the doctrine of the Church of England? And the second question is: What is meant by "an adherent to that doctrine"? Here, again, at first sight, it would seem to be a very strange thing if the answer to the first question should be: "Nobody really knows; it is so uncertain that if the words form part of a condition precedent, a possible beneficiary would be quite unable to satisfy the condition, because the words 'the doctrine of the Church of England' are void for uncertainty". No beneficiary could be an adherent to that doctrine in those circumstances whatever the meaning of the word "adherent" may be.

VAISEY, J., said ([1953] 1 All E.R. 311):

"What is the doctrine of the church? It is a body of beliefs of a very wide character, covering the whole of human experience and divine revelation, but not capable of being reduced to the certainty of a code."

It may very well be that there is no one specific test that can be applied to decide what it is that constitutes membership of the Church of England, and, further, that there is no precise formulation of the doctrine of the Church of England in some recognised code so that it is possible to say: "Here is the doctrine of the Church of England and it is not to be found elsewhere." But do these two things in conjunction compel this court, in the precise case before us, to say that the words the testator has chosen to use are void for uncertainty?

With great respect to VAISEY, J., I think not.

So far as the clergy are concerned, after the passing of the Clerical Subscription Act, 1865, a clergyman was only called on to make the following declaration:

"I assent to the thirty-nine articles of religion, and to the book of common prayer and of the ordering of bishops, priests and deacons. I believe the doctrine of the Church of England as therein set forth, to be agreeable to the Word of God; and in public prayer and administration of the sacraments I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority."

But although clergymen were required to assent to the doctrine of the Church of England in these words, no such assent, so far as I know, is required from lay members of the Church of England, and, for my own part, I do not think the decision in this case requires a consideration of the extremely difficult questions which have perplexed scholars and divines and laymen in many ages when seeking to formulate with any precision the doctrine or faith of the Church of England. Undoubtedly, there are those who seek for more precision, and those who seek for a larger freedom for the members of the church, in what they must hold or preach. But this I think to be clear: that if any dignitary of the Church of England, or any layman of great standing in the church, had happened to be the beneficiary under the will of the testator, it would be a surprising thing to say that he failed to bring himself within the meaning of the words used by this testator.

If the true rule of construction be that the court must take the words used by the testator and gather from the words the intention of the testator, and, having done that, seek to give effect to the intention of the testator, then, I think, for myself, that in this case it is possible to gather the intention and to give sensible expression to it. The testator was not content to say, "who shall be a member of the Church of England," but added, "and an adherent to the doctrine of that church."

First of all, therefore, the testator would seem to have had in mind that there might be many persons who claimed to be members of the Church of England who were members in name only, and the added words would seem to indicate his view that it was not enough to render lip service only. The words "an adherent to the doctrine of that church", seem designed to secure sincerity and a conscientious attachment to the Church of England, and the forsaking of any other. It is, perhaps, a fair assumption to make that a testator who uses words such as these believed himself to be a member of the Church of

England and an adherent to the doctrine of that church; otherwise he would not have laid down the condition in these words.

A It is not to be supposed that the testator was himself acquainted with all the niceties of doctrinal disputation, but rather that he was using words as an ordinary layman who was a sincere member of the Church of England, and when he uses words such as "the doctrine of that church", he must be taken, I should have thought, as meaning the general teaching of the Church of England, as opposed to the distinctive teaching of other denominations. When he uses the word "adherent", he is using a word that is commonly used as meaning "one who conforms to", or, "one who is attached to", and to say that it is impossible to know what the testator meant by the use of the word because no guidance is given as to the degree of adherence, is, I think, with the utmost respect to those who take and have taken a contrary view, to import doubt B that ought not to exist when the whole of the words used are given their ordinary meaning. I cannot subscribe to the view that it is impossible to say what is the doctrine of the Church of England. In my view, it is capable of reasonable formulation. I also think it is possible for a man to say: "I conscientiously and sincerely agree with that doctrine", which is all that an adherent is required to do, as I understand and interpret the word as used by the testator.

C I am fully conscious of the limitations on the power of this court in a matter of this kind. It must construe the words the testator has used, and not make a new or amended will for the testator, which might seem more conformable to what is thought to be right or just. But, in my judgment, the testator has used words in this case which are capable of a sensible and definite meaning, and any claimant under the provisions of the will ought to be allowed to try D to bring himself within the scope of those words. That task may not be easy, and I do not know what the exact facts may be. The trustees will have to decide whether the claimant fulfils the condition expressed in the will by the testator. They will have to decide, as I think, whether the claimant is a member of the Church of England, giving his sincere allegiance to it, and accepting the characteristic and distinctive teaching of the church. These things, I venture E to think, are capable of a sensible and definite meaning, and, in my view, when the testator used the words "a member of the Church of England and an adherent to the doctrine of that church," he was not using words that ought to be held void for uncertainty, and the claimant should be permitted to show, if he can, that he fulfils the condition. For these reasons, I would allow the appeal.

F ROMER, L.J.: The person who claims as devisee on the death of Francis Allen must establish four things, viz., (i) that he is a son of Francis Allen, (ii) that he is a member of the Church of England, (iii) that he is an adherent to the doctrine of that church, and (iv) that there is no brother older than he who is a member and an adherent as aforesaid. In a sense, it is true to say G that the qualifications embodied in points (ii) and (iii) constitute conditions precedent, for proof that the claimant possesses them precedes the vesting of any legal or beneficial interest in the property. However, I agree with SIR RAYMOND EVERSHED, M.R., that it is more accurate to regard the qualifications as forming part of the description of the devisee—as though, for example, the gift had been to the tallest son of Francis Allen; and I approach the question H as to the validity of the devise on that footing.

On this view, the difficulty which arises is whether the testator has described the beneficiary whom he had in mind with a sufficient degree of certainty to enable the court to identify him, and the principle which is relevant to this question is "*id certum est quod certum reddi potest.*" The first point which I propose to consider is whether an inquiry whether any particular individual is or is not a member of the Church of England would be foredoomed to failure from the start on the ground that it is not possible to answer that question

in regard to anyone at all. If failure were inevitable, then a gift depending on the possession of the prescribed qualification could not take effect, for the testator would have introduced into the description of the beneficiary an element of uncertainty which could not, by inquiry, be rendered certain. If, on the other hand, the true view of the matter is that it might be predicated of some people that they were members of the Church of England, the fact (if fact it be) that it could not be predicated of others would not automatically invalidate a gift which was dependent in its vesting on possession of the qualification. Is it then beyond the power of the court to ascertain of anybody, with a reasonable degree of certainty, whether he can be said to be a member of the Church of England?

This question is not free of authority. In *Re Perry Almshouses* (7) the founder of an eleemosynary charity prescribed by the instrument of foundation that the objects should be selected from persons who should have (i) regularly attended divine service at the parish church for a fixed period, (ii) been partakers of the Holy Communion, and (iii) lived a godly, righteous and sober life to the glory of God's Holy Name; and that the trustees should be members of the Church of England. The question before the court was whether this was a charity the endowment whereof was held for the benefit of members of the Church of England "as such", and, accordingly, whether the charity was an ecclesiastical charity. During the argument before STIRLING, J., it was contended (inter alia) on behalf of the Charity Commissioners that there was no legal definition of membership of the Church of England and that the only test of membership was by a person conscientiously declaring himself to be a member. The contrary argument which was advanced by counsel for the trustees of the charity was that as there could be no question but that there was an established church the suggestion that the phrase "a member of the Church of England" had no meaning was not tenable; and that the difficulty of predicating whether in a particular case a person was or was not a member would not prevent the court from giving effect to that phrase. In the course of his judgment (in which he held that the charity was an ecclesiastical charity) STIRLING, J., expressed his conclusion on this question as follows ([1898] 1 Ch. 400):

"Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, I think that a person who has been baptised, has been confirmed, or is ready and desirous to be confirmed, and is an actual communicant, does hold the status of a member of that church, and would be ordinarily regarded and spoken of as such."

In the Court of Appeal, SIR NATHANIEL LINDLEY, M.R., said ([1899] 1 Ch. 31):

"It is very forcibly urged by the appellants that the founder has not, in terms, made such membership [of the Church of England] a condition for participating in her charity. The appellants contend that such a condition cannot properly be inferred from the terms of her gift. It is urged that it is quite consistent with those terms that she did not intend to do more than require performance of the conditions which she expressly prescribed. The answer to this argument is that, although it may be true that some persons may conscientiously perform these conditions without being members of the Church of England, there is nothing to show that the founder ever thought of them. She specified those conditions as the most obvious means of ascertaining who were such members. She took it for granted that poor persons conducting themselves as she required would be members of the Church of England; and a construction which would let in a succession of hypocrites is, in my opinion, clearly inadmissible . . . I feel the force of the observation that, if the founder had been asked whether any further inquiries were to be made to ascertain whether

A persons conforming with her requirements were really members of the Church of England, she might have said 'No', and might have been content with the test she imposed. It may be extremely difficult to determine whether a constant worshipper at church, who partakes of the Holy Communion and leads a godly, righteous, and sober life to the glory of God's Holy Name, is or is not a member of the Church of England. Prima facie he would be taken to be so, and the founder took the risk of non-members, whether conscientious or unconscientious, benefiting by her charity."

CHITTY, L.J., in dealing with the same point, after referring to the three tests which the founder had prescribed, said (*ibid.*, 34):

B "These three tests are all practical, and eminently so—indeed, as efficient as any that can be reasonably suggested for ascertaining whether a person is a member of the Church of England. If the question is asked, Is a person who complies with these tests, who attends the parish service every Sunday for five years, partakes of the Holy Communion and leads the life described, a member of the Church of England? it seems to me that the answer cannot be otherwise than in the affirmative."

C VAUGHAN WILLIAMS, L.J., said that he had no doubt but that the charity was one for the benefit of members of the Church of England as such and in no way indicated any doubt as to the meaning of that phrase. In *Re Tegg* (9) FARWELL, J., refrained from expressing a definite opinion on the question whether the expression "members of the Established Church of England" in relation to a condition subsequent was sufficiently definite in itself to be enforceable but confined himself to saying that the expression "might be a matter of some certainty."

D The result of the cases above cited is that STIRLING, J., and two members of this court expressed the view (from which the third member did not dissent) that there are at least some people in this country of whom it can be postulated that they are members of the Church of England, while FARWELL, J., although leaving the point unanswered as a matter of decision, did not indicate a contrary view. It, accordingly, seems to me that a departure from the opinion of SIR NATHANIEL LINDLEY, M.R., STIRLING, J., and CHITTY, L.J., would only be justified if this court were satisfied that those opinions were manifestly erroneous. For my part, I think that they were manifestly right. The contrary view would result in the disqualification of any one of the highest dignitaries of the church from claiming a legacy to which the only condition attached by the testator was that the taker should be "a member of the Church of England." Such a conclusion, I venture to think, would come as something of a shock to the public conscience. It may well be that it would be difficult, if not impossible, to say of some persons whether they are or are not members of the Church of England, but (as was argued for the trustees before STIRLING, J., in *Re Perry Almshouses* (7)) that consideration does not of necessity render it impossible for some particular individual to establish that he is. It seems to me, therefore, that the claimant in the present case would at least be entitled to prove, if she could, that her husband possessed such qualifications as SIR NATHANIEL LINDLEY, M.R., and CHITTY, L.J., referred to in the judgments to which I have referred, if she can also show that he satisfied the second part of the requisite qualification, viz., that he was an adherent to the doctrine of the Church of England.

H I now turn to this further requirement. The primary question here, again, is whether this part of the qualification is of so uncertain a nature that an inquiry whether any particular individual satisfied it would be useless at the outset on the ground that it could not be answered in relation to anyone. VAISEY, J., has expressed the view, and has given cogent reasons to support it, that it is impossible to say, with any approximation to certainty, what the testator meant

by the language which he has used, and that as the court cannot, therefore, ascertain whether any person who claims as devisee is qualified to take or not, the gift of necessity fails. I think this question is an exceedingly difficult one, but I have come to the conclusion on the whole that the learned judge was right.

The two reasons which have mainly led me to this conclusion are, first, that I do not know what the testator meant by the doctrine of the Church of England, and, secondly, if I did know to what doctrine the devisee had to adhere, I have no idea of the degree or manifestation of adherence which the testator had in mind. No evidence was before the court (as I suspect that it would have been if any had been available) to prove either what the testator meant by referring to the doctrine of the Church of England, or what that expression means in its ordinary acceptation. It is referred to in the Clerical Subscription Act, 1865, s. 1, but the phrase as there used is referable only to the taking of the oath by priests and embodies, moreover, a definition which it is improbable in the extreme that the testator had ever heard of. There is, accordingly, no certainty, and no means, so far as I am aware, of achieving any degree of certainty, as to the doctrine to which the devisee is required by the will to adhere. Even, however, if the doctrine could be ascertained or the assumption made that adherence to the Church of England was all that the testator had in mind, there would remain the difficulty of what adherence means when the word is used in relation to a religious teaching or faith. "To adhere" to the Church of England is much the same thing as "to conform" to it and FARWELL, J., in *Re Tegg* (9) was constrained to admit that he did not in the least know what that phrase meant. A like inability was confessed in the decisions in the New Zealand cases of *Re Lockie* (10) and *Re Biggs* (2), and by the very learned judge from whom this appeal has been brought. In *Re Lockie* (10) SMITH, J., put to himself a series of questions for the purpose of testing the meaning of adherence. I do not repeat them, but they show convincingly, to my mind, the uncertainty which must of necessity attach to the word in relation to religious belief. Some of the tenets of the church may be said, without irreverence, to be contrary to all established scientific experience. Does a man "adhere" to such tenets if he accepts them merely as imagery or allegory, or does nothing short of absolute and literal belief constitute adherence? Does outward acceptance of a doctrine suffice whatever the degree of mental reservation? Must the doctrine be accepted in its entirety or may certain exceptions be permitted, and, if so, what?

Unless a testator gives some guidance on these points, I know of no authority that the court possesses to set up signposts of its own. So to do is to extend the power of testamentary construction into the field of testamentary disposition and thus to perform a function which lies outside the jurisdiction of the court. A man must exercise the testamentary power himself; neither the court nor his executors can do it for him (compare the observations of LORD SIMONDS in *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson* (11)). In the present case, the testator has given no sufficient guidance in the matter of adherence to doctrine, nor are there any means, in my opinion, by which his intention can be satisfactorily ascertained, and in these circumstances it is impossible, in my judgment, to postulate of any son of Francis Allen that he is within the specified description.

It is important to note that the testator was apparently drawing a distinction between membership of the Church of England, on the one hand, and adherence to its doctrine, on the other. This suggests to me that the difference which he had in mind was between outward conformity to the church, which could be demonstrated by membership of it, and sincerity of belief in its teaching, which could, as he thought, be proved by "adherence" to its doctrine. He has failed, however, to explain either the doctrine which he had in mind or

the degree of sincerity which he required or the manner in which such sincerity was to be manifested, and the result of his omission in these respects is, in my judgment, that it is impossible for the court to identify the object of his bounty, and the gift, accordingly, fails.

A It appears to me that it is difficult to reach a contrary conclusion consistently with the reasoning of the majority speeches in *Clayton v. Ramsden* (1). The gift in that case was to determine if the testator's daughter should marry a person "not of Jewish parentage and of the Jewish faith" and the House held that that provision of defeasance was void for uncertainty. In the course of LORD RUSSELL OF KILLOWEN's speech, he observed that the words "of Jewish parentage" referred to race and then proceeded as follows ([1943] 1 All E.R. 19):

B "Must both parents be of the Jewish race, or would one alone, and which, suffice? I confess myself unable to find any context which provides an answer; but the answer may well be that, in the absence of a context to the contrary, the true construction is that both parents must be of the Jewish race. But at this point the real difficulty begins, viz., the question of degree. The testator has given no information or clue as to what percentage or proportion of Jewish blood in the husband will satisfy the requirement that he should be of Jewish parentage. The daughter could never, before marrying the man of her choice, be certain that he came up to the requisite standard of Jewish parentage, nor could a court enlighten her beforehand. The standard is unknown, and incapable of ascertainment. It is this uncertainty of degree which prevents the divesting event from being seen precisely and distinctly from the beginning, and which makes this condition void for uncertainty. The uncertainty attaching to the requirement of Jewish parentage avoids the whole condition subsequent, with the result that no defeasance takes place. In these circumstances it is unnecessary to express an opinion upon the certainty of the words 'of the Jewish faith'; but had it been necessary I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by LORD GREENE, M.R.) the testator has given no indication of the degree of attachment or adherence to the faith which he requires on the part of his daughter's husband. The requirement that a person shall be of the Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with the requirement."

It is true that the condition in *Clayton v. Ramsden* (1) was a condition subsequent and that the courts have always required such conditions to be defined with precision. Nevertheless, the conclusion which LORD RUSSELL reached derived from the poverty of guidance by the testator as to what he really intended and by his failure to describe the qualities which he required of the man whom his daughter might subsequently marry. The House, therefore, held that it was not possible to say of any man that he did, in fact, possess those qualities, and, instead of establishing some criterion of its own, rejected the condition as being unsusceptible of ascertainable meaning. In my opinion, a parallel result must logically follow in a case where the description relates, not to the person on whose ascertainment a gift is to determine, but to the person to whom the gift is bequeathed. If the gift in *Clayton v. Ramsden* (1) had been, e.g., a legacy to the eldest of the testator's employees who should be "of Jewish parentage and of the Jewish faith" it is difficult to see how, consistently with the reasoning of LORD RUSSELL (and I may add that the reasoning of LORD ROMER followed a very similar line) any of the employees could have been held entitled to take, for if, in the words of LORD RUSSELL, it is unknown and unascertainable whether a person is or is not of Jewish

parentage, then no employee could have established a claim by showing that he was; per contra, if effect could have been given to the description, the condition in *Clayton v. Ramsden* (1) would presumably not have been held void for uncertainty, for the court would have been able to "enlighten" the daughter before she contracted a marriage. In such cases as the present, it seems to me that the only escape (were it permissible) from the difficulty would be to disregard the qualification as being merely subordinate to the gift (and in some instances that might, indeed, be possible), or, on the same justification, to treat it as sufficiently satisfied by conformity to some test which the court itself thinks reasonable to apply. I do not think, however, that either of these courses would be legitimate in the present case. The testator has shown unmistakably that he looked on adherence to church doctrine as an essential quality in the devisee and it is not permissible, in my opinion, either to abrogate the requirement or to guess what he meant by introducing it, and thus establish a speculative standard. Many people might hazard many different guesses, and, even if the majority of them guessed the same, the principle "id certus est quod certum reddi potest" can only be applied, in my judgment, where that which the testator has left uncertain can be rendered certain, not where it can only be rendered probable. A B

In these circumstances, it seems to me that it would be of no use to direct an inquiry whether Reginald Allen qualified or not, without also giving directions to the master as to what meaning he should attribute to the "doctrine" of the Church of England and as to the degree, quality and manifestation which the testator intended in the use of the word "adherent"; and, for the reasons which I have attempted to explain, I, for my part, would feel quite unable to give any such directions. I, accordingly, agree with VAISEY, J., that this part of the qualification or description of the intended devisee is expressed in such uncertain terms that it is impossible to ascertain whether he was the eldest, or some other, or none of the sons of Francis Allen, and that the devise must, accordingly, fail. It follows that I would dismiss the appeal, but, as my brethren take a different view, the appeal will be allowed. C D E

Appeal allowed.

Solicitors: *Thicknesse & Hull, Capel Cure & Ball* (for the plaintiff and the third defendant); *Hore, Patisson, Bathurst, Summerhays & Co.* (for the second, sixth and seventh defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LITTLEWOOD v. GEORGE WIMPEY & CO., LTD. BRITISH OVERSEAS AIRWAYS CORPORATION (second defendants and third parties).

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), July 2, 3, 6, 27, 1953.]

A *Tort—Joint tortfeasors—Contribution—Action against two defendants—Action against second defendant not commenced within statutory period—First defendant's right to contribution from second defendant—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c).*

Public Authority—Limitation of action—Claim for contribution by joint tortfeasor—Commencement of period of limitation—Length of period—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c)—Limitation Act, 1939 (c. 21), s. 2 (1), s. 21 (1)—R.S.C., Ord. 16A, r. 1.

B One year and nine months after an accident in which he was injured a plaintiff issued a writ in an action for damages for negligence and breach of statutory duty against the first defendants. Within three months the first defendants brought in as third parties the public corporation which had employed the plaintiff, and subsequently the plaintiff by leave amended his writ by adding the third parties as defendants. At the trial, both the first defendants and the third parties were found to have been guilty of negligence or breach of duty giving rise to the injury, blame being attributed to them in the proportions of two-thirds and one-third respectively, but the plaintiff's action against the third parties was dismissed on the ground that it was brought against a public authority and had not been commenced within one year of the accrual of the cause of action as required by the Limitation Act, 1939, s. 21 (1). The first defendants claimed contribution towards the damages from the third parties under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c).

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F HELD: (i) (DENNING, L.J., dissentiente) a "tortfeasor who is, or would if sued have been, liable in respect of the . . . damage," against whom contribution could be claimed under s. 6 (1) (c) of the Act of 1935 meant either (a) one who had been sued and held liable for the damage, or (b) one who had not been sued, but would have been held liable if he had been sued; "sued" could not be construed as "sued in time" (dictum of BIRKETT, J., in *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)* ([1945] 2 All E.R. 451), approved); and, as the third parties had been sued and held not liable for the damage, they were not liable for contribution under the section.

G (ii) the time limit under the Limitation Act, 1939, s. 21 (1), for the recovery of contribution commenced to run from the date on which the first defendants' liability was ascertained, i.e., when judgment was given against them, the provisions of R.S.C., Ord. 16A, which provided for the bringing in of the third parties, being machinery for the convenient determination of the position contingently on the first defendants being held liable.

H *Wolmerhausen v. Gullick* ([1893] 2 Ch. 514); dictum of CASSELS, J., in *Hordern-Richmond, Ltd. v. Duncan* ([1947] 1 All E.R. 430); and *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* ([1953] 1 All E.R. 328), approved.

Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party) ([1945] 2 All E.R. 449), overruled.

(iii) (SINGLETON, L.J., dissentiente) liability for contribution arose under the Act of 1935 and not "in respect of any neglect or default in the execution of any . . . Act, duty or authority" under the Limitation Act, 1939, s. 21 (1), and, therefore, the time within which an action for

contribution could be brought was six years under s. 2 (1) of the Act of 1939 and not one year under s. 21 (1).

Tuckwood v. Rotherham Corpn. ([1921] 1 K.B. 526), applied.

Decision of PARKER, J. ([1953] 1 All E.R. 583), affirmed.

FOR THE LIMITATION ACT, 1939, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1180, and for the LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1), see *ibid.*, Vol. 25, p. 359.

Cases referred to:

- (1) *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (2) *Hordern-Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp. B
- (3) *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 32 Digest 334, 188.
- (4) *Tuckwood v. Rotherham Corpn.*, [1921] 1 K.B. 526; 90 L.J.K.B. 341; 124 L.T. 522; 85 J.P. 101; 13 B.W.C.C. 327; 38 Digest 123, 911.
- (5) *Fry v. Cheltenham Corpn.*, (1911), 81 L.J.K.B. 41; 105 L.T. 495; 76 J.P. 89; 5 B.W.C.C. 162; 38 Digest 123, 910. C
- (6) *Smith's Dock Co. v. Readhead (John) & Sons*, [1912] 2 K.B. 323; 81 L.J.K.B. 808; 106 L.T. 843; 5 B.W.C.C. 449; 34 Digest 496, 4095.
- (7) *Bartonshill Coal Co. v. McGuire*, (1858), 3 Macq. 300; 31 L.T.O.S. 258; 34 Digest 126, 972.
- (8) *Smith v. Selwyn*, [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195; 1 Digest 63, 516. D
- (9) *Dickinson v. Del Solar*, [1930] 1 K.B. 376; 99 L.J.K.B. 162; 142 L.T. 66; Digest Supp.
- (10) *Allen v. Waters & Co.*, [1935] 1 K.B. 200; 104 L.J.Ch. 249; 152 L.T. 179; 99 J.P. 41; Digest Supp. E
- (11) *Broom v. Morgan*, [1953] 1 All E.R. 849; [1953] 1 Q.B. 597.
- (12) *Knapp v. Railway Executive*, [1949] 2 All E.R. 508; 2nd Digest Supp.
- (13) *Page v. Burtwell*, [1908] 2 K.B. 758; 77 L.J.K.B. 1060; 99 L.T. 542; 1 B.W.C.C. 267; 34 Digest 495, 4088.
- (14) *Chant v. Read*, [1939] 2 All E.R. 286; [1939] 2 K.B. 346; 108 L.J.K.B. 547; 160 L.T. 462; Digest Supp.
- (15) *Drinkwater v. Kimber*, [1952] 1 All E.R. 701; [1952] 2 Q.B. 281; 3rd Digest Supp. F
- (16) *Morgan v. Ashmore, Benson, Pease & Co., Ltd.*, [1953] 1 All E.R. 328.
- (17) *Davies v. Humphreys*, (1840), 6 M. & W. 153; 9 L.J.Ex. 263; 151 E.R. 361; 32 Digest 334, 187.
- (18) *Robinson v. Harkin*, [1896] 2 Ch. 415; 65 L.J.Ch. 773; 74 L.T. 777; 32 Digest 332, 178. G
- (19) *Craythorne v. Swinburne*, (1807), 14 Ves. 160; 33 E.R. 482; 26 Digest 141, 1048.
- (20) *M'Gillivray v. Hope*, [1935] A.C. 1; 104 L.J.P.C. 11; 151 L.T. 482; 27 B.W.C.C. 348; Digest Supp. H

APPEAL against an order of PARKER, J., dated Jan. 29, 1953, and reported [1953] 1 All E.R. 583.

Following an accident in which he was injured on July 28, 1949, the plaintiff, on Apr. 26, 1951, issued a writ in an action for damages for negligence and/or breach of statutory duty against the first defendants, who, on July 6, 1951, issued a third-party notice which was served on the third parties, the plaintiff's

employers, on July 12, 1951. On Feb. 4, 1952, the plaintiff by leave amended his writ and statement of claim in the action by adding the third parties as second defendants. On Jan. 29, 1953, PARKER, J., gave judgment on the question of liability in the action, holding that the first defendants were liable to the plaintiff for negligence and that the third parties had been in breach of their statutory duty to provide the plaintiff with a safe system of work, and apportioning the blame for the damage as to two-thirds to the first defendants and as to one-third to the third parties. He held, however, that the third parties

A were a public authority within the protection of the Public Authorities Protection Act, 1893, and that, as the action had not been commenced within one year from the date on which the cause of action accrued, as required by the Limitation Act, 1939, s. 21 (1), it was statute-barred, and he dismissed the action against them. He further held that the first defendants were not entitled

B to contribution from the third parties towards their liability for the plaintiff's damages under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The first defendants appealed against the order refusing an order for contribution by the third parties.

Diplock, Q.C., and S. Rees for the first defendants.

Scarman for the second defendants and third parties.

Cur. adv. vult.

July 27. The following judgments were read.

SINGLETON, L.J.: On July 28, 1949, the plaintiff was employed by the third parties. He was working on a vehicle known as a fork lift when a lorry belonging to the first defendants came into collision with it. On Apr. 26, 1951,

D he commenced proceedings against the first defendants claiming damages for personal injuries which he alleged were due to the negligence of their driver. On June 20, 1951, the first defendants delivered their defence, which denied negligence and alleged that the accident was due to the negligence of a servant of the third parties. On July 6, 1951, the first defendants issued a third-party notice against the third parties claiming contribution or indemnity. On Nov. 12,

E 1951, the first defendants delivered their statement of claim against the third parties, and the third parties delivered their defence thereto on Nov. 28, 1951. On Feb. 4, 1952, the plaintiff, pursuant to leave, amended his writ and statement of claim by adding the third parties as defendants in the action. Both in the third-party proceedings and in their defence to the statement of claim, as amended, the third parties pleaded the Limitation Act, 1939, s. 21 (1), as one

F of their defences. It was said that at the time of the collision their servants were acting in intended execution of the Civil Aviation Act, 1946. PARKER, J., held that this was so, and it is not now in dispute.

The action came on for hearing in January, 1953, and the judgment of PARKER, J., which was given on Jan. 29, 1953, was in favour of the plaintiff against the first defendants. The judge held that the Limitation Act, 1939, s. 21 (1), provided a defence to the claim against the third parties, and that the action failed as against them. Thereupon he had to consider the claim of the first defendants against the third parties for contribution. On that claim the judge held that the first defendants were not entitled to an order for contribution against the third parties, though, but for the defence under s. 21 (1), he would have given judgment against them in the action, and in

H the third-party proceedings would have ordered them to contribute one-third of the damages. The first defendants appeal to this court on this last part of the judgment, and it is submitted that the third parties ought to be ordered to make contribution.

The right to contribution in the circumstances of this case depends on the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) which reads:

"Where damage is suffered by any person as a result of a tort . . .

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

The machinery by which the right can be enforced is provided by R.S.C., Ord. 16A. The decision of PARKER, J., on the claim to contribution was based entirely on the wording of s. 6 (1) (c). He held that the claim to contribution failed on the ground that it had not been shown that the third parties were a tortfeasor who either "is liable, or would have been liable if sued". It is said on behalf of the first defendants that the finding of the judge that the responsibility for the collision was to the extent of one-third on the third parties is sufficient to entitle the first defendants to an order for contribution, and that their cause of action against the third parties only arose on judgment against them in the action. If it were otherwise, it was argued, the rights of the defendants against the third party could be defeated by the plaintiff.

I repeat that which I have already said—the position is to be determined by s. 6 (1) (c) of the Act of 1935. It appears to me that the draftsman of the sub-section had in mind a suit in which there were one or more defendants, and it was sought to provide that, after judgment in the action, contribution could be ordered as between the defendants, and, further, that a tortfeasor who had not been sued in the action, but who was brought in as third party, might be ordered to make contribution if he would have been liable in respect of the same damage had he been sued. In that way, the natural meaning of the word "liable" in the first line of the sub-section is "held liable", and the words "who is . . . liable" two lines later would have the same meaning. I am prepared to assume that the meaning of "liable" ought not to be limited to "held liable", and that if a tortfeasor paid a claim he might have a right to contribution. In such a case he would have to prove: (a) that he was a tortfeasor; and (b) that he was liable at the time he paid. And it would be open to the one against whom contribution was claimed to raise any defence which was open to the one who claimed contribution.

The action by the plaintiff was not commenced until twenty-one months after the commission of the tort. At that time an action against the third parties could not have succeeded if s. 21 (1) of the Limitation Act, 1939, was pleaded. They were not held to be liable in the action in which they were subsequently added as defendants. Counsel for the first defendants sought to establish that they were in the position of a tortfeasor who would, if sued, have been liable in respect of the same damage. Now, I find difficulty in treating a tortfeasor who has been sued as though he had not been sued. And I find still greater difficulty in treating such a tortfeasor as one who would have been liable if he had been sued when he is sued in the action and is held not to be liable. I cannot see how a judge who has held that a defendant is not liable can immediately thereafter say that he would have been liable if he had been sued. The claim of the first defendants can only succeed if one is to read into the sub-section after the word "sued" some such words as "in time" or "before any period of limitation had run". There may be omissions in the sub-section. It may not have provided for every eventuality. But it is not legitimate to introduce words into the sub-section. A reasonable interpretation can be given to it as it stands, though it does not go as far as it might have done. The claim does not fall within either limb of the sub-section. The duty of the court is to apply the sub-section as it stands, not to extend it. I agree with the judgment of PARKER, J.

That is all that it is necessary to say for the determination of this appeal, but as much time was devoted to argument on the Limitation Act, 1939, s. 21 (1), perhaps I ought to say something on it. One question which was raised is as to the time at which the cause of action of a defendant against a third party arises. In *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1), a case rather like this, BIRKETT, J., held that the cause of action accrued on the commission of the tort. It is right to say that authorities were not cited to him.

- A In a later case, *Hordern-Richmond, Ltd. v. Duncan* (2), CASSELS, J., took a different view, with which PARKER, J., agreed in the judgment now under appeal. The adoption of the view of BIRKETT, J., would lead to simplification, for there seems to be something incongruous in the position of two defendants who are sued in respect of an accident when one puts (or both put) forward a claim to contribution and it can be said that the cause of action of the plaintiff
- B arises on the date of the accident and the cause of action as to contribution arises on a later date (or dates). None the less, it is difficult to see what cause of action a person who is indirectly involved in an accident has if he has suffered no damage. If he is sued he can make use of the third-party procedure. It may be that his cause of action accrues when the writ in the action is served on him—but that was not argued—and I am content to adopt the view of
- C PARKER, J., that the cause of action arises when the defendant is held liable, i.e., when judgment is given against him, and that R.S.C., Ord. 16A, is merely machinery for the convenient determination of the position which may arise subsequently. This is in accordance with the decision in *Wolmerhausen v. Gullick* (3): see [1893] 2 Ch. 529; and in the ordinary case it avoids the possibility of any injustice to a defendant as against a third party. The form
- D of order in use in contribution cases where both are defendants provides that, on one defendant paying the whole, he shall be at liberty to enter judgment against the other for the proportion of damages and costs found against him.

- E Counsel for the first defendants submitted that a claim to contribution did not fall under, and was not affected by, s. 21 (1) of the Limitation Act, 1939. He cited in support the decision of the Court of Appeal in *Tuckwood v. Rotherham Corpn.* (4). The claim in that case arose under the Workmen's Compensation Act, 1906, s. 6 (2), and it was held that the Public Authorities Protection Act, 1893, s. 1 (a), did not apply to such a claim. It had been held in an earlier case (*Fry v. Cheltenham Corpn.* (5)) that the Public Authorities Protection Act, 1893, did not apply to a claim by a workman under the Workmen's Compensation Act, 1906, and SCRUTTON, L.J., said ([1921] 1 K.B. 535):

- F "In the first place there is the decision of the Court of Appeal in *Fry v. Cheltenham Corpn.* (5) that to a claim by a workman employed by the corporation against the corporation for compensation under the Workmen's Compensation Act, 1906, the Public Authorities Protection Act, 1893, does not apply. I take the ground of the decision to be that the
- G Act of 1893 deals with claims based on acts or neglects, and that the liability under the Workmen's Compensation Act is not based on acts or neglects, but on the statutory consequences of a contract to employ. It seems to me, and this is my first ground, that, if one starts with the proposition that claims by workmen under the Workmen's Compensation Act are not within the Public Authorities Protection Act, the subsidiary claim against public authorities for indemnity against the workmen's
- H claims must also be outside the Public Authorities Protection Act. If it were necessary to strengthen my view, it has been decided by BRAY, J., in *Smith's Dock Co. v. John Readhead & Sons* (6) that the claims on which an employer can recover an indemnity are not limited to claims which can be made by the workman's dependant at common law. In that case the defendants had been guilty of negligence, causing injury to a workman in consequence of which he died shortly afterwards. His illegitimate

daughter obtained compensation under the Workmen's Compensation Act from the employer, and indemnity was obtained against the defendants in respect of the compensation so paid to the illegitimate daughter, though the daughter could not have claimed damages against the defendants, because under Lord Campbell's Act such an action could not have been brought on behalf of an illegitimate child. That appears to me to strengthen my view that this action under the Workmen's Compensation Act is outside the provisions of the Public Authorities Protection Act. Secondly, and in some respects this is very like the first ground, I think, looking at the words of the Public Authorities Protection Act, that the claim against the corporation is not for an act done in execution of an Act of Parliament or of a public duty or authority, or in respect of a neglect in the execution of any such Act, duty, or authority. It is true that negligence is one of the ingredients of the liability to indemnify, but there are several other ingredients of the liability—namely, that the person asking for indemnity has, under the Workmen's Compensation Act, either paid or been compelled by an order to pay the compensation provided by the Act, which may be something quite different from the damages which would follow at common law for an act of negligence. In my view on that ground also, which I gather is the view adopted by my Lord, the case does not come within the words of the Act."

I do not regard the decision in that case as helpful in forming a view on the question now under consideration. The right to contribution between tortfeasors is given by s. 6 (1) (c) of the Act of 1935. The procedure applicable is set forth in R.S.C., Ord. 16A—see particularly r. 1, r. 3 and r. 12. That order followed the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1) (b), which gave power to the court or a judge to grant

"all such relief relating to or connected with the original subject of the cause or matter, claimed in like manner against any other person, whether already a party to the cause or matter or not, who has been duly served with notice in writing of the claim pursuant to rules of court or any order of the court, as might properly have been granted against that person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."

Section 39 (2) provides:

"Every person served with any such notice as aforesaid shall thenceforth be deemed a party to the cause or matter with the same rights in respect of his defence against the claim as if he had been duly sued in the ordinary way by the defendant."

Under Ord. 16A, r. 3, the third party becomes a party to the action with the same rights in respect of his defence against any claim made against him, and otherwise, as if he had been sued by the defendant. From this it follows that a defence under the Limitation Act, 1939, s. 21 (1), is available to a third party. And I would add that s. 31 (1) of that Act provides: "'Action' includes any proceeding in a court of law . . ." I am in favour of dismissing the appeal.

DENNING, L.J.: It must seem strange to a private individual that the big contracting firm of George Wimpey & Co., Ltd., the first defendants, can be sued at any time within six years after an accident, whereas the government-controlled British Overseas Airways Corporation, the third parties, can only be sued within one year. This distinction arises because the British Overseas Airways Corporation are a public authority and George Wimpey & Co., Ltd., are not. In June, 1949, a strong committee presided over by LORD TUCKER recommended that there should be no such distinction. It was manifest, they

said, that injustice often results to the individual from the one-year limitation for public authorities, and they observed significantly that it is only those who benefit from the one-year limitation who consider that it should continue. Yet nothing has been done to carry out the recommendations of the committee, and more than four years have now elapsed since they made their report. It reminds me of the case we had a little while ago about the hall-marking of gold articles when seventy-three years ago a committee recommended that the law should be consolidated and amended without delay, and yet nothing has so far been done [see *Westwood v. Cann* ([1952] 2 All E.R. 349)].

In the present case, it is not the injured man who suffers by the distinction. It is the first defendants. Both the third parties and the first defendants were to blame for the accident. The first defendants have been made to pay the full damages to the injured man, and now, when they claim contribution from the third parties, it is said they cannot get it because the injured man did not sue within one year. He did not sue either of them within one year. Nearly two years elapsed before he started an action at all. I do not suppose that he would have sued the third parties even then but for the fact that he was advised (wrongly as it turns out) that they were not a public authority. Acting on that erroneous advice he sued them. He succeeded in showing that they were to blame, but he did not get judgment against them, because they were protected by the one-year limitation. On this account it is said that the first defendants have no right of contribution from the third parties. It was conceded on behalf of the third parties that, if the injured man had not sued the third parties at all, the first defendants could have got contribution. But it is said, as he sued them and failed, the first defendants cannot get contribution. If such be the law, I can only say it is most unsatisfactory. It means that the right of the first defendants to contribution is defeated by something over which they had no control and with which they had nothing to do. It is defeated by the conduct of the injured man, first, in delaying to sue the third parties for more than a year, and, secondly, in thinking that the third parties were not a public authority and not protected by the one-year limitation.

In order to see whether this is indeed the law, it is necessary to construe the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), which gives the right to contribution. The critical question is: What is the meaning of the word "liable"? There are two rival views. One is that "liable" means "held liable". According to this view a person is not liable for the damage unless and until he has had judgment entered against him. The other view is that "liable" means "responsible in law". According to this view, a person may be liable for the damage even though he has not been sued to judgment.

In my opinion, the ordinary meaning of the word "liable" in a legal context is to denote the fact that a person is responsible at law. Thus, when it is said (as LORD CHELMSFORD, L.C., once said (3 Macq. 306) in a leading case, *Bartons-hill Coal Co. v. McGuire* (7)) that a master is liable for the wrongdoing of his servant, that means that he is responsible for it in a court of law. It does not mean that he has actually been sued for it. Furthermore, a man may be "liable" in this sense even though the remedy against him is suspended or barred for some reason or other. The law of England is familiar with the concept of a liability which exists in the eye of the law, though it may not be enforceable by action. It is, perhaps, more familiar in contract than in tort. Everyone knows that a contract is good even though it may not be enforceable owing to the Statute of Frauds, and that a debt which is statute-barred is still a debt even though the debtor may, if sued, raise the statute of limitations. The same concept applies also in tort. Thus a thief is liable for his tort of conversion (which is also a felony) though he cannot be sued for it until he has been prosecuted: *Smith v. Selwyn* (8). A diplomat is liable for a tort committed by him, although it is not enforceable against him if he claims diplomatic privilege:

Dickinson v. Del Solar (9) ([1930] 1 K.B. 380). An injured party who has incurred hospital expenses which have not been paid and have become statute-barred can recover them from a tortfeasor: *Allen v. Waters & Co.* (10), per GODDARD, J. ([1935] 1 K.B. 215). A husband who has been guilty of a tort on his wife is liable in respect of it, though it is enforceable only against his master, not against the husband himself: see *Broom v. Morgan* (11). In the present case, the judge has found in favour of the plaintiff against the first defendants on the issue of liability, but in their favour on the statute of limitations. A

If the word "liable" in s. 6 (1) (c) is construed in the sense I have mentioned, which I venture to think is its ordinary meaning, no injustice will result at all, whereas if it is construed as meaning "held liable by judgment" much injustice will result. Let me give some illustrations. (i) If "liable" means "held liable", it would follow that no tortfeasor could claim contribution unless he had been sued to judgment in the courts. That would be a most unreasonable interpretation. As a matter of good sense it ought to be open to a tortfeasor to admit his liability and pay for the damage and then claim contribution from any other tortfeasor. It should not be necessary for the first tortfeasor to contest the claim in the courts before he can recover contribution. That would be so obviously a waste of time and money that Parliament cannot have intended it. When he comes to enforce his right of contribution, however, it must be open to the second tortfeasor to say: "You need not have paid, because you were not liable at all." The court then inquires into his liability in this sense, that it sees whether the first tortfeasor was "responsible at law" for the damage. If it finds him to be so, and also the second tortfeasor, it awards him contribution. This was assumed to be the law in *Knapp v. Railway Executive* (12), and I have no doubt it is correct: see *Page v. Burtwell* (13), per FARWELL, L.J. ([1908] 2 K.B. 763). B C D

(ii) If "liable" means "held liable", it would put it in the power of the injured party to decide whether one tortfeasor should get contribution from another or not. If the injured party wished to help one of two tortfeasors, all he would have to do would be to execute a deed releasing him, or simply allow the period of limitation to run against him, whereupon it would be clear that that tortfeasor, "if sued", would not be "held liable". Nay more, the injured party could bring a hopeless action against that tortfeasor and allow judgment to be entered for him on the ground of a release or the statute of limitations, whereupon that tortfeasor could say that he had in fact been sued, and had not been "held liable". The same result may be reached without any design on the part of the injured party, but simply by delay, as here, on his part or by an error in point of law. It is impossible to suppose that Parliament contemplated that the right to contribution should depend on such chances. Surely the sensible interpretation is that, if the first tortfeasor brings an action for contribution, the second tortfeasor should be able to resist it on the ground that he was not "liable", i.e., not responsible in law for the damage. But he should not be able to resist it on the ground that, although liable, he escaped for some special reason rendering his liability unenforceable, such as a release, or the statute of limitations. E F G

(iii) When a wife is injured by the negligence of her husband and also the negligence of a stranger (as often happens, I fear, in a motor accident), the wife is entitled to sue the stranger for the whole damage she has suffered, but she cannot sue her husband, because one spouse cannot sue the other for a tort. In point of law, the husband is guilty of a tort, but his wife cannot sue him for it: see *Broom v. Morgan* (11). Suppose now that the wife makes the stranger pay the whole damages, can the stranger recover contribution from the husband on the ground that the husband was also to blame? One would have thought that in justice he ought to be able to do so, but in law it H

depends on the meaning of the word "liable" in s. 6 (1) (c). If "liable" means what I think it does, "responsible at law", the stranger can recover contribution from the husband, as he ought to do. But if it means "held liable" he cannot. I am aware that in two cases it has been assumed that "liable" means "held liable", and the husband has escaped paying any contribution: see *Chant v. Read* (14) and *Drinkwater v. Kimber* (15); but the point about the meaning of the word "liable" was not argued, and it is, therefore, I suggest,

A open to re-consideration.

Furthermore, if the word "liable" in the opening words of s. 6 (1) (c) means "responsible at law" (as was assumed in *Knapp v. Railway Executive* (12)), then it should be given the same meaning in the succeeding words. It is a well-settled rule of construction that the same word occurring in the same document should, *prima facie*, be given the same meaning whenever it occurs;

B all the more so in the same sentence. The only argument against this interpretation of the word "liable" is the words "if sued". The insertion of those words makes it look as if the legislature used the word "liable" in the sense of "held liable". I think that this is too narrow a view. The legislature clearly intended to be comprehensive. They intended to cover any other tortfeasor, whether sued or not, who was responsible in law for the damage. It would

C be a strange thing if these words, which were intended to have a comprehensive effect, should be interpreted so as to narrow the right to contribution and to make it dependent on the action or inaction of the injured party. These considerations lead me to the conclusion that "liable" does not mean "held liable by judgment". It means "responsible in law" for the damage.

If, however, the word "liable" means "held liable", then I think it plain

D that the words "if sued" must be expanded so as to read "if sued by the injured party at the time when the cause of action arose". If you are to envisage a hypothetical action, then you must envisage one brought in time to be an effective action and not one which is statute-barred. When the words "if sued" are so expanded, then there are two categories of tortfeasors against whom contribution can be claimed: (i) Those who have been sued and held

E liable; (ii) those who would, if sued in time, have been held liable. The third parties fall clearly within the second category of tortfeasors who would, if sued in time, have been held liable. It is no answer for them to say that they were in fact sued out of time. That only means that they are not within the first category of tortfeasors "held liable". It still leaves them inside the second category of those who, if sued in time, would have been held liable. I find

F myself in complete agreement with the reasoning of DONOVAN, J., on this point in *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* (16).

Applying this interpretation of the statute to the facts of this case, it is quite clear that the first defendants are tortfeasors liable for the damage, and that the third parties are other tortfeasors "liable" for the damage in the sense that they are responsible in law as tortfeasors in respect of it. And, in any

G event, they would, if sued in time, have been "held liable" for it. The right to contribution is, therefore, complete.

One more question, however, arises. Although the first defendants have a right to contribution from the third parties, is their remedy for it barred by the one-year limitation contained in the Limitation Act, 1939, s. 21 (1)? This depends on when the cause of action for contribution arises. If it arises at the date of the accident (as BIRKETT, J., held in *Merlihan v. A. C. Pope, Ltd.* (*Pagnello, Third Party*) (1)), then the remedy would be barred, but I do not think that is correct. It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability

H

of the first tortfeasor has, however, been ascertained by judgment against him or admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor. A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share: *Davies v. Humphreys* (17); but his right in equity (which now prevails) arises when his liability is ascertained and the statute of limitations then begins to run: *Wolmerhausen v. Gullick* (3), *Robinson v. Harkin* (18). In cases where a writ is issued against the first tortfeasor and he serves a third-party notice against the second tortfeasor, the notice is convenient machinery, but it does not mean that he has then a cause of action. His cause of action only arises when judgment is given against him ascertaining his liability. On this footing, it is clear that the remedy of the first defendants against the third parties is not statute-barred, because they put in their claim at once.

What is the actual period of limitation applicable to the right to contribution? At first sight it would appear to be the twelve months provided by the Limitation Act, 1939, s. 21 (1), because the third parties are a public authority and the action is brought "in respect of" neglect in the execution of their public duty. But the decision of this court in *Tuckwood v. Rotherham Corpn.* (4), in my view, binds us to hold that the words "in respect of" do not cover an action for indemnity where, beside the neglect, there are other ingredients necessary to give rise to the cause of action. The reasoning in that case covers this case also, and I do not think we should depart from it, especially in view of the injunction contained in s. 21 (2) of the Act. The period of limitation is, therefore, not the one year provided by s. 21 (1), but the ordinary period of six years provided by s. 2 (1). In this case, however, it does not matter, because in either case the first defendants brought their claim in time.

My conclusion is, therefore, that the first defendants have a right to contribution from the third parties. That right is not barred by statute, and they should recover. I would be in favour of allowing the appeal accordingly. In conclusion I would just say this. There is an obvious gap in s. 6 (1) (c) of the Act of 1935. The legislature did not have in mind the case of tortfeasors who had special defences available against the injured party, such as a public authority with a one-year limitation and a spouse who has immunity from suit. If the courts cannot close this gap, then I hope that Parliament will soon do so. It is fourteen years since the first case in the courts exposed the gap, and subsequent cases have served to show how wide it is.

MORRIS, L.J.: This case affords vivid illustration of the difficulties which can arise where different periods of statutory limitation of action apply to different tortfeasors who are concerned in respect of the same damage. The plaintiff suffered damage on July 28, 1949. When judgment in regard to his claims was delivered on Jan. 29, 1953, the learned judge held that the "blame" for his injuries should be assigned as to two-thirds to the first defendants and as to one-third to the third parties. But judgment had to be entered against the first defendants alone, for the plaintiff had not commenced his action against the third parties

"before the expiration of one year from the date on which the cause of action accrued."

The third parties had pleaded the Limitation Act, 1939, s. 21 (1), and that the claim of the plaintiff related to acts or omissions of the third parties while acting in intended execution of an Act of Parliament. No challenge has been made on appeal as to the correctness of absolving the third parties from liability

to the plaintiff. The appeal only concerns the question whether the first defendants are entitled to contribution against the third parties. This question involves problems of great difficulty in regard to the construction of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The only claim to contribution which the first defendants can, or do, assert is that which they can derive from the wording of that section. No considerations as to hardship or as to policy are relevant save as involved in any submissions based

- A on the scheme and purpose of the Act. If certain public authorities can feel secure from claims after the lapse of a statutory period and after the safety curtain of time has been thought to have been lowered, it might be said to be contrary to the intention of the legislature if this security can be indirectly assailed. On the other hand, it might be said to be inappropriate that the full burden should be carried by one tortfeasor when another shared his blame.
- B But these and similar competing considerations must be excluded. The words of the section are to be regarded and rights and liabilities depend solely on the result yielded by the perplexing tasks of construction.

- C Prior to the Act of 1935, the first defendants could not have founded a claim to contribution against the third parties. If they have a right to contribution it is a statutory right. The first defendants' third-party notice against the third parties was dated July 6, 1951. It was amended on Mar. 11, 1952, after the plaintiff had joined the third parties as a defendant. In para. 3 of their amended statement of claim against the third parties the first defendants plead:

- D "In the event of the [first] defendants being held liable to the plaintiff in respect of damages or costs, they are entitled pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, to, and claim, an indemnity or a contribution . . ."

In para. 6 of the amended defence of the third party to the first defendants' claim it is pleaded:

- E "Further the third party will say that at the time of the said collision, they, their servant or agent on their behalf, were acting in intended execution of the Civil Aviation Act, 1946, and that these third-party proceedings are barred by reason of the provisions of s. 21 of the Limitation Act, 1939."

- F The question as to the applicability of s. 21 (1) of the Limitation Act, 1939, to the claim of the first defendants against the third parties becomes involved with the question what rights are given by the Act of 1935 and when they are given. The first defendants' "cause of action" against the third parties is for contribution. Have the first defendants been given a right to contribution? If they have—at what moment did they first possess such right? What is the nature of any such right? Much depends on the meaning of the word "liable" in its context in s. 6 (1) (c) of the Act. The word "liable" is a very familiar one in legal parlance and as a medium of expression is much employed. If
- G someone is said to be liable it is very likely that what is meant is that he is answerable at law, but no rigid or all-embracing definition can be suggested. The word may be employed with different meanings according to the context. In s. 3 of the Act of 1935 it is enacted that, subject to the provisions of the Act,

- H "the husband of a married woman shall not, by reason only of his being her husband, be liable—(a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation."

The word "liable" seems to have a different meaning according as applied to (a) or to (b). The husband is not to be "liable" for certain torts or contracts, and is not to be even "liable" to be sued.

The wording of s. 6 (1) is as follows:

"Where damage is suffered by any person as a result of a tort (whether a crime or not)—(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage."

The words "judgment recovered against any tortfeasor liable" seem to suggest that being held liable is something different from being liable. But the later words "any other person who would, if sued, have been liable" seem to denote that a person is liable who would have been held liable if sued. The meaning of this part of the section is that judgment against one joint tortfeasor does not release another person who could also have been successfully sued as a joint tortfeasor.

The right to recover contribution which is given by s. 6 (1) (c) is given to a "tortfeasor liable in respect of" the damage suffered by some person. It is given against any other tortfeasor (whether a joint or a separate tortfeasor) "who . . . would if sued have been liable in respect of the same damage." The words "would if sued" appear to me to postulate the case of someone who has not been sued. In the case of such a person who has not been sued the inquiry becomes whether he would, if he had been sued, have been "liable". It seems to me that in this context the word "liable" must mean "held liable" or sued to judgment. Contribution may, therefore, be recovered from: (a) another tortfeasor who is liable; or (b) another tortfeasor who has not been sued, but who, if he had been sued, would have been liable. "Liable" under group (b) must mean "held liable", and in the context so it must in group (a). The result is that contribution may be recovered from (a) another tortfeasor who has been held liable to the plaintiff, or (b) from another tortfeasor who has not been sued, but who, if he had been sued, would have been held liable.

Parliament might have gone on to add some other group. There might have been provision to recover contribution from a tortfeasor who has been sued, but who has been sued unsuccessfully, but who might—at some other time—have been sued successfully. But there is no such provision. Whether the omission be deliberate or inadvertent is matter of speculation. I agree with the view expressed by BIRKETT, J., in *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1) ([1945] 2 All E.R. 451) that it would not be right to read after the word "sued" in the words "or would, if sued, have been" the words "in time".

I do not think that the word "liable" in the first line of s. 6 (1) (c) need be limited to tortfeasors who have been held liable, though this matter is not now directly in issue. In the context at the beginning of para. (c), the word may include one who has properly admitted liability to the person who has suffered damage. He may then recover contribution from another tortfeasor who either (a) has been held liable in respect of the same damage, or (b) has not been sued, but, if he had been sued, would have been held liable. It may be that in this situation the claimant would be more fortunately placed unless (in a case where the other tortfeasor has not been sued) the hypothetical proceedings must be deemed to have been commenced on the date of the admission of liability.

The conclusion which I have expressed makes it unnecessary to decide the question as to the notional date of the hypothetical proceedings in the case of a tortfeasor who has not been sued at all. Thus, if one tortfeasor is sued and held liable, while one who may be a tortfeasor is not sued, do the words "if sued" mean "if he had been sued at the time that the tortfeasor who has been held liable was sued", which is a very reasonable view and one which may avoid some anomalies, or do they mean "if at any time he had been sued"? If the view which I have formed is applied to the facts, the result appears

to be as follows. The plaintiff Littlewood on July 28, 1949, suffered damage as the result of a tort. The first defendants never admitted liability, but by the judgment given on Jan. 29, 1953, they were held liable. The first defendants came, therefore, within the opening words of para. (c) of the subsection, i.e., the words "any tortfeasor liable in respect of that damage." They could as from then claim to recover contribution. It seems to me that their cause of action then arose. They could not earlier claim to recover contribution, for they were denying their liability to the plaintiff. They could (and did) serve a third-party notice on the third parties, which would give the latter the opportunity to challenge the claim of the plaintiff, but the claim of the first defendants on the third parties would only become effective contingently on the first defendants' being held liable to the plaintiff. I consider, therefore, that the third parties could not defeat the first defendants' claim in limine

- A by asserting that more than twelve months had elapsed since the date of the accident (July 28, 1949) when damage was suffered by the plaintiff. Comparison was made between the present situation and that which exists between surety and co-surety, but the claim made by a surety who has paid is one based in contract and in equity. In *Craythorne v. Swinburne* (19) LORD ELDON, L.C., said (14 Ves. 164):

C "It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution . . ."

- D The claim for contribution now under consideration is purely statutory and exists in the words of the sub-section or not at all. *Tuckwood v. Rotherham Corpn.* (4) arose out of the provisions of the Workmen's Compensation Act, 1906, s. 6 (2), comparable in scope to those of s. 6 (1) (c) of the Act of 1935. The language of the Public Authorities Protection Act, 1893, s. 1 (referred to in that case), does not differ significantly from that in the Limitation Act, 1939, s. 21 (1). Under the Act of 1893 the time is in general computed "next after the act, neglect, or default complained of"; under the Act of 1939 the time is "from the date on which the cause of action accrued". Under the Act of 1939 the time limit is in reference to claims which are

- F " . . . for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority . . ."

The wording of the Act of 1893 is very nearly the same. Though it is sufficient for present purposes to say that the claim for contribution was not defeated by any statutory period of limitation, the reasoning in *Tuckwood's* case (4) would suggest that the twelve months' period of limitation was not applicable.

- G In *M'Gillivray v. Hope* (20), which concerned contributions to be paid by former employers to the last employer of a man to whom such last employer had paid workmen's compensation, LORD TOMLIN said ([1935] A.C. 10):

- H "Further, under the English law, where one who is liable to pay a sum of money to another is entitled against a third party to be indemnified in whole or in part against what he has so to pay, he cannot recover on the indemnity against this third party where he himself has made no payment in respect of his own liability . . ."

Though the first defendants could start proceedings against the third parties to deal with the "event of" the first defendants being held liable to the plaintiff, and though such procedure possessed advantages, in my judgment, the first defendants were not obliged to claim against the third parties until they (the

first defendants) were held liable to the plaintiff. In a claim against the third parties, the first defendants would first have to prove that they were tortfeasors liable to the plaintiff. They would then have to prove, if my construction of the Act is correct, either that the third parties had been held liable to the plaintiff, or that the third parties, not having been sued, would, if they had been sued, have been held liable. Though, if dealing with this second limb, they would be concerned with the neglect or default of the third parties in the intended execution of an Act of Parliament, the claim of the first defendants would, according to the reasoning in *Tuckwood's* case (4), be a claim in respect of the statutory right to contribution given by the Act of 1935. Thus, BANKES, L.J., in his judgment in *Tuckwood's* case (4) said ([1921] 1 K.B. 533):

“The question thus is, is this action claiming the right to the statutory indemnity an action in respect of any alleged neglect in the execution of any such duty? In my opinion it is not. It is true that in order to succeed in the action the plaintiff must establish that the workman would have been entitled to recover damages against the corporation for the negligence of their servant in driving the tramcar. That no doubt is an essential part of his cause of action; but I do not think that it is true to say that the action claiming the right to the statutory indemnity is an action in respect of any alleged neglect in the execution of a duty within the meaning of the language used in the section.”

Both SCRUTTON, L.J., and ATKIN, L.J., agreed with the reasoning expressed by BANKES, L.J. Even if the claim of the first defendants against the third parties was in respect of any neglect or default in the intended execution of an Act of Parliament, the “cause of action”, in my judgment, did not accrue until the first defendants could show that they were tortfeasors liable to the plaintiff. The careful judgment of DONOVAN, J., in *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* (16), was not available to PARKER, J., before he gave his judgment in the present case. The difficulties of construction are well evidenced by the conflicting judicial opinions which have been formed.

For the reasons which I have given, I consider that the legislature has specified the description of those from whom contribution may be recovered in language which, on the facts of this case, does not enable the first defendants to recover from the third parties. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Stanley & Co.* (for the first defendants); *J. H. Milner & Son* (for the third parties).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CAVE v. CAPEL.

[QUEEN'S BENCH DIVISION (Ormerod, J.), July 31, 1953.]

Execution—Sheriff—Protection—“Action in respect of seizure and possession of goods”—Withdrawal from possession of goods claimed—Action for trespass by person other than claimant—R.S.C., Ord. 57, r. 16A.

- A execution on the goods of a judgment debtor. At the judgment debtor's address he found a caravan in which resided the plaintiff, the mother of the judgment debtor. After making inquiries as to the ownership of the caravan the sheriff's officer—acting, it was found, reasonably—removed the caravan to a barn belonging to the judgment creditor. The plaintiff, who had locked herself inside the caravan, subsequently left the judgment creditor's premises. Later it was discovered that the caravan did not belong to the judgment debtor, the sheriff was instructed to withdraw from possession, and he in fact withdrew. The plaintiff issued a writ against the sheriff for damages for wrongful imprisonment and trespass to the person, and the sheriff took out a summons under R.S.C., Ord. 57, r. 16A, for an order “protecting him from any action in respect of the said seizure and possession of the said goods . . .”
- B
- C

HELD: the act of the sheriff's officer in taking possession of the caravan and his act in removing the plaintiff in the caravan must be regarded as one and the same act, and, therefore, the plaintiff's action was “in respect of the seizure and possession of the goods” within r. 16A, and the sheriff was entitled to an order under the rule.

- D Dictum of SIR WILLIAM BRETT, M.R., in *Smith v. Critchfield* (1885) (14 Q.B.D. 878), applied.

Per curiam: Order 57, r. 16A, applied to an action such as the present and not only to an action brought by the claimant to the goods.

FOR R.S.C., ORD. 57, r. 16A, see the ANNUAL PRACTICE, 1953, p. 1233.

- E Case referred to:

(1) *Smith v. Critchfield*, (1885), 14 Q.B.D. 873; 54 L.J.Q.B. 366; 54 L.T. 122; 21 Digest 554, 1270.

APPEAL from an order of a master adjourned into open court for judgment.

- F On Oct. 29, 1952, a bailiff, William Hext, acting on behalf of the defendant as sheriff's officer, in pursuance of two warrants was instructed to levy execution on the goods of a certain A. H. Cave in respect of two judgments. On going to the judgment debtor's address the bailiff found no property on which to levy execution except a caravan in which was residing the plaintiff, Mrs. May Finella Cave, the mother of the judgment debtor, who informed the bailiff that the caravan was not her son's property, but refused to say to whom it belonged and declined to leave it. The bailiff made inquiries from the judgment creditor's solicitor, and other persons and came to the conclusion (quite properly, as HIS LORDSHIP found) that it was his duty to levy execution on the caravan. Accordingly, on Oct. 30, 1952, he removed the caravan to the judgment creditor's farm. Mrs. Cave (the plaintiff) had refused to leave the caravan and had locked herself in. At the farm the caravan was put in a barn with the plaintiff still inside it, and the main double doors of the barn were locked, but a side door was left open through which the plaintiff eventually left. On Oct. 31, 1952, notice was given to the bailiff by a Mrs. M. F. Carr or her solicitors that she was the owner of the caravan. Inquiries were made, and the sheriff withdrew from possession. On Apr. 24, 1953, the plaintiff issued a writ against the defendant claiming damages for wrongful imprisonment and trespass against the person. The defendant took out a summons under R.S.C., Ord. 57, r. 16A,
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- H

claiming protection under that order. Protection was refused by the master, and the defendant appealed to the judge in chambers.

A. M. Wallace for the defendant.

Lermon for the plaintiff.

ORMEROD, J., stated the facts and continued: The question which I have to consider is whether this action is one in which protection should be given to the sheriff by reason of R.S.C., Ord. 57, r. 16A, which reads as follows:

"When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the judge or master may make any such order as may be just and reasonable in respect of the same . . ."

There is a proviso that the claimant shall receive notice of that application.

The first question which has to be considered is whether this is an action coming within the words of the rule, which are that the sheriff

"may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods."

It was contended on behalf of the plaintiff that this is not an action in respect of either the seizure or possession of the said goods, but is something entirely separate and distinct, and, therefore, does not come within the words of the rule. I find it extremely hard to accept that contention. The trespass which is claimed against the defendant occurred when the bailiff was acting in accordance with the warrant, that is to say, taking possession of the caravan which he believed, and in the circumstances had ground for believing, was the property of the judgment debtor, and, therefore, property on which execution could be levied. In that state of affairs it appears to me that, having regard to the way in which the plaintiff's claim is put and having in mind the plaintiff's actions at the time of the execution, it is impossible to separate the act of the sheriff's officer in levying execution from his act (whether it was a wrongful act or not) in taking the plaintiff in the caravan from the judgment debtor's premises to those of the judgment creditor.

In *Smith v. Critchfield* (1), which was cited to me during the argument in this appeal, there is a statement of opinion by SIR WILLIAM BRETT, M.R., which was certainly obiter, but which appears to me to carry some considerable weight. That was a case where execution had been levied on the goods of a judgment debtor, but the man who appeared to be the rightful owner of the goods brought an action against the sheriff, not only for wrongfully distraining on the goods, but also for trespass on his property in order to levy execution, and, although the point did not fall to be decided in that case, there was an expression of view by the Master of the Rolls that it was impossible to separate the entry on the premises from the levying of execution, and, therefore, the two matters must be considered as one. The learned Master of the Rolls said (14 Q.B.D. 878):

"It is not, of course, in every case that the judge will protect the sheriff. He will be protected when he has only made an honest mistake in executing the process of the court, and but for such mistake everything that he has done would have been justified by the writ. Then against what is he to be protected? It is contended that he may be protected in respect of one part and not in respect of another part of what is really one simultaneous action done by him under the writ of execution; that he may be protected from an action for wrongfully seizing the goods but not from an action for wrongfully walking into the house to seize them. I do not think this contention can be sustained. The trespass to the house and the trespass

to the goods are, as it seems to me, parts of one action which is intended to be done under the writ, and which would have been rightful if the goods had belonged to the execution debtor, but which is in fact wrongful because of the sheriff's mistake as to the property in the goods."

In that case the claim was by the claimant to the goods, and his action was in form a claim, not only for damages for wrongful seizure, but also for trespass on his property. The present, of course, is a claim by someone other than the actual owner of the goods distrained on, but it appears to me that the reasoning applies just as strongly in this case as it applied in that case. In my view, the words:

"The trespass to the house and the trespass to the goods are, as it seems to me, parts of one action"

B apply here in that the trespass to the goods, if there was such a trespass—that is to say, the taking of the goods in execution—and the trespass to the person of the plaintiff (who insisted on remaining in the caravan when the goods were taken away) must be regarded as one and the same action, and, therefore, it would appear on the face of it that this is an action to which the words of the rule apply.

C It was further contended, however, that, even if that were so, the rule would still not apply because, if it be read as a whole and its meaning as a whole be taken, it could be interpreted in the sense that it applied only to actions in respect of the seizure and possession of the goods which were taken by the claimant. It was urged that the proviso to the rule made that clear, because the proviso is to the effect that a claimant "shall receive notice of such intended application", and it was argued that, if the application was an application to

D protect the sheriff against an action by someone other than the claimant, no useful purpose would be served by inserting that proviso. After some consideration I have come to the conclusion that the words of the rule must be taken to mean what on the face of them they do mean, and that the sheriff is entitled to apply for an order protecting him from any action in respect of the seizure, and

E not merely from an action in respect of the seizure which may be brought by the claimant. I see no sufficient reason in the wording of the rule for importing into it those additional words, and, in particular, importing those additional words into a rule which was obviously brought into being for the specific purpose of protecting a sheriff against actions which might be brought against him after he had taken possession of the goods. In these circumstances I have come to

F the conclusion that this appeal should be allowed, and that there should be an order giving the defendant protection under Ord. 57, r. 16A.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co.* (for the defendant); *Kingsford, Dorman & Co.* (for the plaintiff).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

ACTON CORPORATION v. MORRIS AND ANOTHER.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), July 27, 28, 1953.]

Requisition—Duration—Confirmation of requisition by Minister—Extension of period of requisition.

On June 22, 1945, the plaintiffs, a local authority, requisitioned certain premises by virtue of powers delegated to them on the terms of the Ministry of Health Circular No. 2082 by the Minister of Health in pursuance of the Defence (General) Regulations, 1939, reg. 51 (5). Circular No. 2082 authorised the requisition of premises for the re-housing of persons rendered homeless by enemy action, and under para. 9 thereof, by reference to the enclosure in Ministry of Health Circular No. 1949, the procedure laid down to make such a requisition effective for more than one month was an application for an extension of time to be granted by or on behalf of the Minister. On July 13, 1945, the plaintiffs sent to the Ministry of Health a document in the following terms: "I . . . , town clerk of Acton, in the exercise of the powers delegated to me under the terms of the Ministry of Health Circular No. 2082 by the Minister of Health and by virtue of reg. 51 of the Defence (General) Regulations, 1939, took possession of the premises . . . for the purpose of accommodating persons rendered homeless by enemy action". Then followed: "The Minister of Health hereby confirms the taking possession of the premises named . . ." and below was a blank space for a signature followed by: "For senior regional officer, Ministry of Health." On July 19, 1945, the senior regional officer confirmed the requisition. In 1952 the plaintiffs brought an action for possession of the premises, contending that the confirmation by the senior regional officer was equivalent to an extension of the requisition for an indefinite period.

HELD: the documents of July 13 and 19, 1945, were nothing more than a notification by the plaintiffs of the requisition of the premises and a confirmation by the Minister of that requisition and they could not be construed as an application for and the grant of an extension by or on behalf of the Minister; the procedure laid down for extending the period of requisition had not been complied with; and, therefore, the requisition had terminated one month from the date of the taking possession of the premises, and the plaintiffs were no longer entitled to possession.

APPEAL by the defendants from an order of His Honour JUDGE TUDOR REES at Brentford County Court dated Apr. 17, 1953.

On June 22, 1945, the plaintiffs, a local authority, through their town clerk served a notice of the requisition, "for accommodating persons rendered homeless by enemy action", of premises known as 35 and 37 Kent Road, Acton Green, W.4, in pursuance of powers delegated to them by the Minister of Health under reg. 51 of the Defence (General) Regulations, 1939, made under s. 1 of the Emergency Powers (Defence) Act, 1939. On July 13, 1945, the town clerk sent to the Ministry of Health a document in the following terms:

"I, Hugo Charles Lockyer, town clerk of Acton, in the exercise of powers delegated to me under the terms of the Ministry of Health Circular No. 2082 by the Minister of Health and by virtue of reg. 51 of the Defence (General) Regulations, 1939, took possession of the premises set out upon the accompanying schedule for the purpose of accommodating persons rendered homeless by enemy action."

At the bottom of the document were the words:

“The Minister of Health hereby confirms the taking possession of the premises named in the accompanying schedule.”

Below these words was a blank space followed by: “For senior regional officer, Ministry of Health,” and then a note:

A “The Minister of Health may at any time direct that the possession of the premises named in the accompanying schedule shall cease.”

On July 19 the senior regional officer confirmed the requisition. The Ministry of Health Circular No. 1949 which, by reference to Circular No. 2082, extended to the re-housing of persons rendered homeless by enemy action, provided that where (as in the present case) the requisition was limited to one month from the date of taking possession, any necessary application for the extension of the period must be made to the senior regional officer of the Ministry of Health.

B The house, No. 35 Kent Road, had, before it was damaged by bombing, been divided into two flats, one on the ground floor and one on the first floor, and the first defendant, one Morris, had occupied the ground floor. When C the house had been repaired Morris approached the plaintiffs who, in July, 1951, served notice on the then owners that they had given up possession of the ground floor flat. Morris went into occupation of that flat and in 1952 he purchased the entire house. He then let in the second defendant, one Smith, his brother-in-law, and his family to occupy the first floor flat. The plaintiffs D objected to this on the ground that the flat was still in their possession and should be occupied by their own nominee. When they attempted to install their own tenant they were excluded by Morris who had put a new lock on the door of the house to which the plaintiffs had no key.

In an action by the plaintiffs for possession of the flat and damages for trespass the defendants contended that the plaintiffs were no longer in possession since the requisition had ceased one month from the date of the notice and they E had made no application to the Minister for an extension of the time as required by Circular No. 1949, the document dated July 19, 1945, amounting only to a confirmation of the requisition. The county court judge held that the plaintiffs were entitled to possession of the flat and made an order for possession.

J. R. Phillips for the defendants.

F *Wingate-Saul* for the plaintiffs.

SOMERVELL, L.J., stated the facts and continued: There was some question as to the construction of the document of July 13, 1945, but, in my opinion, having regard to the words at the bottom and the blank space, it was a request by the town clerk to the Minister of Health, through the senior regional officer, to confirm the taking possession of the premises named in the schedule. G The Defence (General) Regulations, 1939, reg. 51, dealt with the taking of possession, or, as it is normally called, the requisitioning, of premises for varying purposes of the war. It is common ground that there was power to delegate the powers which the Minister of Health had as a competent authority within the meaning of the regulation and that he did so delegate his powers for certain H purposes and subject to certain restrictions to local authorities, including the plaintiffs in this action.

The first point taken for the defendants is that the delegated powers were not valid beyond a month, and, therefore, the requisition is now invalid. It will have been noted that the document of July 13, 1945, from the town clerk to the Ministry of Health referred to Circular No. 2082 as the circular under which possession was taken. It is a curious fact that when the plaintiffs

amended their pleadings they said that they had taken possession under Circular No. 1857, to which I shall refer. It is conceded that, if they are held to their pleadings, they must fail, because Circular No. 1857 does not authorise the taking of possession for the accommodation of persons rendered homeless by enemy action. We were told that that point was not taken below, and I think it is probably true that, if it had been taken, the learned county court judge would have allowed an amendment. In my view, if it became material, we would allow an amendment. I will proceed to consider the matter on the basis that it is open to the plaintiffs to say that they requisitioned these premises under Circular No. 2082 which was dated July 3, 1940, and covers the present subject-matter. In respect of the procedure with which we are concerned, it is provided by para. 9 (ii) that it should be in accordance with

“the conditions laid down in the enclosure to Circular No. 1949, except para. 3 (ii) and except that the exceptional procedure set out in para. 2 of that enclosure may be regarded as the normal procedure for the purpose of this delegation.”

That is a little complicated. When, however, one turns to Circular No. 1949 one finds that it provides that normally approval by the Minister should be sought in advance of requisition, but it also provides for the exceptional procedure referred to under which requisition may be taken first subject to conditions to which I will refer in a moment. When we come to the procedure, in the enclosure to Circular No. 1949, para. 3 (i) reads:

“The requisitioning power is limited to the taking possession of (a) Houses or other residential buildings, in both cases if unoccupied; (b) Other buildings whether occupied or not.”

Paragraph 3 (ii) is immaterial. By para. 3 (iii):

“The period of occupation of the building is not to extend beyond the period indicated to the clerk by the senior regional officer when consent is given to the requisition; or, in the case of premises requisitioned under the exceptional procedure set out in para. 2, beyond one month. In both cases any necessary application for the extension of the period should be made to the senior regional officer.”

That last sentence contains the words on which this appeal turns. It is argued on behalf of the defendants that in the document of July 13, 1945, submitted by the town clerk to the Minister, there is no application for the extension of the period of one month for any period, and, therefore, the condition necessary to extend the requisition beyond a month has not been complied with. *Prima facie*, that seems to me to be right. The plaintiffs—and we are moving, I agree, in a technical field—sought to get over the difficulty which those words seem to create by referring to other circulars and to the general background of delegation under reg. 51. I am bound to say for myself that the further one probes into matters other than the directly relevant document, the more difficult does their case become. In Circular No. 1857, which was the admittedly inapplicable circular relied on in the pleadings, there was also a provision that the period of occupation was not to extend beyond one month from the date of taking possession, and then in para. 6 (iii) there are these words: “unless the requisition is confirmed by the Minister”. In that circular, therefore, confirmation was regarded as the appropriate process for extending the time of requisition beyond the month, but, whether that provision was regarded as an inapt use of words or not, it is material to note that it was amended by para. 15 of Circular No. 1949, the procedure under that circular being assimilated to the procedure under Circular No. 2082 with which we are concerned. If one investigates these

other matters there is attached to Circular No. 1949 Form C.S.2 to be submitted to the Minister. The form submitted to the Minister on July 13, 1945, by the town clerk, was inaccurately headed "Form C.S.2." It does not set out everything which is set out in Form C.S.2. Form C.S.2, I think, emphasises the view which the defendants put before the court that confirmation is one thing and extension of time is another, because at the bottom of Form C.S.2 will be found these two sentences:

A "The Minister of Health hereby confirms the taking possession of the land and/or premises named above",

and

B "The period of occupation must not extend beyond — months from the date of taking possession unless the consent of the Minister is obtained."

Then there are the words:

"Note. The Minister of Health may at any time direct that the possession of the land and/or premises named in this application shall cease."

C In my opinion, this is a case in which the principle to be applied is that those who are exercising special powers to take private property must see that they carry out accurately and in detail the Act of Parliament, or, in this case, the conditions of the requisitions under the circulars and Defence Regulations. Nor is it clear that this is a matter of no substance. All that has happened here is that there was confirmation by the Minister of something which did not require confirmation, namely, taking possession of the premises. There are no words D to suggest that the Minister has been asked to extend the time or that he has done so. For these reasons I think this first point succeeds and that this appeal should be allowed.

If that is right, it is unnecessary to consider the second point which was whether, assuming that the plaintiffs still had the right to use the premises, E they could get an order for possession or damages for trespass as all that the first defendant had done was to put a lock on his own door. It may be that the form of relief was not claimed in precisely the right way. It may be that the right of the local authority which the first defendant infringed was a right of access, but, if that had been the point, probably even at this stage it could have been put right by an amendment asking for the appropriate declaration.

F **JENKINS, L.J.:** The plaintiffs' claim to possession of No. 35 Kent Road depends on their town clerk's requisition notice dated June 22, 1945, and the confirmation by the senior regional officer of the Ministry of Health of the town clerk's taking possession of the premises, dated July 19, 1945. They claim that those two documents, taken together, constituted a valid requisition of the G premises which at all times thereafter remained, and is still, in force. The defendants contend that the requisition of the premises carried out by means of those documents ceased to have effect at the expiration of one month from the date of the town clerk's notice of requisition, that is to say, one month from June 22, 1945. This question turns on the true construction of those documents and of the circular letters issued by the Minister from time to time H whereby he delegated, pursuant to the authority given him under reg. 51 of the Defence (General) Regulations, 1939, various requisitioning powers to local authorities.

The first of those circulars to which we were referred was Circular No. 1857 dated Aug. 27, 1939. That contains, in para. 6, this provision, headed "Requisitioning powers":

"Local authorities have in many cases already made arrangements for

the temporary use of unoccupied buildings for evacuation purposes, and it is not thought that the use of compulsory requisitioning powers will often be necessary. In order, however, to meet cases in which accommodation in unoccupied dwelling-houses or other buildings is urgently required for purposes of the government evacuation scheme and no arrangements with the owners have been found practicable, the Minister has decided to delegate to the clerks of local authorities the requisitioning powers conferred on him by reg. 51 of the Defence Regulations . . . The delegation is subject to the following restrictions: (i) The requisitioning power is limited to the taking possession of (a) Houses or other residential buildings, in both cases if unoccupied; (b) Other buildings whether occupied or not. (ii) The power is limited to the taking of possession of buildings for some purpose directly connected with the government's evacuation scheme under s. 56 of the Civil Defence Act, 1939, as, for example, the accommodation of persons transferred under the scheme or the provision of the accommodation for communal meals, etc., for these persons. (iii) The period of occupation of the building is not to extend beyond one month from the date of taking possession, unless the requisition is confirmed by the Minister."

It will be observed that the purposes to which those requisitioning powers relate are not relevant to the present case, for they were the purposes of, or directly connected with, the government evacuation scheme, and it is common ground that the requisitioning here in question had nothing to do with any such scheme. It is, nevertheless, important to note that under para. 6 (iii) the period of occupation of the building is not to extend beyond one month from the date of taking possession unless the requisition is confirmed by the Minister.

The next circular to which reference should be made is Circular No. 1949 dated Jan. 18, 1940. That circular related primarily to the occupation of premises for first-aid, ambulance, and mortuary purposes and purposes connected with the emergency hospital scheme. Those, again, are purposes not relevant to the present case. But para. 15 of Part 2 of Circular No. 1949 contains the following provision:

"The exercise by clerks to county borough and county district councils of the powers delegated to them by paras. 6 and 7 of Circular No. 1857 dated Aug. 27, 1939, will in future be subject to the conditions laid down in the enclosure to this circular."

The enclosure to the circular says:

"In A.R.P. Department Circular (No. — dated —) and issued by the Minister of Home Security it was announced that the requisitioning powers previously delegated to clerks for various civil defence purposes were, with one exception (the provision of public shelters), made subject to the condition that the prior consent of the regional commissioners should be obtained before possession of land or premises is taken over. The Minister has decided to adopt a similar procedure in relation to the taking possession of premises for purposes connected with the first-aid post, ambulance and mortuary services, and with the government evacuation scheme, and accordingly in future the consent of the department must be obtained before possession is taken."

There is a provision about applications for the purpose of obtaining consent, and para. 2 goes on:

"The only exception to this rule is the case where additional premises are urgently required in extension of or in substitution for existing premises during or immediately following an air-raid. In these circumstances

possession may be taken without reference to the department, although the senior regional officer should be informed as soon as possible thereafter."

Paragraph 3 contains limitations on the requisitioning power. The first relates to the character of the premises, and nothing turns on that here. The second also, I think, is immaterial. Paragraph 3 (iii) reads:

A "The period of occupation of the building is not to extend beyond the period indicated to the clerk by the senior regional officer when consent is given to the requisition; or, in the case of premises requisitioned under the exceptional procedure set out in para. 2, beyond one month. In both cases any necessary application for the extension of the period should be made to the senior regional officer."

B Thus, one finds that in the enclosure to Circular No. 1949 a new provision is introduced, to the effect that where the requisition is limited to the period of one month as having been made without prior consent, any necessary application for the extension of the period should be made to the senior regional officer, whereas in Circular No. 1857 the provision was to the effect that the period of occupation of the building was to be limited to one month unless the requisition was confirmed by the Minister.

C Finally, there is Circular No. 2082 which dealt with the subject-matter here in question, that is to say, to put it very broadly, the re-housing of persons rendered homeless by bombing. That contained this delegation of powers in para. 9:

D "The Minister accordingly, in exercise of his power under para. 5 of Defence (General) Regulation 51, hereby extends the powers already delegated to you to cover the taking possession of buildings for some purpose directly connected with the accommodation of refugees from enemy attack or the imminence of enemy action. The exercise of the powers now delegated will be subject to the following conditions, namely,

E (i) The power shall not be exercised in advance of the occasion on which the buildings are required; (ii) the conditions laid down in the enclosure to Circular No. 1949, except para. 3 (ii) and except that the exceptional procedure set out in para. 2 of that enclosure may be regarded as the normal procedure for the purpose of this delegation."

F The result, therefore, was that in cases to which Circular No. 2082 applied it was permissible, as normal procedure, for a local authority to requisition without obtaining the previous consent of the Minister or the regional officer representing the Minister, but in such cases the duration of the requisition was limited to one month and any necessary application for the extension of the period was to be made to the senior regional officer.

G Those being the relevant circulars, I should turn again to the two actual documents in this case. The requisition notice of June 22, 1945, does not expressly refer to Circular No. 2082, but a reference to that circular is implicit in the concluding words

"for accommodating persons rendered homeless by enemy action."

H It was, therefore, a requisition under the powers delegated by Circular No. 2082 made without any prior consent from the Minister, and the position, accordingly, was, if I understand the circulars correctly, that the requisition effected by this notice could last only for the period of one month subject to the possibility of its being extended for some further period on an application for that purpose being made to the regional officer. The plaintiffs rely on the senior regional officer's confirmation of July 19, 1945, as equivalent to an extension for an indefinite period. I cannot accept that view. The document to which such

confirmation is attached on the face of it contains no more than a notification by the town clerk of what he has done, namely, the taking possession of the premises under Circular No. 2082. Appended as it is to such a document, the confirmation on behalf of the Minister is, on the face of it, no more than a confirmation of that which the town clerk has already done, namely, the effecting of a requisition to be valid for a period of one month. It is said that we should construe this document as recording an extension granted by or on behalf of the Minister, but I cannot construe it as anything more than a confirmation of the existing state of affairs. A

My Lord has pointed out that additional force is given to the defendants' argument on this part of the case by the circumstance that in Circular No. 1857 the word used is "confirmation", whereas Circular No. 2082 refers to "extension". In a matter of construction it is always legitimate to assume that a change of language is intended to produce some difference in the meaning. B Under the relevant circular in the present case the procedure laid down to make a requisition such as this effective for more than one month was an application for an extension to be granted by or on behalf of the Minister. No such application was made, and my conclusion is that no such extension was granted. I appreciate that, so far as the Minister himself was concerned, it would have been within his powers to requisition premises for an indefinite period for any authorised purpose, and I also appreciate that it would have been possible C for him to delegate ad hoc authority to effect such a requisition in any particular case. If that course had been adopted, the result might well have been different, but that course was not adopted. The procedure followed was intended to comply with the provisions of the circulars, and for the reasons I have given I think it failed to do so. Accordingly, I agree that this appeal should be allowed. D My conclusion in regard to the validity and duration of the requisition makes it unnecessary to decide the interesting question whether, even if the requisition had still been in force, any relief could properly have been granted against the first defendant, the owner of the premises, for the acts on his part alleged to have amounted to the exclusion of the plaintiffs from possession.

HODSON, L.J.: I agree with both the judgments which have been delivered and cannot usefully add anything. E

Appeal allowed.

Solicitors: *Oswald Hanson & Smith* (for the defendants); *H. C. Lockyer*, town clerk, Acton (for the plaintiffs).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BRIGHT v. BRIGHT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 27, 28, 29, 30, 31, 1953.]

Divorce—Desertion—Constructive desertion—Previous suit charging adultery and cruelty dismissed—Allegations in petition alleging desertion same as those raised, or capable of being raised, by earlier petition.

A The wife filed a petition, dated Apr. 21, 1950, for divorce on the ground of the husband's adultery with his half-sister, L.B.T., and cruelty. The allegations of cruelty were, *inter alia*, that in or about 1927 the husband threatened the wife with a revolver; that in or about 1928 he threw several of the wife's belongings out of the window and threatened to throw her out of the house; and that, in the early part of 1932, he threatened to attack the wife with a knife, broke a finger of her left hand, and punched her in the right eye. The charges were denied by the husband, and on Jan. 22, 1952, the wife's petition was dismissed. The wife then filed a petition, dated Oct. 2, 1952, for divorce on the ground of the husband's desertion, alleging, *inter alia*, that from about 1926 the husband frequently quarrelled with and abused the wife; that in 1927 she had become suspicious that the husband was carrying on an improper association with L.B.T., and that when she asked the husband to see less of L.B.T. their relationship became further strained; that between 1927 and 1930 the husband kept her short of money and frequently told her that he no longer wanted her and wished that she would go; that in April, 1930, when the wife refused to share a bedroom with L.B.T., the husband left the house with L.B.T. to find alternative accommodation; and the wife repeated the three allegations in her former petition relating to the revolver, throwing her belongings out of the window, and breaking her finger, and said that by such conduct the husband had in April, 1932, driven her from the matrimonial home. The husband, by his answer, denied the charge of desertion and pleaded that the wife was estopped *per rem judicatam* from making any of these allegations. On these preliminary issues,

F HELD: it was necessary in proceedings in the Divorce Division to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the other party; in the latter event, as here, no interest of the public was infringed by saying that a party was estopped *per rem judicatam* from repeating allegations that had previously been the subject of judicial determination, and, therefore, the ordinary rules of estoppel applied: *Hudson v. Hudson* ([1948] 1 All E.R. 773), distinguished; and, accordingly, G (i) since the allegation of adultery had been dismissed in the previous suit the wife could not now allege that she had reasonable grounds for belief in such adultery and the allegations relating to this would be struck out; *Allen v. Allen* ([1951] 1 All E.R. 724), applied; (ii) the allegations of threats of violence and of actual assault, which repeated the allegations in the previous petition, would also be struck out since the acts alleged either did or did not amount to cruelty, and if, as had been held H in the earlier suit, they did not amount to cruelty, they could not now be relied on as "grave and weighty matters" to support a charge of constructive desertion, for by their very nature the acts either constituted cruelty or amounted to nothing: *Dixon v. Dixon* ([1953] 1 All E.R. 910) and *Foster v. Foster* (*ante*, p. 518), distinguished; *Timmins v. Timmins* (*ante*, p. 187), considered; (iii) the allegations that the husband had

quarrelled with and abused the wife, had kept her short of money, and had frequently told her that he no longer wanted her and wished that she would go, had not been specifically raised in the previous proceedings, but could and should have been raised in support of the charge of cruelty then made, and, therefore, those allegations would also be struck out: *Hoystead v. Taxation Comr.* ([1926] A.C. 155), applied; (iv) the remaining allegation, that the husband left the wife in April, 1930, raised a case of simple desertion which had not been investigated in the former suit, and, therefore, would not be struck out, and the wife would have leave to amend her petition to enable her to charge her husband with simple desertion at that date.

AS TO ACTS CONSTITUTING CRUELTY AS A GROUND FOR DIVORCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-653, paras. 954-960; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 294-306, Nos. 2393-2534.

AS TO CONSTRUCTIVE DESERTION—WIFE FORCED OUT OF MATRIMONIAL HOME, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

AS TO RES JUDICATA AS AN ESTOPPEL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 159-236, Nos. 213-657.

Cases referred to:

- (1) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest, Replacement, 84, 633.
- (2) *Pike v. Pike*, [1953] 1 All E.R. 232.
- (3) *Timmins v. Timmins*, [1953] 2 All E.R. 187.
- (4) *Dixon v. Dixon*, [1953] 1 All E.R. 910; [1953] P. 103.
- (5) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.
- (6) *Edwards v. Edwards*, [1949] 2 All E.R. 145; [1950] P. 8; [1949] L.J.R. 1335; 113 J.P. 383; 27 Digest, Replacement, 366, 3022.
- (7) *Yeatman v. Yeatman*, (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 27 Digest, Replacement, 365, 3019.
- (8) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
- (9) *Henderson v. Henderson*, (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.
- (10) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 27 Digest, Replacement, 599, 5604.
- (11) *Hudson v. Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 27 Digest, Replacement, 517, 4603.
- (12) *Finney v. Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest, Replacement, 375, 3092.
- (13) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest, Replacement, 363, 3005.
- (14) *Winnan v. Winnan*, [1948] 2 All E.R. 862; [1949] P. 174; [1949] L.J.R. 345; 27 Digest, Replacement, 375, 3098.
- (15) *Foster v. Foster*, [1953] 2 All E.R. 518; 117 J.P. 377.

PETITION by the wife for dissolution of marriage.

The parties were married in Sierra Leone on Jan. 15, 1911. There were three children of the marriage. The parties were African and were domiciled in Sierra Leone, but they came to England for some time in 1930 and later returned to Sierra Leone. On Apr. 30, 1932, the wife filed in the Supreme Court of Sierra

Leone a petition for judicial separation on the ground of the husband's cruelty, but the wife did not proceed and the petition remained on the court file. Ever since April, 1932, the parties had lived separate and apart. In 1942 the wife came to England and had remained in England ever since. The husband, who was a doctor, remained in Sierra Leone. The wife filed a petition dated Apr. 21, 1950, for dissolution of the marriage, in which she alleged that the court had jurisdiction to entertain the petition on the ground that she had been resident in this country for the preceding three years, in accordance with the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (now the Matrimonial Causes Act, 1950, s. 18 (1) (b)). She further alleged that the husband had committed adultery with one L.B.T., his half-sister, and the petition continued:

" 12. That the [husband] has since the celebration of the marriage treated the [wife] with cruelty. 13. That in or about 1913 at Park House, Garrison Street, Freetown aforesaid, the [husband] struck the [wife] a violent blow on the thumb with a stick, breaking the skin and causing severe bruising. 14. That in or about 1915, at Park House, Freetown aforesaid, the [husband] pushed the [wife] violently against the corner of a bed post, and her left eye was thereby severely cut and bruised. 15. That in or about the year 1926, at the White House, Freetown aforesaid, the [husband] struck the [wife] a violent blow on the head with a shoe. 16. That in or about 1927 at the White House, Freetown aforesaid, the [husband] drew a revolver from his pocket and threatened to shoot the [wife]. 17. That in or about 1928 the [husband], who frightened the [wife] by the violence of his temper, threw several of her belongings out of the window of the White House, Freetown aforesaid, and threatened to throw her out of the house. 18. That in January, 1932, when the [wife] was living apart from the [husband] at the White House, Freetown aforesaid, the [husband], in an angry and threatening manner, entered the said house with some half dozen persons against the will of the [wife] and forced her to run from the house and seek the protection of the police. 19. That in or about the early part of 1932 at the White House, Freetown aforesaid, the [husband] advanced towards the [wife] with a knife in his hand, threatening to attack her. A violent struggle took place between the [husband] and . . . a nephew by marriage of the [wife], who was present and who came to her assistance. The [husband's] knife was taken from him, but he broke free, seized the [wife] by her left hand and broke her finger by twisting it, he then struck the [wife] a violent blow with his clenched fist in her right eye. 20. That from the early days of the marriage the [husband] caused the [wife] great distress and anxiety by his frequent demands for large sums of money. 21. That the [wife] has by reason of the [husband's] conduct suffered injury and risk of injury to her health."

The husband, by his answer, denied the allegations of adultery and cruelty. The suit was heard by Mr. Commissioner BUSH JAMES, Q.C., who dismissed the petition on Jan. 22, 1952.

By a petition dated Oct. 2, 1952, the wife now sought a dissolution of the marriage on the ground of desertion, and alleged :

" 8. That the [husband] has deserted the [wife] without just cause for a period of three years immediately preceding the presentation of this petition, to wit, from and since about the month of March, 1932. The circumstances of the desertion are set out in paras. 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 hereof. 9. That from about the year 1926 the attitude of the [husband] towards the [wife] changed and the [husband] frequently quarrelled with and abused the [wife]. 10. That during the year 1927 the [wife] received a letter from the [husband], who was in England, from which the [wife]

became suspicious that the [husband] was carrying on an improper association with his half-sister, [L.B.T.]. 11. That when the [husband] returned to the matrimonial home, the White House, Freetown, Sierra Leone, he refused the [wife's] request that he should see less of the said [L.B.T.], and relations between the [wife] and the [husband] became further strained. 12. That between the years 1927 and 1930 the [husband] habitually kept the [wife] short of money. 13. That between the years 1927 and 1930 at the White House, Freetown aforesaid, the [husband] frequently told the [wife] that he no longer wanted her and wished that she would go. 14. That in or about the year 1927 at the White House, Freetown aforesaid, the [husband] threatened the [wife] with a revolver. 15. That in or about the year 1928 at the White House, Freetown aforesaid, the [husband] threatened to throw the [wife] out of the house, and in fact threw some of her belongings out of a window and told her to go. 16. That in or about the month of April, 1930, at 18, Albany Road, Stroud Green, in the county of London, when the [wife] refused to share a bedroom with the said [L.B.T.], the [husband] refused to stay in the same house with the [wife], and left forthwith to find alternative accommodation with the said [L.B.T.], and the [husband] did not return to the [wife] while they remained in England. 17. That in or about the month of March, 1932, at the White House, Freetown aforesaid, the [husband] threatened the [wife] with a knife, broke one of her fingers by twisting it, and struck her a violent blow on her right eye with his clenched fist. 18. That by his conduct as aforesaid the [husband] evinced an intention to drive the [wife] from the matrimonial home with the object of bringing cohabitation between the [wife] and the [husband] permanently to an end; and that the [wife] was thereby in or about the month of April, 1932, driven from the matrimonial home at the White House, Freetown aforesaid, and has not thereafter returned to cohabitation with the [husband] and her health has been damaged by the [husband's] treatment of her."

This petition was served on the husband in Freetown on Oct. 31, 1952. No appearance was entered by the husband, and on Jan. 23, 1953, application was made by the wife to DAVIES, J., for an expedited hearing as a witness from the Gold Coast, then in England, was intending to return home. The application was granted and the case came as an undefended suit before His Honour JUDGE GRANVILLE WHITE, sitting as a commissioner in divorce, who, on Feb. 9, 1953, granted a decree nisi in favour of the wife. Before the decree had been made absolute, the husband filed notice of motion for a re-hearing, in pursuance of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36 (1). On June 23, 1953, the Divisional Court set aside the decree nisi and ordered a re-hearing. By his answer, dated June 23, 1953, the husband denied desertion, and said that the matters alleged in para. 10 had been litigated before and pronounced on by Mr. Commissioner BUSH JAMES, Q.C.; that the allegations in para. 14, para. 15 and para. 17 were identical in substance with the allegations in para. 16, para. 17 and para. 19, respectively, of the previous petition; and

"That the [wife] ought not to be admitted to plead desertion and is estopped from pleading that she had just cause as alleged in . . . her petition on the ground that she is seeking to re-litigate matter which has already been determined in the judgment of Mr. Commissioner BUSH JAMES, Q.C. . . . The merits of the said pleas are *res judicata*."

This report deals with the preliminary issue of estoppel thus raised, as decided by WILLMER, J., on July 29, 1953.

C. N. Shawcross, Q.C., and R. T. Barnard for the wife.
Simon, Q.C., and Gorst, Q.C., for the husband.

WILLMER, J.: This case arises out of a wife's petition for divorce on the ground of desertion. In its present form, the petition constitutes a plea of constructive desertion, for it is alleged that on a date in April, 1932, the wife by reason of the husband's conduct was driven out of the matrimonial home. I have to deal with two preliminary questions which have been raised on the threshold of the trial. On the one side, the husband contends that the wife is estopped per rem judicatam from raising the allegations which she now

- A** seeks to raise to show that the husband was guilty of desertion by driving her out. The reason for that contention is that there was a previous petition by the wife against the husband on the grounds of cruelty and adultery. That petition was heard by Mr. Commissioner BUSH JAMES, Q.C., in January, 1952, and was dismissed. It is contended on behalf of the husband that all the allegations which are now put forward in support of the plea of constructive desertion
- B** were either put forward and dismissed in the course of the previous proceedings, or else are such that they could, and ought to, have been put forward as part of the case which was then presented. On those grounds, it is urged that the wife ought not to be allowed to litigate again what amounts to substantially the same case as she sought to put forward on the previous occasion. On the
- C** other hand, the wife asks leave to amend her petition by including an alternative plea of simple desertion on a date in April, 1930. It is not, nor I think can it be, suggested, that such a plea would be barred by any estoppel arising out of anything decided in the previous case; but it is urged on behalf of the husband that, if I accede to the husband's application and refuse to allow the wife to put forward her allegations of constructive desertion, I ought not,
- D** especially at this very late stage, to allow her to make such a radical amendment of her case. On the other hand, if I allow all, or some, at any rate, of the wife's allegations of constructive desertion to stand, then, as I understood counsel for the husband, it is conceded that it would be difficult to resist the wife's application to amend. It was quite properly pointed out on behalf of the wife that this is an unfortunate way of dealing with an application of this sort.
- E** The proper way to deal with it would have been to apply in chambers before trial for an order striking out the offending part, or parts, of the petition, so as to get these questions decided without waiting for the trial, and without incurring the expense of collecting the witnesses and making all the other preparations for trial. However, that course was not taken and, unfortunate
- F** as it may be that it was not, I do not think it affects the merits of the application; it only goes to the question of costs. I think it remains true to say that, if the wife is estopped by reason of the judgment in the previous proceedings, it would clearly be wrong for me to allow the present suit to proceed.

- I think it will be convenient if I state my decision on these difficult questions straight away, and then proceed to give the reasons which have guided me to that decision. On the main question I have come to the conclusion that the
- G** wife is estopped per rem judicatam from raising any of the allegations in the petition which go to support her plea of constructive desertion. That, as I see it, involves para. 9 to para. 15 of the petition, both inclusive, and also para. 17 and para. 18. It does not, however, so far as I can see, touch para. 16, which alleges that in April, 1930, the husband refused to stay in the same
- H** house as the wife and left forthwith to find alternative accommodation. I cannot see that anything was decided in the previous proceedings which would involve any estoppel against the wife in raising that allegation. That is an allegation of a physical separation induced by the act of the husband in April, 1930, and it leads me at once to the amendment asked for by the wife, namely, the amendment to raise the allegation of simple desertion in April, 1930. That corresponds with the allegation in para. 16 of the petition, and as I cannot

see that there is any estoppel against that allegation it seems to me that I ought to allow leave to amend in order to allege a simple desertion in April, 1930.

Now for the reasons which have led me to that conclusion. [His LORDSHIP stated the facts and continued:] I will endeavour to summarise the objections taken by the husband to the allegations now made. Paragraph 10 and para. 11, which raise allegations of an association between the husband and his half-sister, L.B.T., which, it is said, prompted suspicions in the mind of the wife, are objected to on the ground that it is no longer open to the wife to allege that she had any reasonable grounds for suspicion, having regard to the finding of the learned commissioner that the association complained of was not in fact a guilty association. On that point, the husband relies on the decision of the Court of Appeal in *Allen v. Allen* (1), which made it clear that, once the court has decided that a charge of adultery has not been proved, it is no longer open to the complaining party to say that he or she had reasonable ground for believing in such adultery. Paragraph 14, para. 15 and para. 17 raise allegations of threats of violence or of actual assault, and it is complained by the husband that they are mere repetitions of allegations made in the previous petition and expressly dealt with by the learned commissioner in his judgment, whereby he found that the allegations made were not proved. He came to the conclusion that nothing which the husband did in the way of threats or assault amounted to cruelty, and, in those circumstances, it is said that the same allegations cannot now be raised in support of a plea of constructive desertion. In support of that contention, I was referred to the decision of the Court of Appeal in *Pike v. Pike* (2), and particularly to the remarks of HODSON, L.J., and DENNING, L.J. In that case, an attempt was made to set up a case of constructive desertion by alleging acts which, if they were anything at all, were acts of cruelty, and the Court of Appeal decided that a party desiring to put forward such a case must charge cruelty. It will be sufficient if I read two extracts. HODSON, L.J., said ([1953] 1 All E.R. 235):

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty."

Pausing there, it is said that what is there described by HODSON, L.J., is exactly what the wife is trying to do in this case, that is to say, she is trying to build up a case of constructive desertion by what is really a case of unproved cruelty. DENNING, L.J., said (*ibid.*, 236):

"In the circumstances of this case, the husband's conduct was either cruelty or it was not. It was not something different from cruelty. For the wife to justify her refusal to return, the only thing she could rely on would be the husband's cruelty, and in such a case cruelty must be pleaded and proved."

The observations of DENNING, L.J., were developed and explained by him in *Timmins v. Timmins* (3), when he said (*ante*, p. 191):

"We were referred to *Pike v. Pike* (2), and, in view of some comments made on it by DAVIES, J., in *Dixon v. Dixon* (4), I think I ought to explain some of the things I there said. In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a 'grave and weighty' character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty

because it lacks the element of injury to health: as in *Russell v. Russell* (5) and *Edwards v. Edwards* (6); or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but, nevertheless, it may give good cause for leaving, as the cases which I have cited earlier amply show. On the other hand, conduct which is not 'of a grave and weighty character', and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman v. Yeatman* (7). It is conduct of that kind to which I referred in *Pike v. Pike* (2) when I said ([1953] 1 All E.R. 235) that conduct 'less than cruelty' does not justify a spouse in leaving. In the present case, the conduct of the husband was, I think, of a grave and weighty character, and the only reason why it was not cruelty was because there was no intent to injure. It comes, therefore, within the earlier cases to which I referred."

To that quotation I would add that in the present case it is suggested that the conduct complained of comes within the latter class referred to by DENNING, L.J., that is to say, in the present case it is said that the acts relied on by the wife were either acts of cruelty or else they were not grave and weighty matters at all. That being so, since the learned commissioner decided they were not acts of cruelty, they cannot be relied on as grave and weighty matters justifying the allegation of constructive desertion.

I come next to para. 9, para. 12 and para. 13. These relate to matters which appear not to have been specifically raised in the previous proceedings, but it is argued that all the matters alleged could, if true, have been raised in support of the charge of cruelty then made. That being so, it is contended that the court ought not now to entertain them, especially having regard to the general principles relating to estoppel which have been laid down in the decided cases. The locus classicus to which I was referred in this connection is *Hoystead v. Taxation Comr.* (8). I need not refer to the facts of that case which have no relation to those of the present case, but, in giving the judgment of the Privy Council, LORD SHAW stated the principle in the following oft-quoted words ([1926] A.C. 170):

"It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson* (9) by WIGRAM, V.-C., as follows (3 Hare, 114): 'I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law."

On the principles there stated, it is contended by the husband that these allegations in para. 9, para. 12 and para. 13 of the present petition, although not

raised in the previous petition, nevertheless ought not to be allowed to be raised now.

On behalf of the wife it was contended in the first place that in relation to questions of estoppel the principles applied in this court differ materially from those applied in the ordinary civil courts. They differ, it is said, because of the overriding interest which the public has in proceedings in this court, particularly in proceedings which raise questions of status. No one will desire to quarrel with the statement that this court is concerned, as no ordinary civil court is concerned, with the public interest. It is argued that for that reason the ordinary rules of estoppel per rem judicatam do not apply here. In support of that contention, I was referred to some remarks of LANGTON, J., in *Winter v. Winter* (10). That was a case of an application for re-hearing by a husband, who had allowed an undefended petition by his wife to go through and then changed his mind about it. LANGTON, J., sitting in the Divisional Court, made it clear that the husband personally had no merits whatsoever. The Divisional Court, nevertheless, made an order for a re-hearing of the case, largely because they held that they were concerned, not only with the interests of the unmeritorious husband, but also with the public interest of ensuring that his case was properly investigated and that the wife did not obtain relief to which she was not properly entitled merely because of the absence of the husband.

The facts of *Hudson v. Hudson* (11) were more like those of the present case. That was a case in which the question was raised whether a husband, against whom a justices' order had been made on the ground of persistent cruelty, was estopped by that order from contesting the same allegations of cruelty when brought in this court in the course of a petition for divorce. It was held that there was no estoppel, notwithstanding the fact that the justices' order had been the subject of an unsuccessful appeal to the Divisional Court who had expressly affirmed it. The decision, I think, is conveniently summed up by the second sentence of the headnote ([1948] P. 293) which says:

"In the Divorce Court the matter is not concluded per rem judicatam; and no doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before it."

From that it is argued that the public interest prevents me from striking out, on the ground of estoppel, these paragraphs of the petition which are now objected to. I think that that argument rests on a misapprehension, and on a failure to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the opposite party. It is one thing to say that the husband is not estopped from denying charges made by the wife, i.e., that the wife cannot in this court get relief simply because the husband is estopped from denying the charges. In that case the public interest, no doubt, does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But it is quite another thing to say that a petitioner, who is, if I may use the expression, the aggressor, the party bringing the charges, is entitled to persist in repeating allegations which have already been the subject of previous proceedings and have already been determined against him or her, and to do this merely for the purpose of obtaining relief for himself or herself. In such circumstances, as I see it, no interest of the public is infringed by saying that the petitioner is estopped per rem judicatam from repeating allegations that have previously been the subject of judicial determination. On the contrary, there is abundant authority for the proposition that in such cases the

doctrine of estoppel applies with its full force in this as in any other court. I do not propose to refer in detail to the wealth of authority on this subject; most of the cases are collected in *RAYDEN ON DIVORCE*, 6th ed., p. 185; and the text, which states the law, as far as I can see, in an unexceptionable way, reads (*ibid.*, p. 184):

- A "Charges which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for not only does the common law doctrine of estoppel apply, but, since in matrimonial causes a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship. The rule applies not only to the actual point of decision in the previous case, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
- B

I refer to a good example in *Finney v. Finney* (12), which has been approved in *Harriman v. Harriman* (13), and in *Winnan v. Winnan* (14). In those circumstances I do not think there is any merit in the first objection which the wife takes, and I hold that the ordinary rules as to estoppel per rem judicatam apply in relation to the allegations contained in this petition.

C

- The next objection taken is that, notwithstanding that the rules of estoppel may apply, nevertheless there is authority against holding that, where there has been a determination with regard to allegations of cruelty, the petitioner is necessarily estopped from raising the same allegations again in support of a plea of constructive desertion. On this aspect of the case it seems to me the wife has a more formidable argument. I was referred in the first instance to the recent decision of *DAVIES, J.*, in *Dixon v. Dixon* (4). That was a case which came before the learned judge in chambers on an application to strike out from a petition a plea of constructive desertion on the ground that the allegations put forward in support of it were the same allegations as had been the subject of an unsuccessful petition for cruelty. In other words, on the face of it, the problem before the learned judge in that case was precisely the same as the problem before me now. The difference is that there the learned judge was dealing with the application at the proper time, viz., on a summons in chambers before the trial, whereas I am asked to deal with it at the trial. The summons was adjourned into court, and we, therefore, have the benefit of a report of the judgment. *DAVIES, J.*, in that case felt himself unable to accede to the application, and, consequently, refused to strike out the offending paragraphs. I was invited by the wife to follow the decision of *DAVIES, J.*, in that case, but, for reasons which I will try to explain, it seems to me that the circumstances in *Dixon v. Dixon* (4) are distinguishable in material particulars from those of the present case. One of the difficulties which *DAVIES, J.*, appears to have felt, and to which he gave expression in the course of his judgment, was the difficulty of reconciling what was said in *Pike v. Pike* (2), in the passages to which I have already referred, with the decision (also of the Court of Appeal) in *Edwards v. Edwards* (6). The other circumstance which caused difficulty, and which, I think, was one of the main reasons for his decision, was the fact that in that case the judgment of the learned commissioner who had tried the original petition for cruelty was extremely brief; it did not deal in detail with all the various allegations put forward, and did not in the least make it clear what exactly the learned commissioner was deciding with regard to the various allegations. In those circumstances *DAVIES, J.*, although, I think, obviously feeling sympathy for the application, held that it was impossible to take the drastic course of striking out the allegations in limine, but that the case must be allowed to go to trial. This case which is before me is somewhat different.
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For here the judgment of the learned commissioner in the previous petition for cruelty is very full and deals in detail with the various allegations that were raised. In particular, the judgment deals specifically with the allegations as to threats and assaults which are repeated in the present petition. So I do not share the difficulty of DAVIES, J., of not knowing what the learned commissioner in the previous proceedings really decided in relation to the allegations now made. Another matter in respect of which, it seems to me, I have the advantage of DAVIES, J., is that the difficulty of understanding what was meant by the Court of Appeal in *Pike v. Pike* (2) does not now persist, for since the decision of DAVIES, J., in *Dixon v. Dixon* (4) *Timmins v. Timmins* (3), to which I have already referred, has been before the Court of Appeal, and I have had the benefit of the explanation given in *Timmins v. Timmins* (3) of what had previously been said in *Pike v. Pike* (2). It may be that if DAVIES, J., had had the advantage, which I have had, of reading what was said in *Timmins v. Timmins* (3), he might have come to a different conclusion. I do not know, but at any rate, in view of what was there said in the passage to which I have already referred (ante, p. 191), it appears to me that in relation to these allegations of violence or threats of violence the principle applies that either they were acts of cruelty, or, if they were not acts of cruelty, they were not "grave and weighty" matters at all. They cannot be put forward as "grave and weighty" matters other than cruelty on the ground, for instance, that they were not calculated to injure health or did not involve any intent to injure. By their very nature they either come within the class of acts calculated to injure health or intended to injure, or else they do not amount to anything at all; and if they do not amount to anything at all (which, as I see it, is the effect of the judgment of the learned commissioner), then they cannot be relied on as "grave and weighty matters" to support a charge of constructive desertion. At any rate, having the advantage of the decision in *Timmins v. Timmins* (3), and bearing in mind the great difference between the judgment which is said to raise the estoppel in this case and that which was before DAVIES, J., in *Dixon v. Dixon* (4), I do not think I can hold myself bound by the decision in *Dixon v. Dixon* (4).

Another authority strongly relied upon on behalf of the wife was *Foster v. Foster* (15). That was a case in which there had been two summonses by the wife before different benches of justices. There was an earlier summons before one bench of justices on the ground of persistent cruelty, which the justices dismissed. There was a later summons, which came before a different bench, on the ground of constructive desertion arising partly out of the same circumstances as the previous summons for cruelty, and in that second case, the second bench of justices found in favour of the wife. The question was then taken to the Divisional Court on appeal from the decision of the second bench of justices. The Divisional Court thus had to deal with a case where allegations, which had been the subject of a previous summons for cruelty, were again used to support a summons based on constructive desertion. It was a case about which the Divisional Court clearly felt difficulty. I notice from the dates given at the head of the report that it appears to have occupied the attention of the court for three days. Eventually the Divisional Court came to the conclusion that they could not interfere with the decision of the second bench of justices. There was in that case, in addition to the matters put forward as allegations of cruelty in the earlier case, evidence of certain other acts said to have been done by the husband subsequent to the date of the acts relied on in the first proceedings. The problem before the Divisional Court was not, of course, the same as that which I have to deal with here, viz., whether a party is to be allowed to make the allegations at all. There the allegations had already been made, and evidence given in support of them, in the course

A of the proceedings before the justices. The problem before the Divisional Court was whether there was admissible evidence by which the decision of the justices, the subject of the appeal, could be supported. Their decision was that there was enough, I think I can add just enough, evidence to support the decision of the justices. I think it is made clear from the report that in coming to that decision LORD MERRIMAN, P., and COLLINGWOOD, J., were impressed by the fact that, in addition to the allegations which had been the subject of the previous proceedings for cruelty, there were other allegations of subsequent behaviour on the part of the husband, which were capable of supporting a charge of constructive desertion. If that is right, then clearly *Foster v. Foster* (15) is distinguishable from the case which I have to decide now, quite apart, of course, from the obvious distinction to which I have already referred, viz., B that the problem to be solved by the Divisional Court was not the same as that which I have to deal with here.

C In the result, I hold that so far as this petition raises the same allegations as those put forward in the previous petition for cruelty the wife is estopped from reiterating those allegations in support of her plea of constructive desertion. That decision governs para. 14, para. 15 and para. 17, which, as I pointed out, are paragraphs reiterating matters which formed the subject of specific allegations and specific findings in the previous case. With regard to para. 9, para. 12 and para. 13, which raise matters not specifically raised in the previous proceedings, it is clear to me that these allegations are all allegations which could well have been made as part of the cruelty case which was then sought to be set up; indeed, one could go further, and say, from experience D of this court, that each of them is of the type commonly raised in almost every cruelty case that comes before this court. In those circumstances, it appears to me that every word that was said in *Hoystead v. Taxation Comr.* (8), in the passage to which I have already referred, applies with its full force. In my judgment, the wife ought not now to be allowed to raise these allegations, which could have been raised as part of her case of cruelty if they are allegations E of substance. With regard to para. 10 and para. 11 of the petition, as I have said, the learned commissioner found that the association between the husband and his half-sister was not an adulterous association. Actually he went further than that, because in the discussion which followed the conclusion of his judgment he said:

F "I do not think these charges of incestuous adultery should ever have been brought. I think they are wicked."

That is a strong statement by the learned commissioner who tried the case. Having regard to his finding on those charges of adultery, it is no longer open in law for the wife to allege that she has reasonable cause to suspect the husband's association with the woman named. That is the result of *Allen v. Allen* (1), to which I have already referred. At no time, therefore, subsequent G to January, 1952, when the learned commissioner pronounced his judgment, could the wife rely on that suspicion in support of her plea of constructive desertion. The importance is that this petition, as I have said, was not presented until October, 1952, and, as is well-known, the desertion complained of in a petition for divorce must cover the three years immediately preceding the presentation of the petition. Having regard to the decision of the learned commissioner in January, 1952, it appears to me that from that time onwards H it was impossible for the wife to rely in support of her allegation of constructive desertion on the suspicion which she says she had about her husband's relationship with the woman named. In those circumstances I do not think it is open to the wife now to complain, as part of her case of constructive desertion, that she suspected that association.

That leaves only para. 8 and para. 16. Paragraph 8 is the subject of the application for amendment to which I have already referred, and I venture to suggest to counsel for the wife that, perhaps, para. 16 requires amendment as well. But, as I said at the outset of this judgment, I cannot see that the wife is in any way estopped, by reason of any finding in the previous proceedings, from alleging that the husband left her in April, 1930. No such allegation was put forward as part of the charge of cruelty which was investigated in the previous proceedings, nor, so far as I know, is it in any way connected with the charge of adultery which was then made. I say that, notwithstanding the fact that in para. 16 the name of the woman named is actually referred to, but it is not referred to in connection with any charge of, or suspicion of, adultery. I can see no ground, therefore, on which I can fairly say that para. 16 ought to be struck out. If that paragraph is to remain, then it seems to me that in order that the pleadings in the case should bear some relation to that which it is desired to prove by evidence, I ought to allow the amendment sought for the purpose of alleging simple desertion in April, 1930. I have not said a word so far on the subject of delay, but I cannot help adverting to the fact that the act of desertion, which it is now desired to allege, is said to have happened twenty-three years ago, and this is not the first opportunity which the wife has had of bringing it forward. It is true that she could not proceed in this country until 1949, but unless I am told I am wrong I should assume she could have proceeded a good deal before that in her own country. In those circumstances it is obvious that the question of delay must arise. I have not dealt with it in what I have said so far, because it seems to me that it comes properly at a later stage of the case; it is one of the things about which the wife will clearly have to be questioned, if the case goes on and she has to give her evidence, and in the end it may be that I shall have to consider whether the delay has been such that, in my discretion, I ought to refuse relief.

[HIS LORDSHIP then heard the evidence and, on July 31, 1953, dismissed the wife's petition.]

Solicitors: *Sidney Franks* (for the wife); *How, Davey & Lewis* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA AND
ANOTHER v. HUGGARD ASSETS, LTD., AND ATTORNEY-
GENERAL OF CANADA AND OTHERS (INTERVENERS).

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone), October 6, 7, 8, 9, 13, 14, 15, 16, 20, 21, 1952, March 24, 1953.]

Privy Council—Canada—Alberta—Crown lands—Grant by Dominion of rights over petroleum and natural gas—Power to impose royalties—Validity of royalties imposed after grant—Transfer of rights in Crown land from Dominion to Province—Dominion Lands Act, 1908 (c. 20), s. 76 (k)—Natural Resources Act [Transfer Agreement Act], 1930 (S.A., 1930 (c. 21)), s. 1, s. 3.

The respondents H.A., Ltd. (the plaintiffs in the action), were the successors in title to rights in respect of petroleum and natural gas in certain Crown lands in Alberta granted by the Crown in August, 1913, in right of the Dominion of Canada, pursuant to Orders in Council of 1911 and 1913. The grant contained, inter alia, the following terms "... to have and to hold the same unto the grantee in fee simple, yielding and paying unto us and our successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of our governor in council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect of royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on Sept. 1, 1909 . . ." At the time of the grant there were regulations in force affecting the terms on which the Dominions could dispose of Crown lands, but there was no specific rate of royalty chargeable for petroleum or natural gas. The regulations in force on Sept. 1, 1909, referred to in the grant of August, 1913, were the Consolidated Regulations, 1906, made under the provisions of the Dominion Lands Acts, 1886 to 1892, which provided, by para. 6, for the levying of a variable royalty. At the time of the grant the Dominion Lands Acts, 1886 to 1892, and the regulations thereunder had been repealed or superseded by the Dominion Lands Act, 1908, and the Orders in Council of 1911 and 1913 were made pursuant to s. 76 (k) of the Act of 1908, giving the governor in council power to make orders and regulations concerning the disposal, etc., of Crown land and mineral rights. By the Natural Resources Act [Transfer Agreement Act], 1930, of Alberta the rights and powers in respect of Crown lands, mines and minerals, etc., in Alberta were transferred to the Crown in right of the province, and by Orders in Council made between 1941 and 1948, the province of Alberta purported to impose a royalty on any petroleum or natural gas derived from lands so vested in the province. The respondents thereupon brought an action for, inter alia, a declaration that the province was not entitled to exact any such royalty. On appeal from the Supreme Court of Canada,

HELD: (i) on the true construction of the grant, and, in particular, having regard to the words "from time to time", the Crown was empowered to impose royalties in respect of petroleum and natural gas by regulations made after the date of the grant;

(ii) even assuming that a grant subject to a variable royalty was inconsistent with the requirements of tenure in free and common socage (established for the land in question by a charter of 1670), the terms of

grants of land were now governed by the Dominion Lands Acts and the regulations and orders made thereunder, passed subsequent to 1870, which had validated the grant.

Per curiam: The Statute of Tenure, 1660, does not apply to Canada.

(iii) section 78 (k) of the Act of 1908 giving power to the governor in council to "... further make any regulations which are considered necessary to give the provisions of this section full effect" did not preclude the governor from making the orders of 1911 and 1913 embodying the regulations of 1906, even though they had been superseded, and the effect of the orders, read together, was to validate the grant of 1913 including the imposition of royalties, and this right to levy a "variable royalty" was a right which, within s. 3 of the Alberta Transfer Act, 1930, by "contract . . . or other arrangements . . . relating to . . . lands, mines, minerals or royalties" was transferred by s. 1 and s. 3 of the Act from the Crown in right of the Dominion to the Crown in right of the province, and, consequently, the province, by the Orders in Council of 1941-48, was justified in levying the royalties in question.

Cases referred to:

- (1) *Majestic Mines, Ltd. v. A.-G. for Alberta*, [1941] 2 W.W.R. 353; 2nd Digest Supp.
- (2) *Walker v. Walker*, [1919] A.C. 947; 88 L.J.P.C. 156; 121 L.T. 618; 17 Digest 457, 240.
- (3) *Board v. Board*, [1919] A.C. 956; 88 L.J.P.C. 165; 121 L.T. 620; 17 Digest 457, 242.
- (4) *Parker v. Harris*, (1692), 1 Salk. 262 (91 E.R. 230); Holt, K.B. 411 (90 E.R. 1127); 31 Digest, Replacement, 242, 3764.

APPEAL by special leave from a judgment of the Supreme Court of Canada, dated Feb. 6, 1951. The facts appear in the judgment.

Wilson, Q.C. (of the Canadian Bar), *Gahan, Q.C.*, and *W. Y. Archibald* (of the Canadian Bar) for the appellants.

Cross, Q.C., and *N. S. S. Warren* for the respondents.

Gahan, Q.C., for the Attorney-General of Canada, *Wilson, Q.C.* (of the Canadian Bar), for the Attorney-General of Manitoba, and *Shumiatcher, Q.C.* (of the Canadian Bar), for the Attorney-General for Saskatchewan, interveners in support of the appellants.

Mar. 24. **LORD ASQUITH OF BISHOPSTONE** delivered the following judgment of the Board. The issue raised on this appeal is, shortly, whether the Crown in right of the Province of Alberta is entitled to levy certain royalties from Huggard Assets, Ltd., respondents in the appeal and plaintiffs in the action, on petroleum and natural gas derived by them from a certain area in that province.

The facts leading up to this litigation, which will have to be unfolded in more detail later, can, with advantage, be stated in brief outline at the outset. The plaintiffs claim an interest in these minerals as successors of a company called the Northern Alberta Exploration Co., Ltd., the original grantees of the area under a grant in the form of a patent dated Aug. 25, 1913. The grantor was the Crown in right of the Dominion. The Crown in right of Alberta succeeded, under the Transfer Agreement Act of 1930, to any right which the Crown in right of the Dominion had theretofore owned in Crown lands, mines and minerals situate in Alberta, and royalties derived therefrom; together with the right to enforce

"any power or right, which, by any contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands,

mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved "

to the Crown in right of the Dominion. These provisions have been described as constituting a "statutory novation", the province stepping into the shoes of the Dominion, and succeeding to its rights. The main issue in the case is whether the Dominion, at the time of the grant in 1913, was entitled to the right to exact royalties, which are now in dispute. The determination of that issue depends on the answer to the two further questions:—(1) What, on its true construction, does the grant of 1913 in its *reddendum* purport to provide in respect of royalties payable by the grantee? (2) Whatever on its true construction that provision means, is it legally valid and enforceable?

It may be convenient to set out the *habendum* and *reddendum* of the grant at this stage:

"... to have and to hold the same unto the grantee in fee simple, yielding and paying unto us and our successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of our governor in council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect of royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on Sept. 1, 1909..."

and there follow provisions for forfeiture on failure to pay such royalty. At the time of the grant there were regulations in existence affecting the terms on which the Dominion could dispose of Crown lands, mines and minerals in Alberta, but none of these regulations prescribed a specific rate of royalty chargeable in respect of petroleum or natural gas derived from these sources.

(1) The first question which their Lordships have to decide is whether, in these circumstances, having regard to the terms of the grant, and, in particular, to the words "from time to time", the *reddendum* purported to entitle the Crown, as grantor—then in right of the Dominion—to levy royalties "prescribed" by a regulation, or a succession of regulations, made *after* the date of the grant. Their Lordships have considered this question and are clearly of opinion that the answer must be in the affirmative. The grant *does* purport to confer such a right on the grantor. This was the unanimous opinion of the Supreme Court of Canada. Any other answer would render the words "from time to time" meaningless. It is true that in *Majestic Mines, Ltd. v. A.-G. for Alberta* (1), a different conclusion was reached but the crucial words "from time to time" were absent, and clearly the decision might have been the other way if they had been present. (Their Lordships may point out, as some argument was based on the words "if any" as used in the *reddendum* in the present case, that, in their view, these words plainly qualify the word "royalty" and not "petroleum or natural gas", or "natural gas" only.)

(2) This answer, however, merely disposes of the problem what it was that the grant *purported* to provide. A more difficult question remains, viz.: whether the grant could validly contain such a provision. This question emerged when, some time after the Transfer Agreement of 1930 had vested Crown lands, mines and minerals (situate in Alberta) and rights and powers in respect of royalties on such lands, etc., in the Crown in right of that province, the province, by various Orders in Council made between 1941 and 1948, purported to impose a royalty on any petroleum and natural gas derived from lands, etc., vested in the province by the Act of 1930. As the result of this imposition the

plaintiffs brought the present action and claimed in the prayer to their statement of claim the following relief:

"1. A declaration that the Lieutenant Governor in Council (of Alberta) was not entitled to exact any royalty with respect to petroleum and natural gas produced from the lands. 2. An order rectifying the patent by striking out all references to royalties."

Four points of varying importance may conveniently be noted here: (a) No facts are alleged or were proved which could possibly support a plea of rectification. There was no preceding contract representing the real bargain to which the terms of the grant failed to give effect. This disposes of the second branch of the prayer. (b) The plaintiffs at no stage contended—nor did the defendants—that the grant was *wholly* invalid. The plaintiffs impugned only the provision as to royalties, wishing this to be deleted and the rest to stand. (c) No point was taken in the statement of claim, or at any stage of the argument till the case was heard before this Board, to the effect that a grant in terms of this *reddendum* or a royalty levied in accordance therewith could only be authorised by a regulation as opposed to an Order in Council. At every stage until the ultimate appeal an Order in Council was assumed to be as good as a regulation for these purposes. Nevertheless, much of the Board's time was occupied with this argument and with a number of other contentions not raised below. (d) No point was taken by counsel prior to the hearing before this Board, that the English Statute of Tenures, 1660 (12 Car. 2, c. 24), extended to this region of Canada and invalidated any grant of minerals in fee simple on terms which permitted the Crown as grantor to levy a royalty, the existence or quantum of which could be determined from time to time by its own caprice or whim. This last point was, however, raised *proprio motu* by the Supreme Court of Canada, which, by a majority of four to three, decided the appeal before them largely on it.

It is now time to indicate the course which the proceedings below followed. The Supreme Court of Alberta, Trial Division (McBRIDE, J.), decided for the plaintiffs. It considered that only point (1)—the construction of the *reddendum* of the grant—was in issue. The learned judge decided—erroneously in their Lordships' view—that the *reddendum* did not, on its true construction, purport to entitle the Crown as grantor to impose royalties on petroleum and natural gas by regulations to be made in future, none having been imposed thereon by any regulation in force when the grant was made. He did not consider what might be the validity of a provision which *did* purport to give the Crown such a right: but decided for the plaintiffs on the ground that the Crown did not in the grant even stipulate for the power it claimed later to exercise. The defendants appealed to the Appellate Division of the Supreme Court which, the four learned judges being equally divided, dismissed the appeal. There was then a further appeal to the Supreme Court of Canada. The learned judges (seven in all) were unanimously of opinion that the learned trial judge and the Appellate Division were in error in supposing that the *reddendum* of the grant did not purport to have a prospective operation. They all thought that, according to its tenor, it empowered the Crown to prescribe royalties in respect of petroleum and natural gas by a regulation posterior to the date of the grant, albeit none were proscribed by any regulation anterior to that date. In this view their Lordships have recorded their concurrence. The Supreme Court, though favourable to the appellant defendants on this point, dismissed the appeal by a majority of four to three, for a different reason: one which, their Lordships were informed, was not raised before them by counsel, and which

had certainly been raised by no one in the Trial or Appellate Divisions. The main reason for this decision was that, owing to the supposed application of Charles II's Statute of Tenures, 1660 (12 Car. 2, c. 24), a royalty in the form contended for by the Crown was contrary to law, bad for uncertainty, and void, and that no competent legislation had validated it. They further held that the condition for payment of royalties being bad, the forfeiture clause conditioned on its breach was bad also, and that the grant was valid minus the provision as to royalties. Such is a bare summary of the three Canadian decisions on which the appeal came before this Board. The ratio on which the Supreme Court of Canada reached its conclusions, albeit by a bare majority, must be most carefully weighed, and a more precise account of it given; for so far it has only been adumbrated. But before doing so, their Lordships observe that it may prove convenient to describe a royalty which the grantor claims to be entitled to impose for the first time after the contract or grant, at any figure he chooses, or to vary from time to time at his uncontrolled discretion, as a "variable royalty". It will also make for brevity to refer to the areas which came to be called after 1670 "Prince Rupert's Land" and the "North Western Territories", simply as "Rupert's Land".

The argument in support of the proposition that the grant could not validly provide for a "variable royalty" in this sense of the term may be summarised under the following heads:—(1) A royalty is akin to rent if not a species of it. A rent must be "certain": and a rent variable at the whim of the lessor is uncertain. So, therefore, is a royalty similarly variable: and unenforceable independently of any argument founded on the statute of King Charles II. (2) The Statute of Tenures, 1660, applies to Canada or that part of it called Rupert's Land, which was vested in the Dominion in 1870 and from which, in 1905, Alberta (including the mineral lands in question) was carved out. This statute, by cll. 2 and 4, abolishes grants in fee of land on tenures (such as the old English tenure by knight service) for which the consideration consisted at one time of uncertain services, or of payments by way of composition for such services which reflected in their quantum or in the method of their determination the uncertainty of the services themselves. Clause 4 provided that

"all tenures hereafter to be created by the King's Majesty . . . Upon any . . . grants . . . of any estate of inheritance at the common law shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight service or in capite, and shall be discharged of all wardship value and forfeiture of marriage, livery, primer seisin, ousterlemain",

and certain other burdens incident to tenure by knight service. Clause 4 relates to estates to be created "hereafter". Clauses 1 and 2 abolish knight service tenure and its characteristic burdens (which in those clauses were described as including "escuage") in respect of existing estates, and convert them also into tenure by free and common socage, free from those burdens for the future. The hall-mark, it was said, in *LITTLETON*, *COKE ON LITTLETON*, and *BLACKSTONE*, of tenure by "free and common socage" was, and is, that any services, or cash composition in lieu thereof, must be "certain": and, so the argument continued, since a "variable royalty" could not be described as "certain" in any sense of the word, ergo "a variable royalty" was prohibited by the statute. (3) It was further contended that, whether or not the Act of 1660 applied to Rupert's Land with the results described in (2) above, in any case the charter, by which in 1670 Charles II granted Rupert's Land to the Hudson's Bay Company expressly included a term providing for the prevalence of free and common socage as the standard basis of tenure of land therein. The same result, it was suggested, could be reached if Rupert's Land was a "settled"

colony (as it has been since held to be: *Walker v. Walker* (2): *Board v. Board* (3)) even if there were no such provision in the charter, for it is well established that settlers import into a settled colony the common and statute law of their country as they existed at the time of settlement, and so far as applicable to the settled territory. But the terms of the charter would seem to make resort to this rule superfluous so far as the establishment of socage tenure is concerned. All these three arguments, even if otherwise sound, are liable to be met by two answers:—(i) that a “variable” royalty *is* consistent with “free and common socage”, or (ii) that, if it is not, Dominion legislation has displaced the requirement of such socage tenure and validated a form or forms of tenure which are inconsistent with it. The second of the three arguments—that based on the Act of 1660—may, in addition to these possible objections, be exposed to a third: namely, that the statute of Charles II never applied to Canada; or to the material part of Canada, namely, “Rupert’s Land”.

Their Lordships proceed to consider each of these three arguments in turn: in the first instance in abstraction from the possible effect of any “validating” legislation. (1) They do not consider that the first of the arguments in question is established. There may well be an analogy between royalties in respect of a grant, and rent in respect of a lease, and it may well be that rents must be in some sense of the word “certain”. But what does “certain” mean in this connection? What is an “uncertain” rent? A rent, payable in year one, the amount of which is to depend on events which cannot happen till year three, would seem to be in any sense of the word, “uncertain” and bad. The tenant could never tell till year three how much rent he was liable to pay in year one; consequently, neither he nor his lessor could know for how much, if anything, the latter could in year one distrain. This is an extreme case. Short of it, it is clear that a fluctuating rent is not, as such, necessarily “uncertain”—certainly not if it is mathematically calculable, so as to attract the operation of the maxim “certum est quod certum reddi potest”. The only decided case cited to the Board in which a rent was held “uncertain” is the old case of *Parker v. Harris* (4), the report of which is both laconic and obscure. It would seem that what was “uncertain” there was not the quantum of the rent but the times at which it was to be payable. It is said in the present case that the royalty is “uncertain” because its amount depends on the whim, from time to time, of the grantor. It seems doubtful whether this quality is fatal. In this very case, the charter of 1670 provided for a royalty which, in some sense, depends on the whim of the grantor, the King. He is to receive two elks and two black beavers every time he visits the territories in question. No one can tell whether he will visit the territory at all; nor if he does, how often: yet his unpredictable election to visit it never, seldom, or repeatedly, determines the number of elks and beavers to be “yielded up”. In these circumstances, their Lordships are not satisfied that this contention is made out. But, whether sound or unsound, it would still (like the other two) fall to the ground if adequate “validating legislation” were proved. (2) The majority of the Supreme Court, as has been stated, based their decision, in the main, on the Statute of Tenures, 1660. Their reasoning assumes that this statute applied to Canada, or at least to “Rupert’s Land”. The Act has no express “extent” clause. An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession. In 1660 there was, of course, no United Kingdom. The Acts of Union of 1706 (with Scotland) and of 1800 (with Ireland) were still in the womb of time. True, it happened that since

- the accession to the English throne of James I—already then King of Scotland—the same person was the Sovereign of both England and Scotland, just as later, the same person was to occupy the British and the Hanoverian throne. But that coincidence of sovereignties is beside the present purpose. Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England (which, since 1536, has by Act of Parliament included Wales) must depend in such circumstances on the intention of its framers, to be deduced from the nature of its subject-matter and substantive provisions. It would, presumably, have no such external application if its subject-matter were beyond question of merely insular and domestic import. Their Lordships, if it were necessary to decide the point, would incline to the view that the Act of 1660 was of purely local application: that it applied to England only. Its main objects were two: (i) to abolish certain oppressive incidents of feudal military tenure, “wardships”, “marriages” “primer seisin”, “ousterlemain” and the like. To effect this it was necessary to abolish the military or knight service tenures themselves—the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (cl. 15 to 27) by certain duties on strong liquors, for instance, beer, cider, perry and aqua vitæ; some home produced, some imported. It seems to their Lordships strained to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country thousands of miles away which was only inhabited at the time by a few Indians and half castes: people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them. It seems to their Lordships that these and the other provisions of the Act—notwithstanding that it provides that “free and common socage” should prevail in future, and abolishes tenure by “escuage”—were not intended to apply outside England and Wales; to which, along with Berwick-on-Tweed, the machinery for collecting the compensatory duties is expressly confined (cl. 47). Their Lordships have dwelt on this point somewhat at length because the judgments of the majority of the Supreme Court of Canada are so largely founded on it. Having regard, however, to the conclusions they have reached on other points, it is almost academic, because apart from the rule governing settled colonies, the charter of 1670, under which the Hudson’s Bay Company was granted Rupert’s Land, provides expressly for tenure of that land in “free and common socage and not in capite or by knightes service.” That being so, two questions remain:—A. Were the terms of the grant which is in question in this case—a grant subject to a “variable royalty”—inconsistent with and in breach of the requirements of tenure in “free and common socage”? B. If yes, were those requirements still valid when the grant was made in 1913, or had legislation, regulations or orders passed in the meantime so far modified them as to validate the grant?
- H A. The first of these questions is open to doubt; for, as their Lordships have observed, in the charter itself the consideration moving from the tenant—the royalty—is as to its amount largely at the discretion of the grantor, the King of England. If he chooses never to visit the area, no royalty is payable at all: and this would seem to argue that a considerable degree of “uncertainty” in the consideration moving from the tenant is compatible with “free and common socage”, notwithstanding the dicta of LITTLETON, COKE and BLACKSTONE, to the contrary. One instance given by LITTLETON (COKE ON

LITTLETON, 96A) of a tenure on "certain" services is where the tenure depends on the tenant shearing all sheep on the grantor's land: a service which can clearly be made more or less burdensome according as the grantor chooses to have on his land few or many sheep. LITTLETON himself describes this as a "certainty in uncertainty". Rather than plunge into the jungle of learned disagreement which surrounds what is, or is not, involved in free and common socage, their Lordships will assume, without deciding, that it is inconsistent with the terms of the 1913 grant.

B. On that assumption, the residual question is whether competent legislation has validated the grant. Their Lordships have come to the conclusion that it *has* done so. There can be no question that the Dominion Parliament was competent at all material times, after 1870, by clear enactment, to repeal or vary any law as to land tenure prevailing in Rupert's Land before that region was in that year vested in the Dominion, even if this meant introducing forms of tenure unknown in the past to English law, or forbidden by it. The question is not whether the Dominion possessed the necessary power, but whether, in fact, it exercised it. The legislature of a new country with a small population and vast possibilities of development might well favour an elastic policy in its efforts to attract settlers, and be the less inclined to submit indefinitely to the fetters of English feudal tradition in such matters as land tenure. By a complex of legislation between 1868 and 1870, into the details of which their Lordships do not think it necessary to enter, the Hudson's Bay Company surrendered its grant of Rupert's Land for £300,000 and on June 23, 1870, that region was admitted to the Dominion. The charter of 1670, under which it had been granted to the Hudson's Bay Company, expressly provided, as has been seen, that tenure should be in "free and common socage". Interim legislation (e.g., the Act of 1869 (Dom.), 32 & 33 Vict. c. 3) provided that all laws in force in Rupert's Land at the time of its admission should (unless contrary to the British North America Act, 1867) remain in force till altered. An Imperial Act of 1871 (34 & 35 Vict. c. 28), "to remove doubts", confirmed all Dominion statutes relating to this transaction and gave power to the Dominion *inter alia* to make provision for the "peace order and good government . . . of any territory not yet for the time being included in any province". (Which would aptly describe that part of Rupert's Land which later became Alberta.) Subsequent Dominion Acts followed containing similar provisions, e.g., Revised Statutes of Canada, 1906, c. 62 (which itself reproduced similar provisions in an Act of 1886 and even earlier legislation), and by s. 12 enacted as follows:

"Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on July 15, 1870, shall be in force in the territories, in so far as the same are applicable to the territories, and in so far as the same have not been, or are not hereafter, as regards the territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the territories, or by any ordinance of the territories."

This provision was in force at the time of the disputed grant of 1913. It can hardly be said that tenure by socage was, in 1870, a part of the "laws of England" *inapplicable* to Rupert's Land, since this tenure had been in force in that tract under the terms of its charter, for exactly two centuries before its transfer to the Dominion. Nevertheless, the question remains whether, by competent legislation subsequent to the transfer, this part of the "laws of England" had been "repealed, altered, varied, or modified" in such a way

as to validate the present grant. Such validating provisions, if they exist, must be sought mainly, if not entirely, in the successive "Dominion Lands Acts" and regulations or orders made thereunder. The Dominion Lands Act in force at the time of the 1913 grant was c. 20 of the statutes of 1908. Before referring to its terms it may, however, be helpful to refer to an earlier statute, the Dominion Lands Act, 1886 (R.S.C. 1886 c. 54). Section 47 of that Act reads as follows:

"Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the governor in council, by regulations made in that behalf",

and was reproduced by s. 47 of the Dominion Lands Act, 1892, with the addition of a proviso which does not affect the present case. The Act of 1886 further provided by s. 90:

"The governor in council may . . . (h) Make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect; and, from time to time, alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead."

Their Lordships pause to note two points in relation to these provisions of the Act of 1886:—(1) section 47 gives the governor in council powers as wide as are readily imaginable as to the "disposal" of coal and other minerals *by regulation*. He can impose any terms he, "from time to time," fancies: and employ any method of disposal. If this provision had stood unmodified at the time of the grant, and a regulation had been made giving effect to it, it would, in their Lordships' view, have authorised the grant, notwithstanding any inconsistency between the terms of the grant and technical socage tenure. (2) Side by side with this power, in s. 90 (h) there is a power to make "orders"—in certain special cases, e.g., "casus omissi". These two parallel powers are somewhat sharply distinguished; and the distinction persists in the Act of 1908, to which reference should next be made. Before, however, going to that statute, it is proper to note that regulations under the Act of 1886 (as amended in 1892) were made between 1901 and December, 1906, inclusive, in which month they were consolidated. They will be referred to as "the 1906 regulations" and their tenor explored later, so far as relevant.

The sections of the Act of 1908 corresponding to those cited from the Act of 1886, and dealing respectively with "regulations" and "orders", are s. 37, and s. 76 (k) of the later Act. Section 37 is as follows:

"Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the governor in council: and these regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, in so far as they may be affected under these regulations."

Section 76 reads:

"The governor in council may . . . (k) make such orders as are deemed necessary to carry out the provisions of this Act, according to

their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make any regulations which are considered necessary to give the provisions of this section full effect; ”

Thus, this Act maintains the distinction between regulations and orders, which seemingly are intended to serve different purposes; and the distinction, in this Act of 1908, is emphasised by s. 77 thereof, which reads as follows:

“ Every regulation made by the governor in council, in virtue of the provisions of this Act, and every order made by the governor in council authorising the sale of any land or the granting of any interest therein, shall have force and effect only after it has been published for four consecutive weeks in the Canada Gazette, and all such orders or regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof, and such regulations shall remain in force until the day immediately succeeding the day of prorogation of that session of Parliament, and no longer, unless during that session they are approved by resolution of both Houses of Parliament.”

This section provides that while both regulations and orders shall be laid before both Houses of Parliament within fifteen days of the session next after their date, regulations (though not, apparently, orders) shall become inoperative on the day succeeding the prorogation of the session of Parliament unless during the session approved by a confirmatory resolution. Orders are seemingly not now defeasible for want of such a resolution: though it will be observed that the corresponding section of the Act of 1886—s. 91—while providing for similar formalities, does not distinguish between the effect of not complying with them in the case of a regulation on the one hand, and an order, on the other. As against this, attention should be called to a difference between the language of s. 37 of the Act of 1908 and s. 47 of the Act of 1886, which would seem, if it is significant, to limit the almost despotic powers of disposal vested in the governor in council by the latter provision. For where s. 47 spoke of “disposal” of lands, etc., “in such manner and on such terms and conditions as are, from time to time, fixed by the governor in council”, by “regulations”, s. 37 provides simply that such lands, etc., “may be sold or leased under regulations made by him”. On the other hand, if this change of language does impliedly narrow the powers of the governor in council under the Act of 1908 when proceeding by regulations, there is no corresponding limitation in that Act in his powers to proceed by *order*. On the contrary, an order (though, no doubt, it can be superseded by a later order) cannot, like a regulation, lapse for want of a confirmatory resolution, and would seem to be capable of dealing with cases uncovered, or not adequately dealt with, by any regulation.

As regards “regulations”, the position is complex and obscure. But the instrument, by virtue of which the grant of 1913 purported to be made, was an Order in Council, or rather two such orders, dated May 31, 1911, and Mar. 21, 1913, respectively, and not a regulation. The point that a grant in these terms could not be made under orders but only under some regulation, and that no such regulation at the material time existed, was not taken until the case was argued before this Board.

The points, therefore, remaining are:—(1) Did these orders, if themselves valid, purport to authorise a grant in the terms of that of Aug. 25, 1913? (2) Were the orders which purported to be made under s. 76 (k) of the Act of 1908 a valid exercise of the powers conferred by that sub-section? Or should the sub-section be read as not authorising any order which runs counter to tenure by “free and common socage”?

Before grappling with these questions, it may be pertinent to ask for what reason the Acts of 1886 and 1908 provided that some things could be done

by regulations and some by order. That this was done deliberately admits of no doubt. The only question is "why?" Their Lordships can only suppose the explanation to be that a *regulation* normally (though, perhaps, not quite necessarily) applies uniform treatment to every one, or to all members of some group or class. There is one and the same "rule" ("regula") for all. On the other hand, there may be special cases which the rule did not contemplate ("casus omissi", are expressly instanced in the Acts), or to which, owing to special circumstances, it cannot apply without hardship, or without violating the spirit—"the true intent"—of the Act; and the object of the "order-making" power is to enable the Crown to make special and equitable provision ad hoc for such cases. If anything is clear it is that this case was a very special one, not covered by ordinary rules; and was so considered and treated by those who, on behalf of the Crown in right of the Dominion, made the two orders and issued the grant or patent.

What do the two orders provide? Their Lordships, while holding they should be read together, will deal with them, in the first instance, seriatim. I. *The first order, dated May 31, 1911*, opens with a reference to regulations assumed to be obsolete or rescinded: "the late regulations": and refers to them in its last paragraph once more as "the old regulations". These are the regulations made under the 1886 and 1892 Acts, between 1901 and 1906 inclusive, and referred to above as "the 1906 regulations" because they were issued in a consolidated form in December of 1906. These consolidated regulations had provided (by para. 1) for the "reservation" in suitable cases for purposes of prospecting for petroleum of an area of 1,920 acres, in favour of an applicant for such reservation, of land in, inter alia, the Province of Alberta. They further provided (para. 5 of the consolidation) that "if oil in paying quantities should be discovered by the prospector" . . . an area not exceeding 640 acres of land, including the oil well, would be sold to the person making such discovery at the rate of \$1 per acre, and the remainder of the reserved area, viz.: 1,280 acres, would be sold at the rate of \$3 per acre. Paragraph 6 provided that

"a royalty at such a rate as may from time to time be specified by Order in Council will also be levied and collected on the sales of the petroleum . . ."

Paragraph 8 provided that the patent which might "be issued for petroleum lands" would be made subject to the payment of the above royalty; and that the patent might be declared null and void for default in the payment of such royalty. The order of May 31, 1911, when it refers to these regulations as the "late" or "old" petroleum regulations, assumes them to have been rescinded. This may be either because they were made under the 1886-92 Dominion Lands Acts and not under that of 1908; or more probably because in 1910 there had been made new regulations purporting to rescind the 1906 regulations, and to substitute a power of leasing for a power of sale, lease or other disposal. These last regulations were not included in the appendix of exhibits, and were only produced in the course of the argument before the Board as the result of cables to Canada. It seems doubtful, in the circumstances, whether any notice should be paid to them at all, particularly as the Board was informed that they were void, or had lapsed for failure to be laid before the two Houses of Parliament, or, having been so laid, to obtain the necessary confirmatory resolution. Let it, however, be assumed in the respondents' favour that the 1906 regulations were validly rescinded. Then what was their position? There was, in their Lordships' view, nothing to prevent the Minister from proposing, or the governor in council from making, an Order in Council, under the powers conferred by s. 76 (k) of the Act of 1908 dealing with a special case of hardship by providing that it would be governed by the rescinded 1906 regulations if the equity of the case appeared to him so

to require. And this is what, in fact, the Orders in Council of May 31, 1911, and Mar. 21, 1913, professed to do. The facts leading up to both orders must here be reviewed more closely:—A “reservation” had been made under the old “1906 regulations” in favour of a Mr. Bennetto on Jan. 1, 1906, of a tract of land in Alberta, which may be called “tract X”. Bennetto had done prospecting work on that tract, which was continued by his assigns, the Northern Alberta Exploration Company, the assignors to the respondents. Oil had been discovered, but not in “paying quantities”, hence no right of sale had been acquired by any one. Meanwhile the “reservation” was due to expire on June 17, 1911. The Northern Alberta Company asked for a renewal of the reservation. The order recites that large expenditure had been incurred by Bennetto and the company, and provides that the reservation of petroleum and gas rights should be extended in favour of the company for two years from June 17, 1911: but that it should apply to land other than, though overlapping with, the land originally covered by the reservations. This may be called “tract Y”. This substitution was necessitated by the acquisition by bona fide squatters of a large area of riverain territory covering part of the surface of “tract X”—the original reservation. The order of 1911 finished by reciting and giving effect to the following recommendation:

“Should oil or natural gas be discovered in paying quantities within the period of one year from June 17, 1911, the Minister also recommends that he be authorised to sell to the company, under the provisions of the old petroleum regulations, all the lands contained within the entire area above mentioned both as regards the surface and petroleum and natural gas rights, and that if oil in paying quantities is discovered after the expiration of the first year, but before June 17, 1913, he be authorised to sell to the company the petroleum and natural gas rights under the entire area reserved and the surface rights of that portion lying between the southerly boundary of the McMurray Settlement and Horse Creek.”

II. *The second Order in Council*—that of Mar. 21, 1913, recites these facts and the provisions of the Order in Council of 1911, in particular its final paragraph which has just been quoted. It does not record, and presumably it was not the fact, that within one year, or even nearly two years of June 17, 1911, oil or natural gas “in paying quantities” had been discovered in the substituted area; but it does record that valuable prospecting work had been done by Bennetto and the Northern Alberta Company, and that at least \$75,000 had been expended by them by October, 1912. The Order in Council ended by providing as follows:

“That in view of the very large expenditure which the Northern Alberta Exploration Co., Ltd., has incurred for the purpose of demonstrating the existence or otherwise of petroleum in the McMurray field, which demonstration must be of very great public benefit, and in view of the fact that the location first reserved for the application was lost to him through the encroachment of squatters, the Minister recommends that the above company be permitted to purchase the petroleum and natural gas rights under the entire area reserved for them by the Order in Council dated May 31, 1911, together with the available surface rights thereof, at the rate of \$3.00 an acre, subject, however, to such rights as may be established under the provisions of the Dominion Lands Act and the regulations, by any persons in a position to show that they have in the meantime squatted upon these lands.”

If these two orders are read together, their effect, if they are intra vires the statute of 1908, is to authorise the grant which followed on Aug. 25, 1913, both as regards the price of the land and “under rights” sold and as regards royalties. The price under the grant appears to have been \$3 an acre both for

the surface (1,296 acres) and the mineral rights (1,320 acres). If the Order in Council of 1911 had stood alone, the price would have been \$1 as to part and \$3 as to another part, for the order of 1911 imports the 1906 regulations and that is what they provide. But the Order in Council of 1913 alters this rate to \$3 over-all: and the grant is so far within the authority conferred by the two orders read together. A more important matter in this appeal is that the grant contained, as part of its terms, what has been described as a "variable royalty". The Order in Council of 1911 imports, in this regard, also the terms of the "old" regulations: they are called the "regulations in force on Sept. 1, 1909", but these are the same as the "1906 regulations" and these authorise (in the regulation of May 31, 1901, or para. 6 of the consolidating regulation of 1906) the levy of royalties on petroleum sold "at such a rate as may from time to time be specified by Order in Council". It matters not in their Lordships' view whether by the years 1911-13 these regulations had been rescinded or not, or whether the Acts of 1886 to 1892 under which the 1906 regulations had been made, had been repealed or superseded by the 1908 Dominion Lands Act, or whether, while the 1906 regulations were operative, the levy of such royalties under them was to be contingent on a sale which was itself to be contingent on the discovery of petroleum in paying quantities. Under s. 76 (k) of the Act of 1908, the Crown in right of the Dominion had, in their Lordships' opinion, power to deal with a case such as this by applying to it certain of the terms (those as to royalties) of a superseded regulation. This was a special case. Oil and gas had not been discovered in paying quantities but research and expenditure, attended with much benefit to the public, had been carried out and incurred by the prospectors, the predecessors in title of the respondent company. Hence, they were allowed to acquire the land and rights in question without complying with any regulation (assuming one to exist) but were compelled to submit to liability in future to a royalty not prescribed by any regulation in force at the time of the grant. Their Lordships do not consider that, in dealing with such special or hard cases under s. 76 (k), it was intended that the discretion of the Crown should be fettered or controlled by incidents of English feudal land tenure. It had been expressly enacted that the Dominion Parliament could repeal, vary or modify any English law prevailing before 1870 in territories such as Rupert's Land, and territories like Alberta which might be carved out of it. In providing, as it did, in s. 76 (k) of the Act of 1908, for a discretionary power to deal with hard or anomalous cases the legislature was, as it seems to their Lordships, arrogating to itself the right to infringe the requirements of "free and common socage", so far as the end in view required. Where the justice of the individual case required it, it seems to their Lordships unreasonable (unless the language of the material enactments forces them to such a conclusion) to hold that the Crown's liberty to deal with such cases was intended to be exercised only within the limits set by a rigid respect for the obscure and debated frontiers of historical socage tenure. If this conclusion is justified, it follows that the grant of 1913 was valid not only in other respects, but in respect of the variable and prospective royalties reserved to the Crown in right of the Dominion. Those rights have now been transferred to Alberta. In 1930 the "Transfer Agreement Acts" were passed in identical terms by the legislatures of Alberta (Statutes of Alberta, 1930, c. 21), of the Dominion (Statutes of Canada, 1930, c. 3), and of the Imperial Parliament (20 & 21 Geo. 5, c. 26). Section 1 of the Alberta Act is as follows:

"In order that the province may be in the same position as the original provinces of Confederation are in virtue of s. 109 of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement

and subject as therein otherwise provided, belong to the province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the province for the purposes thereof, subject, until the legislature of the province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the province shall not be liable to account to Canada for any such payment made thereafter."

Section 3 of the Act is as follows:

"Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the governor in council or to the Minister of the Interior or any other officer of the government of Canada, may be exercised by such officer of the Government of the province as may be specified by the legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the province."

The right to levy a "variable" royalty on these lands was a "right" which within s. 3 by "contract . . . or other arrangements . . . relating to . . . lands, mines, minerals or royalties" was originally reserved to the Crown in right of the Dominion, and by s. 1 and s. 3 was, in 1930, transferred from the Crown in right of the Dominion to the Crown in right of the Province of Alberta, which, accordingly, was justified through its lieutenant-governor in council, in levying by the various Orders in Council of 1941-48, the royalties complained of by the plaintiffs-respondents in the present case.

Their Lordships, therefore, humbly advise Her Majesty that the appeal should be allowed and the action dismissed. Each party must pay their costs of the proceedings throughout.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.* (for the appellants, the Attorney-General of Canada, and the Attorney-General for Saskatchewan); *Stafford Clark & Co.* (for the respondents); *Blake & Redden* (for the Attorney-General of Manitoba).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA v.
WEST CANADIAN COLLIERIES, LTD. AND OTHERS AND
ATTORNEY-GENERAL OF MANITOBA AND ANOTHER
(INTERVENERS).

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone), October 21, 22, 23, 27, 28, 29, 30, November 3, 5, 1952, March 24, 1953.]

Privy Council—Canada—Alberta—Mines and minerals—Coal—Royalties—Crown leases and grants—Transfer from Dominion to Province—Increase of royalties—Conflict with transfer agreement—Natural Resources Act [Transfer Agreement Act], 1930 (S.A., 1930 (c. 21)), s. 2—Provincial Lands Act, 1948 (S.A., 1948 (c. 36)), s. 8.

The respondents (plaintiffs in the action) were grantees or lessees of mineral lands and mining rights in the province of Alberta. The grants and leases in question were made by the Crown in right of the Dominion by virtue of Orders in Council and regulations made under the Dominion Lands Acts. In 1930, by three concurrent enactments, of the province of Alberta, of the Dominion and of the Imperial Parliament, statutory force was given to a "transfer agreement" concluded in the previous year by which the mineral lands and rights situate in certain provinces (including the province of Alberta) and which were previously vested in the Dominion were transferred to the province, the province, by s. 2 of the Alberta Act, undertaking to carry out according to its terms every contract to purchase or lease any Crown lands, mines and minerals made with the Crown in right of the Dominion before 1930 and "... not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise ..." The royalties payable by the respondents under the original grants and leases to the Crown in right of the Dominion on coal mined amounted to seven cents per ton on land granted and five cents per ton on land leased. In 1948 the province passed the Provincial Lands Act of Alberta, s. 8 of which provided that "Notwithstanding the terms and provisions of any certificate of title ... or lease which conveys coal or the right to mine ... the same, where the payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the province ..." there should be payable an increased royalty of ten cents per ton of coal from land leased and fifteen cents per ton from land granted. In an action by the respondents for a declaration (a) that s. 8 did not apply to their leases and lands, and (b) that s. 8 was ultra vires,

HELD : section 8 was in conflict with s. 2 of the Transfer Agreement Act, 1930, and was wholly ultra vires, and null and void for all purposes.

A.-G. for Manitoba v. A.-G. for Canada ([1925] A.C. 561), applied.

Cases referred to:

- (1) *Huggard Assets, Ltd. v. A.-G. for Alberta & Minister of Lands & Mines for Alberta*, [1950] 1 D.L.R. 823; 1 W.W.R. 69; 2nd Digest Supp.; *revid. P.C. sub nom. A.-G. of the Province of Alberta v. Huggard Assets, Ltd.*, ante, p. 951.
- (2) *Anthony v. A.-G. of Alberta*, [1942] 3 D.L.R. 421; 2 W.W.R. 554; 2nd Digest Supp.
- (3) *A.-G. for Manitoba v. A.-G. for Canada*, [1925] A.C. 561; 94 L.J.P.C. 146; 133 L.T. 193; Digest Supp.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, dated Aug. 8, 1951.

The respondents were grantees or lessees of mineral lands and mining rights in the province of Alberta (or in territories from which, in 1905, that province

was carved out). The grants and leases in question were originally made by the Crown in right of the Dominion, in which, in 1870, the parent territories had been vested. They were made under powers conferred by a series of Dominion statutes called the Dominion Lands Acts, and by regulations and Orders in Council made from time to time in pursuance of those Acts. In 1930, by three concurrent enactments of the province of Alberta (c. 21, Statutes of Alberta, 1930), the Dominion (c. 3 of the Statutes of Canada, 1930), and the Imperial Parliament (the British North America Act, 1930), triple statutory force was given to a so-called "transfer agreement" concluded in the preceding year. By this agreement, which was in the nature of a novation, the mineral lands and rights situate in certain provinces and theretofore vested in the Dominion, were transferred by the Dominion to those provinces, including the province of Alberta, and the transferee provinces undertook to carry out according to its terms every contract to purchase or lease any Crown lands, mines and minerals made with the Crown in right of the Dominion before 1930. In 1948 the province of Alberta purported to pass a statute, the Provincial Lands Act, 1948 (c. 36, Statutes of Alberta, 1948), s. 8 of which fixed the royalties payable under such leases at ten cents per ton on coal mined, and, in the case of grants in fee simple, at fifteen cents per ton on coal mined

"Notwithstanding the terms and provisions of any . . . agreement for sale, or lease . . . where the payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the province . . ."

The various mineral grants and leases held by the respondents were ranged in certain categories of each of which a "type" was conveniently set out in the agreed statement of facts. Thus, there were grant type I, grant type II, lease type I, lease type II, and lease type III. The respondents, in their amended statement of claim, claimed (a) a declaration that s. 8 of the Provincial Lands Act, 1948, did not apply to their leases and lands, and (b) a declaration that s. 8 was ultra vires. The Trial Division of the Supreme Court of Alberta awarded a declaration in the terms of (a) of the prayer, viz., that s. 8 did not apply to any of those five types of transaction. The trial judge (McLAURIN, J.) did not expressly make the declaration prayed for under (b), but it appeared that he made the declaration under (a) because he considered that the impeached provision was in conflict with the 1930 legislation, and consequently, ultra vires and void. The Appellate Division dismissed the appeal, but their reasoning was slightly different as it turned largely on the decision of the Supreme Court of Canada in *Huggard Assets, Ltd. v. A.-G. for Alberta & Minister of Lands & Mines for Alberta* (1), from which decision an appeal had since been allowed by the Board.

Wilson, Q.C. (of the Canadian Bar), *Gahan, Q.C.*, and *W. Y. Archibald* (of the Canadian Bar) for the appellant.

Patterson, Q.C. (of the Canadian Bar), and *Viscount Hailsham, Q.C.* for the respondents.

Wilson, Q.C. (of the Canadian Bar) for the Attorney-General of Manitoba, and *Shumiatcher, Q.C.* (of the Canadian Bar) for the Attorney-General for Saskatchewan, interveners in support of the appellant.

Mar. 24. **LORD ASQUITH OF BISHOPSTONE** delivered the following judgment of the Board. This is an appeal by the defendants in the action from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of the Trial Division of that court. [HIS LORDSHIP stated the facts as set out above and continued:] Their Lordships proceed to set forth in detail the relevant statutory provisions and the effect of their interaction. Sections 1 and 2 of the Transfer Agreement Act of 1930 are as follows:

"1. In order that the province may be in the same position as the original provinces of confederation are in virtue of s. 109 of the British

A North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the province for the purposes thereof, subject, until the legislature of the provinces otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada, whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this agreement, and that the province shall not be liable to account to Canada for any such payment made thereafter. 2. The province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the province or to interests therein, irrespective of who may be the parties thereto."

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Section 8 of the Alberta Act of 1948 is as follows:—

E "44.c. Notwithstanding the terms and provisions of any certificate of title, agreement for sale, or lease which conveys coal or the right to mine, win, work or excavate the same, where the payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the province, there shall be payable to the Minister on, from and after Apr. 1, 1948, (a) a royalty of ten cents per ton on any coal mined or excavated from any land, the title to which is held under lease from the Crown in the right of the Dominion or in the right of the province; (b) a royalty of fifteen cents per ton on any coal mined or excavated from any land, the title to which is held in fee simple, or under an agreement for sale from the Crown in the right of the Dominion."

F

G It may be said with sufficient accuracy for the present purpose, that the royalties imposed by s. 8 of the Act of 1948 in every case exceeded (indeed roughly doubled) the royalties payable under the terms of the typical grants and leases in question. Under the terms of these instruments seven cents a ton were payable in respect of grants, and five cents a ton in respect of leases. At the time when each of the "typical" grants and leases were made, these were, according to the "agreed statement of facts", the rates of royalty specifically authorised by the regulations in force at the time: subject to the qualification that in grant type I no specific royalty at so many cents per ton is provided for, but "a royalty at such rate per ton . . . as may from time to time be specified by our governor in council." H Having regard, however, to the view which their Lordships take of the validity of s. 8 of the statute of 1948 the detailed terms of the five types of grant and lease are not important. That view may be stated succinctly in advance of the reasoning which appears to their Lordships to support it. It is that s. 8 is in conflict with s. 2 of the Transfer Agreement Act, is wholly ultra vires, and null and void for all purposes.

Section 2 of the Act of 1930, or Acts, falls into two compartments: (1) a substantive provision extending up to the words "by legislation or otherwise"; and (2) a proviso, beginning with the word "except" and occupying the rest of the section. The question whether s. 8 of the Act of 1948 conflicts with this provision, and, if so, to what extent, depends on the true construction of each of these portions of s. 2 of the Transfer Agreement Act. It will be convenient to deal with those portions separately and seriatim. As to the first portion of s. 2, whereby the province agrees to

"carry out . . . every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise":

the appellant has argued that the contracts, etc., here referred to are limited to executory agreements or arrangements, and do not include conveyances or grants which, it is said, absorb and merge the contracts which lead up to them; but where a conveyance—and even a lease is a conveyance—has been executed, but is subject to outstanding obligations of an executory nature, such as an obligation to pay royalties or rent, their Lordships entertain no doubt that such a state of affairs is covered by the words "contract to purchase or lease Crown lands . . . and every other arrangement. . . ." If, therefore, the section ended there—before the exception or proviso which occupies the last five lines of the section—it would be in flat contradiction of s. 8 of the Alberta Act of 1948. Section 2 of the Act of 1930, which has the force, inter alia, of Imperial legislation, provides that the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the province after the transfer of mineral rights to the latter. Section 8 of the Provincial Act of 1948 is a naked assertion that the terms of such instruments can be wholly disregarded. This, and nothing less, is what the word "notwithstanding" in its context, necessarily implies. Unless, therefore, there is something in the exception to s. 2 of the Act of 1930 to save s. 8 of that of 1948, s. 8 is ultra vires the Act of 1930, and the only question would be whether it is void in whole or only in part.

Before, however, embarking on that question their Lordships must consider the effect of the "exception" within one or other limbs of which the appellant contends that s. 8 falls, and by so falling is saved. (1) One limb excepts cases where all the parties, other than Canada, consent. This can be disregarded, for by cl. 13 of the agreed statement of facts it is admitted that there was no such consent. (2) A second limb of the exception excuses compliance with the enacting words in so far as the exempting legislation

"may apply generally to all similar agreements relating to lands, mines or minerals in the province or to interests therein, *irrespective of who may be the parties thereto*".

It is contended by the appellant that s. 8 of the Act of 1948 is legislation "applying generally", etc. This contention cannot, in their Lordships' view, be sustained. Section 8, assuming it to apply to "all similar agreements", is not legislation "applying generally" to such agreements "irrespective of who may be parties thereto"; for it only applies to agreements to which the Crown (in right whether of the Dominion or a province) is a party: it does not apply when the agreement is between a private grantor or lessor—such as the Canadian Pacific Railway or the Hudson's Bay Company—and a private grantee or lessee: a distinction recognised and applied in *cf.*, *Anthony v. A.-G. of Alberta* (2). The objection that the scope of an exception is presumed not to exceed, or broaden, the scope of the substantive provision to which it is an exception, gives way when the words used in the excepting provision are sufficiently clear, as their Lordships consider that, in this passage, they are. It follows that s. 8

of the Act of 1948 is ultra vires s. 2 of the Act of 1930, and is invalid; and the next question is whether it is void in whole; or severable; valid in part and void in part. It is suggested that it is valid in part, namely, that part which refers to "contracts", etc., made by the Crown in right of the province, though not in respect of that part which refers to contracts made by the Dominion. Their Lordships are of opinion that it is wholly ultra vires and wholly void. The test is very clearly laid down by VISCOUNT HALDANE in the *Grain Futures* case (*A.-G. for Manitoba v. A.-G. for Canada* (3)) ([1925] A.C. 568):

"If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is ultra vires as regards the first class of cases, it has to be pronounced to be ultra vires altogether. Their Lordships agree with DUFF, J., in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the legislature intended to pass it in what may prove to be a highly truncated form."

If these tests, especially that embodied in the last four lines, be applied, it is plain that s. 8 is wholly void, notwithstanding that if the portion which relates to royalties reserved on coal from land leased by the Crown in right of the province stood alone, it might be valid. If the latter provision stood alone and the rest were excised, the clause would be not only truncated but reduced to a shadow.

Their Lordships have not been asked for a declaration as to the validity vel non of the five typical transactions but only for declarations (1) that s. 8 of the Alberta statute does not apply, and (2) that it is ultra vires. Their Lordships are of opinion that it is ultra vires.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed, but that the order of the trial judge should be varied by substituting declaration (b) for declaration (a). The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Lawrence Jones & Co.* (for the appellant and the Attorney-General for Saskatchewan); *White & Leonard* (for the respondents); *Blake & Redden* (for the Attorney-General of Manitoba).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

PRACTICE DIRECTION.

Counsel—Fees—Bankruptcy—Judgment summons.

By a Practice Direction, dated July 27, 1953, HARMAN, DANCKWERTS and UPJOHN, JJ., directed that in future, at the hearing of a judgment summons in bankruptcy, the sum of £2 4s. 6d. may be allowed for counsel.

ATTORNEY-GENERAL FOR SASKATCHEWAN v. CANADIAN PACIFIC RAILWAY CO. AND OTHERS (INTERVENERS).

[PRIVY COUNCIL (Viscount Simon, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), May 4, 5, 6, 7, 11, 12, 13, July 6, 1953.]

Privy Council—Canada—Saskatchewan—Business tax—Exemption of property from taxation—Canadian Pacific Railway Company—Validity of Saskatchewan Act, 1905 (S.C.) (c. 42), s. 24—City Act, 1947 (S.S.) (c. 43).

By s. 16 of a contract executed on Oct. 21, 1880, between the Canadian government and the contractors who were to constitute the Canadian Pacific Railway Company, which contract was scheduled to, and approved and ratified by, an Act of the Canadian Parliament of 1881 (44 Vict. c. 1): "The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion, or by any province hereafter to be established, or by any municipal corporation therein . . ." In 1905 the province of Saskatchewan was established by the Saskatchewan Act, 1905, of the Dominion Parliament which was passed pursuant to the powers contained in the British North America Act, 1871, s. 2 of which provided, inter alia, for the passing of laws for the peace, order and good government of any newly established province. Section 24 of the Saskatchewan Act, 1905, provided: "The powers hereby granted to the said province shall be exercised subject to the provisions of s. 16 of the contract set forth in the schedule to c. 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company". The province of Saskatchewan sought to make the respondent company liable to the "business tax" imposed by the City Act, 1947, of Saskatchewan.

HELD: (i) the words "peace, order and good government" in s. 2 of the British North America Act, 1871, were of very wide import, and a legislature empowered to pass laws for such purposes had a very wide discretion; the powers of taxation granted by that Act to new provinces were not confined to those granted by the Canadian Parliament in the British North America Act, 1867, s. 92 (2), to the original four provinces of Canada, and there was no set pattern of "a province" in the Act of 1867, which was bound to be followed in creating the new province of Saskatchewan; and, therefore, s. 24 of the Saskatchewan Act, 1905, imposing a limitation on the province's powers of taxation, was validly enacted.

Reference re Constitutional Validity of Section 17 of the Alberta Act ([1927] S.C.R. 364), approved.

(ii) the business tax was imposed on the owner of things which he was using in his business; where the measure of the tax was the extent of the taxpayer's property used in his business, and that property, when so used, was "forever free from taxation", the tax so measured could not be regarded as something lying outside the exemption; and, therefore, the exemption in s. 16 of the contract operated to relieve the respondent company from the tax.

Cases referred to:

(1) *Reference re Constitutional Validity of Section 17 of the Alberta Act*, [1927] S.C.R. 364.

(2) *Halifax Corp'n. v. Fairbanks' Estate*, [1928] A.C. 117; 97 L.J.P.C. 11; 138 L.T. 162; Digest Supp.

APPEAL by special leave from a judgment of the Supreme Court of Canada, dated Nov. 20, 1950. The facts appear in the judgment.

Leslie, Q.C., Meldrum, Q.C., and Makaroff, Q.C. (all of the Canadian Bar), for the appellant.

Carson, Q.C. (of the Canadian Bar), *Gahan, Q.C.*, and *Findlay* (of the Canadian Bar) for the respondent company.

Viscount Hailsham, Q.C., for the Attorney-General for Manitoba, intervener in support of the appellant.

Leslie, Q.C. (of the Canadian Bar), for the Attorney-General for Alberta, intervener in support of the appellant.

A *Jackett, Q.C.* (of the Canadian Bar), for the Attorney-General for Canada, intervener in support of the respondent company.

July 6. **VISCOUNT SIMON** read the following judgment of the Board. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated Nov. 20, 1950, allowing in part an appeal by the respondent from a judgment of the Court of Appeal for Saskatchewan, dated Jan. 29, 1949.

B The Court of Appeal had before it four questions referred to it by an order of the Lieutenant-Governor in Council, dated Nov. 16, 1948, pursuant to the Constitutional Questions Act (c. 72 of the Revised Statutes of Saskatchewan, 1940). These questions involved consideration of the interpretation of cl. 16 of a contract executed on Oct. 21, 1880, between the Canadian government and contractors who were to constitute the Canadian Pacific Railway Company. The contract
C provided for the construction, operation and maintenance of the Canadian Pacific Railway. The respondent company was created under the authority of a statute of Canada enacted in 1881 (44 Vict. c. 1), to which the contract was scheduled, and cl. 1 of the statute approved and ratified the contract. Clause 16 of the contract is as follows:

D "The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion, or by any province hereafter to be established, or by any municipal corporation therein; and the lands of the company, in the
E North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown."

The Province of Saskatchewan was established in 1905 by the Saskatchewan Act of the Dominion Parliament (4 & 5 Edw. 7, c. 42) and s. 24 of that Act reads as follows:

F "The powers hereby granted to the said province shall be exercised subject to the provisions of s. 16 of the contract set forth in the schedule to c. 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company."

G The Order in Council granting special leave to appeal limited the appeal to the following questions: (a) as to the validity of the limitation on the powers of the province contained in s. 24 of the Saskatchewan Act, 1905; and (b) whether the exemption granted in s. 16 of the contract covers the form of local taxation known as "business tax".

H As to (a), the appellant contends that the Parliament of Canada, in passing the Saskatchewan Act, 1905, and thereby creating the new province of Saskatchewan and including it in the Union, had no power to provide that the provincial legislature, when making laws in relation to direct taxation within the province in order to the raising of revenue for provincial purposes, or in relation to municipal institutions in the province, should exercise those powers "subject to the provisions of s. 16 of the contract", but that the effective taxing powers of the legislature of the new province remain as extensive as the powers conferred by s. 92 (2) of the British North America Act, 1867, on the legislature of each of the provinces originally included in the Federation. This amounts to saying

that s. 24 of the Saskatchewan Act should be disregarded as being ultra vires of the Parliament of Canada.

As to (b), the appellant contends that if effect is to be given to s. 24, and to the provisions of s. 16 of the said contract, which thus provide a certain exemption from taxation by the new province, or by any municipal corporation therein, the result is, nevertheless, to leave the respondent company liable to "business tax" under the City Act, 1947, of the province.

Their Lordships will first deal with the former of the two questions above formulated. It is obvious that, if this first question is answered in favour of the appellant, the second question becomes immaterial, for if the provincial powers of taxation possessed by the province of Saskatchewan are as wide as those contained in s. 92 without the fetter imposed by s. 16 of the contract and s. 24 of the Saskatchewan Act, it is immaterial how s. 16 is construed and applied, and the business tax which has been enacted by the Saskatchewan legislature will be imposed on the respondent company in common with all other persons and enterprises carrying on business within the province. This first question could only be raised on appeal to the Privy Council inasmuch as it had already been in effect decided in a sense adverse to the appellant's contention in the judgment of the Supreme Court of Canada, delivered by NEWCOMBE, J., on behalf of the court, in the *Reference re Constitutional Validity of Section 17 of the Alberta Act* (1). The appellant contended before the Board that NEWCOMBE, J.'s judgment leading to this conclusion in the Alberta reference was wrong, and their Lordships were, therefore, invited to dissent from the view of NEWCOMBE, J., and to hold that s. 24 of the Saskatchewan Act has no effect. Although the British North America Act, 1867, provided for a federation of four provinces only, viz., Quebec, Ontario, Nova Scotia and New Brunswick, the statesmen who were responsible for framing the Act contemplated from the beginning the enlargement of the federal area so as to include the whole of what is now Canada. To the west of the area included in the original federation lay an immense territory stretching to the Rocky Mountains and beyond to the Pacific. The area immediately to the west (which had originally been granted to the Hudson's Bay Company by the charter of 1670) was known as Rupert's Land and the North-West Territories, and between the Rocky Mountains and the Pacific Ocean lay the colony of British Columbia, which already had a separate legislature. Consequently, s. 146 of the Act made provision for the admission into the union of territories not at first included within the boundaries of Canada. The section provided as follows:

"It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

British Columbia entered the Union in 1871 on the terms and conditions scheduled to the Order in Council of May 16, 1871, for British Columbia was a "settled" colony and thus required no statutory provision to create it an additional province of Canada. Rupert's Land and the North-West Territories had become part of Canada pursuant to the Rupert's Land Act, 1868, which authorised the surrender of the land of the Hudson's Bay Company to the Crown, and which further gave power by Order in Council on address from the Houses of the Parliament of Canada to admit the surrendered territory into the Dominion

of Canada. The project of a trans-continental railway which would connect the Pacific coast with the railways in the east of Canada had long been in the minds of Canadian statesmen, and more than one effort had been made to realise the project and attract finance for such a railway. If it could be created, it would not only contribute to the development of trade, but would bind all parts of the Canadian continent together. But in order that the project should be achieved by creating a company, it was necessary to offer investors terms which would attract their support for a railway which would have to traverse immense areas of wild and thinly populated country and would involve the carrying of its track by steep gradients over the Rocky Mountains. It was among the terms and conditions insisted on by British Columbia for its admission into the Union that the government of the Dominion should assume

A “ the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the railway system of Canada ”.

(See first recital in the preamble of the Canadian Pacific Railway Act, 1881.) Section 16 of the contract, which was ratified by that Act, was one of the inducements, and other clauses of the contract provided that the government of the Dominion should make a grant to the company of the lands required for the

C road-bed and the other sites necessary for the convenient and effective construction and working of the railway, that materials of construction should be admitted free of duty, and that there should be granted to the company blocks of land on each side of the railway, which would, of course, increase in value when the railway was made and worked. It is to be observed that s. 146 of the British North America Act, which authorised the inclusion of Rupert's Land and the North-Western Territories into the Union, did not, in terms, authorise the creation of new provinces out of these areas when admitted. Notwithstanding this, the Manitoba Act, 1870, of the Canadian Parliament (33 Vict. c. 3), provided for the creation and constitution of the province of Manitoba, which was carved out of these territories as soon as they were admitted into the Union. Doubts appear to have been entertained respecting the powers of the Parliament of Canada to establish such provinces, and, consequently, the United Kingdom Parliament enacted the British North America Act, 1871 (34 & 35 Vict. c. 28), which, by s. 5, confirmed the Manitoba Act, and by s. 2 provided as follows:

E “ The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said Parliament.”

F It is to be noted that the province of Manitoba thus created was not an exact replica of the provinces created in 1867, but the provisions of the British North America Act, 1867, so far as generally applicable to the provinces previously composing the Dominion were to apply to the province of Manitoba “ except so far as the same may be varied by this Act ” (s. 2). Examples of such variation may be found in s. 22, s. 23 and s. 27 of the Manitoba Act. It was under these powers conferred by the Act of 1871 that the Parliament of Canada enacted the Saskatchewan Act in 1905 and included in it s. 24, which has already been set out. It will be observed that s. 16 of the contract of 1880 did not promise any exemption from taxation by the original provinces, for they had taxing powers under s. 92, which could not be cut down by the Dominion. The exemption provided for was “ from taxation by the Dominion, or by any province hereafter to be established ”, and hence, when the province of Saskatchewan was carved out of Rupert's Land and the North-West Territories, s. 24 was inserted by the Parliament of Canada in an effort to keep faith with the Canadian Pacific Railway Company.

The question, therefore, which their Lordships have first to decide is whether s. 24 is validly enacted. The contention of counsel for the intervener representing Alberta, supported with energy and ingenuity by counsel for the intervener representing Manitoba, was that the Dominion Parliament was given no power by the Imperial Act of 1871 to limit the right of the new province of Saskatchewan to tax under the terms of s. 92. They contended that the authority which the Act of 1871 gave to the Dominion Parliament to carve out of the added territory "a province" was an authority to create a province with powers identical with those of the provinces already created by the Act of 1867, and that no fetter on the power of taxation of the new province was permitted. To this, counsel for the respondent railway company replied that even in the Act of 1867 the powers of taxation conferred on the four original provinces was not uniform; for example, although indirect taxation was a dominion subject (s. 91 (3)), yet, by s. 124, the right was conferred on the province of New Brunswick to levy lumber dues. And other examples could be given. There was thus no set pattern of "a province" in the Act of 1867, which was bound to be followed in creating the new province of Saskatchewan. The development of the added territories in 1871 had not advanced so far as the development of either the old provinces or of Manitoba, so that it may very well have been thought necessary to give the Dominion Parliament freedom of action in the creation of new provinces, not only as to the time of their creation but also as to the extent of powers of taxation which should be conferred on them.

Section 2 of the Act of 1871 empowers the Parliament of Canada, at the time when it establishes new provinces in the added territories, to make provision—(a) for the constitution and administration of any such province; (b) for the passing of laws for the peace, order and good government of any such province; and (c) for its representation in the Dominion Parliament. The words "peace, order and good government" are words of very wide import and a legislature empowered to pass laws for such purposes had a very wide discretion. But counsel for the appellant and for the intervener representing Manitoba emphasised the distinction between s. 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order and good government in territories not included in a province, and s. 2, which only enabled them to provide for the passing of laws for the peace, order and good government of a province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the province. The prescription, they contended, had been done for good and all by s. 92 of the Act of 1867. But their Lordships would observe that if this argument was well founded, the words in s. 2 of the Act of 1871 "for the passing of laws for the peace, order and good government" would be superfluous. The power to make provision for the "constitution" of the new province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which counsel for the appellant and the intervener representing Manitoba contend.

The appellant further relied on the phrase "subject to the provisions of this Act" in s. 146 of the Act of 1867, and contended that this phrase implied a structure of provinces analogous to the original provinces. But so far as the lands comprising Rupert's Land and the North-West Territories are concerned, s. 146 was exhausted when they were admitted to the Union, as they were by the Rupert's Land Act, 1868. It appears to their Lordships that s. 146 is, therefore, irrelevant to the issue they have to decide.

The appellant also relied on s. 3 of the British North America Act, 1886, which directed that the Act of 1867 and the Act of 1871 should be construed

together. The expression "province", it was said, must, therefore, be given throughout the meaning attached to it in the Act of 1867, and this involved that every province must have full s. 92 powers. With great respect, this argument seems to involve a complete non sequitur. Every province created or to be created must, of course, be a province in the Dominion of Canada, but the Act of 1867 contained no such definition of province as would involve any conflict between that Act and the Act of 1871. There is no complete equality of powers

A between the four original provinces. The Manitoba Act, 1870, shows that an Act constituting a province might depart from the strict 1867 pattern. No doubt, one reason for the passing of the Act of 1871 was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of s. 2 of the Manitoba Act recognising variations has been introduced into

B all the documents creating a province since that date—see para. 10 of the schedule to the British Columbia Order in Council of May 16, 1871, the resolution relating to Prince Edward Island scheduled to the Prince Edward Island Order in Council of June 26, 1873, s. 3 of the Saskatchewan Act, 1905, s. 3 of the Alberta Act, 1905, and s. 3 of the terms of the Union between Canada and Newfoundland scheduled to the British North America Act, 1949. From the time that the

C North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under s. 5 of the Rupert's Land Act, 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new provinces out of the added areas, could not make such deviation from s. 92 as was necessary to make effective acts done under the powers conferred on it by s. 5 of the Rupert's Land Act, 1868, and s. 4 of the Act of 1871. These considerations support the conclusion of the Supreme Court in the *Alberta*

D *reference* (1), and their Lordships are not prepared to differ from it.

Counsel for the appellant advanced two alternative grounds for upholding s. 24 of the Saskatchewan Act, claiming (i) that it was validated by the second paragraph of s. 2 of the Act of 1886, and (ii) that s. 16 of the agreement when approved by the Dominion Act of 1881 was part of inter-provincial railway legislation, and, therefore, within Dominion competence under s. 91 (29), and s. 92 (10) of the Act of 1867, and that s. 24, which was only included to make s. 16 effective, must also be regarded as such railway legislation within the competence of the Dominion Parliament. Their Lordships, without pronouncing on the validity of either of these arguments, prefer to rest their conclusion on the other grounds already stated.

F There remains the question whether the language of s. 16 is such as to prohibit the imposition of "business tax" on the respondent company. Notwithstanding that the exemption provided by the clause is conferred on the physical property there mentioned, all taxes are exacted from and paid by persons, and the question comes to be whether the respondent company, as the owner and user of the properties mentioned, is free from taxation in respect of them. Counsel for the interveners representing Alberta and Manitoba argue that the business tax imposed by the City Act, 1947, of Saskatchewan, was imposed on persons and companies carrying on a business and not on their property, or on their ownership or user of property. On this view, the provision that the liability to business tax of a taxpayer was measured by the floor-space or area which he used while carrying on his business was nothing more than a "yard-stick" to ascertain the amount for which the taxpayer was liable under the tax. There are, no doubt,

G many instances in which it is important to distinguish between the nature of the tax imposed and the measure of the amount of tax to be paid. For example, British income tax is imposed on the income of the taxpayer in the year of charge, but the amount of tax is measured by reference to income in an earlier year. But where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is "forever free from

H taxation" the tax so measured cannot be regarded as something lying outside

the exemption. Their Lordships agree with the view of the majority of the Supreme Court that, in the present instance, the tax in question is imposed on the owner of things which he is using in his business. As KELLOCK, J., observed ([1950] S.C.R. 218):

"It would be an extraordinary result if the proper interpretation of this exemption were to be said to be that while taxes imposed upon the owner in respect of his ownership of these things fall within the exemption, nevertheless taxes imposed upon the owner in respect of his use of the same items do not."

LOCKE, J., stated the contention thus (*ibid.*, 244):

"The position adopted on behalf of the province of Saskatchewan put bluntly is this: that while neither the physical property defined by cl. 1 nor the Canadian Pacific Railway Company in respect of its ownership of that property is liable to taxation, so-called business taxes may be levied upon the company in respect of its business of operating it. While the language of cl. 16 is that the property shall be 'forever free from taxation' by any province thereafter to be established, it is said that to tax the company in respect to the use of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited."

That learned judge went on to observe (*ibid.*, 246):

"Clause 16 of the contract does not grant an absolute exemption of the stations, station grounds, buildings and other property referred to but only such as are used for the construction and working of the railway and, in my opinion, if buildings which fell within the description ceased to be used by the owner or operator of the property for such purposes the exemption would be lost. Since, therefore, it is the buildings, station grounds, yards and other property when used for these purposes which are declared to be forever free from taxation by the Dominion or by any province thereafter to be established, I think it cannot be said that a tax upon the owner in respect of the use of the property for the purpose of working the railway is not squarely within the exemption. To construe the clause otherwise is to say that the properties mentioned are exempt from all taxation *when* used for the defined purpose, but *if* they are so used that the owner may be taxed in respect of that use. I am unable so to construe the clause."

Their Lordships agree with this construction of the clause and have reached the conclusion that the exemption operates to relieve the respondent company from the tax.

In the course of the argument the decision in *Halifax Corpn. v. Fairbanks' Estate* (2) was more than once referred to. That decision contains sentences which, detached from their context, were prayed in aid to reinforce the case for the respondents. But the point at issue in that case was different, viz., whether the "business tax" there involved was a direct tax, and was, moreover, so complicated by provisions for treating the owner of property let to the Crown as notionally the occupier, that their Lordships prefer not to rest their conclusions on it. It is unnecessary to say more than that the case does nothing to impair or qualify those conclusions.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

Solicitors: *Lawrence Jones & Co.* (for the appellant and the Attorney-General for Manitoba and Alberta, interveners in support of the appellant); *Blake & Redden* (for the respondent company); *Charles Russell & Co.* (for the Attorney-General for Canada, intervener in support of the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

GILL AND DUFFUS (LIVERPOOL), LTD. v. SCRUTTONS, LTD.

[LIVERPOOL ASSIZES (Glyn-Jones, J.), April 14, 15, 16, June 11, 1953.]

Shipping—Carriage by sea—Delivery—Port of Liverpool—Master porter—Duty to consignees—Cargo damaged during voyage—Part of different consignments of chestnuts intermixed—Duty to apportion loose chestnuts—Duty to weigh—Mersey Docks (Corporation Purchase) Act, 1861 (c. clxxxviii), s. 23, s. 24.

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By the Mersey Docks and Harbour Board's regulations all cargo discharged from a vessel in the port of Liverpool was to be received by a licensed master porter who was responsible for its delivery to the consignee. On Thursday, Nov. 20, 1947, a vessel berthed in the port with a cargo which included a large quantity of bagged chestnuts, some of which were consigned to the plaintiffs and the remainder to W. and S., respectively, each of the consignees being produce merchants. The various consignments were of different quantities and distinguished by different marks, each consisted of a different number of bags, and the bags of the different consignments differed in weight. On Friday, Nov. 21, when the hatches were taken off, the master porter employed to receive the cargo found that during the voyage some of the bags in each consignment had burst and chestnuts from the different consignments had become intermixed, some of them being badly damaged. He showed the consignees the state of the chestnuts in the hold and asked them what they wished to be done. The plaintiffs wanted their insurers to inspect the damage before they gave their reply, but W. and S., who urgently required their consignments for the Christmas market, wished to take delivery of their respective shares, supplying their own labour and their own bags to re-bag their proportions of the loose chestnuts. The master porter did not weigh all the loose chestnuts when they came into his possession. The cargo was discharged on Friday and Saturday, and by noon on Saturday the respective consignees had taken delivery of all the sound bags. During Saturday afternoon and Sunday the workmen employed by W. and S. were given access to the mixed loose chestnuts and allowed to re-bag a quantity. On Monday the master porter weighed the re-packed bags and allowed W. and S. to take so many as would, together with the sound bags already delivered to them, make the total weight of chestnuts received by each of them amount, approximately, to four hundredweights less than the total bill of lading weight of the consignment to each. On the same day the plaintiffs decided to supply bags and have their share of the loose chestnuts re-bagged, and this was done on Tuesday. Finding that the total amount of chestnuts received by them fell short of their consignment weight by over four tons and included a quantity of badly damaged chestnuts, the plaintiffs claimed damages against the master porter for the loss suffered by them owing to his failure to deliver to them a proportionate share of the loose chestnuts.

HELD: (i) it was not unreasonable of the plaintiffs to require their insurers to survey the damage before giving instructions in regard to the disposal of the goods, nor was the delay from Friday to Monday unreasonable; and, therefore, the plaintiffs were not guilty of any breach of duty owed to the master porter such as would discharge him from the performance of any duty owed by him to the plaintiffs.

(ii) as the mixed loose chestnuts included some from each of the consignments, the consignees became tenants in common of the loose chestnuts.

Spence v. Union Marine Insurance Co., Ltd. (1868) (L.R. 3 C.P. 427), and dictum of LORD MOULTON in *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.* ([1913] A.C. 695), applied.

(iii) the relationship between the consignees and the master porter did not arise in contract, as the master porter's services were imposed on the

consignees by the statutes creating the Mersey Docks and Harbour Board and by the board's regulations, the consignees having no choice in the matter and no control over the master porter, and, therefore, the obligations of the master porter to the consignees, as tenants in common, were not the same as they would have been if the tenants in common had voluntarily joined in delivering the mixed loose chestnuts to him as bailee for all three, and he was not deprived of the right or duty to apportion; the master porter was under a legal duty to act fairly between the consignees, and, as the shipowner was compelled by the board's regulations to deliver the cargo to the master porter instead of to the consignees, the master porter was under an obligation to distribute the goods which came into his hands among the consignees in the same way as it would have been the shipowner's duty to do if he himself had made the delivery; in the circumstances it would have been the shipowner's duty to apportion the mixed loose chestnuts rateably between the consignees, and, therefore, it was the master porter's duty to do the same and he was in breach of his duty in failing to give the plaintiffs their fair share; although the evidence fell short of establishing a custom of the port of Liverpool, the obligation to apportion, which the law imposed on the master porter, appeared reasonable to those with knowledge of the trade; if the master porter adopted a reasonable formula for the apportionment, he would not be liable for breach of duty even if some other formula would have produced a fairer and more accurate result.

(iv) the Mersey Docks (Corporation Purchase) Act, 1861, s. 23 and s. 24, did not impose an absolute obligation on the master porter to weigh all goods which he received, but, if it was necessary for him to weigh all the loose chestnuts before they were delivered to the consignees so as to apportion them fairly, he should have done so, notwithstanding that, under the board's bye-laws, he was not entitled to make any extra charge for weighing.

(v) a fair method of apportionment would have been to divide the mixed loose chestnuts among the consignees in proportion to the differences between the total weight of the chestnuts, whether contained in sound or damaged bags, which could be recognised as forming part of each consignment, and the bill of lading weight of that consignment, and the master porter was liable in damages to the plaintiffs for the value of the amount by which the loose chestnuts which they received fell short of what they should have received on this apportionment.

AS TO SORTING DIFFERENT CONSIGNMENTS, see HALSBURY, Hailsham Edn., Vol. 30, p. 536, para. 687; and FOR CASES, see DIGEST, Vol. 41, pp. 536, 537, Nos. 3642-3644.

Cases referred to:

- (1) *Spence v. Union Marine Insurance Co., Ltd.*, (1868), L.R. 3 C.P. 427; 37 L.J.C.P. 169; 18 L.T. 632; 3 Digest 71, 131.
- (2) *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.*, [1913] A.C. 680; 83 L.J.P.C. 23; 109 L.T. 580; 3 Digest 72, 132.
- (3) *Buckley v. Gross*, (1863), 3 B. & S. 566; 32 L.J.Q.B. 129; 7 L.T. 743; 27 J.P. 182; 122 E.R. 213; 3 Digest 64, 78.

ACTION for damages.

The plaintiff company, which carried on business as a produce merchant, was the consignee of a large consignment of bagged chestnuts shipped from Naples to Liverpool in m.v. Ravenspoint. Two other produce merchants were also consignees of bagged chestnuts in the same ship. The defendant company was the master porter employed under the Mersey Docks and Harbour Board's regulations to receive the cargo from the ship and be responsible for its delivery to the consignees. During the voyage many of the bags in each consignment

had burst and chestnuts from the three consignments had become intermixed. The defendant company delivered the sound bags to their respective consignees and asked them what they wanted done with the mixed loose chestnuts. The plaintiff company wished to consult its insurers before deciding, while the other two consignees wished to take delivery of their proportions of the loose chestnuts as soon as possible. Without first weighing all the mixed loose chestnuts, the defendant company allowed each of the consignees other than the plaintiff company to re-bag and take delivery of so much as would, together with the sound bags already received by each, amount to four hundredweights less than the total consignment to each. The plaintiff company having decided to take delivery of its share of the loose chestnuts, what remained were re-bagged on its behalf, but the total amount of chestnuts which it received was more than four tons short of the weight of the consignment and the plaintiff company claimed damages from the defendant company, as the master porter, for the loss suffered. The plaintiff company contended, *inter alia* (a) that the master porter, as agent for each of the consignees and as bailee of the chestnuts for each of the consignees, was under a duty to divide the intermixed chestnuts between the three consignees in proportion to the bill of lading weights of each consignment; (b) that it was an implied term of the contract between each consignee and the master porter that the master porter should allocate the mixed loose chestnuts in due proportion; and (c) that a similar duty to apportion rested on the master porter by the custom of the port of Liverpool. The plaintiff company also relied on alleged breaches of the Mersey Docks (Corporation Purchase) Act, 1861, s. 23, and of the Mersey Docks and Harbour Board's bye-laws relating to master porters.

Wooll, Q.C., and *G. W. G. Jones* for the plaintiff company.

Nelson, Q.C., and *Nicklin* for the defendant company.

Cur. adv. vult.

June 11. **GLYN-JONES, J.**, read the following judgment. On Thursday, Nov. 20, 1947, the motor vessel Ravenspoint berthed in the port of Liverpool with a mixed cargo including a quantity of chestnuts, some of which were consigned to the plaintiff company. The regulations of the Mersey Docks and Harbour Board require that all cargo discharged from a vessel in the port shall be received by a licensed master porter who is responsible for the delivery thereof to the consignees. The defendant company carries on business as a stevedore, is licensed by the harbour board as a master porter, and was employed as a stevedore to unload the cargo from the Ravenspoint and as a master porter to receive the cargo notionally at the ship's rail. In its capacity as master porter the company employed a Mr. Roberts as clerk-in-charge or "counter-off", and among his duties was that of keeping certain records in a book called a "manifest book". This book was prepared before the unloading of the ship began by entering therein particulars, taken from the ship's manifest of bills of lading, of each consignment of goods comprised in the cargo, the entry being completed, as cargo was handled, by the addition of particulars of the quantities received and delivered to the respective consignees or bills of lading holders. The manifest book used by Mr. Roberts on the unloading of the Ravenspoint has been put in and it has been agreed between counsel that I may treat the entries in his book as *prima facie* evidence of the facts which these entries purport to record. I am, therefore, enabled to find, although I have not seen any of the relevant bills of lading, that according to the bills the chestnuts in the vessel were consigned as follows: (i) nine hundred bags, marked PUCA, of a total weight of twenty-six tons, eleven hundredweights, one quarter, and twenty-four pounds, to the plaintiff company, the average weight of each bag, assuming the bill of lading to be correct, being sixty-six pounds; (ii) eight hundred bags, marked CAMEL/W, of a total weight of nineteen tons, thirteen hundredweights, two quarters, and twenty pounds, to E. A. Woodall and Co.,

Ltd., the average weight of each bag, on the same assumption, being fifty-five pounds; (iii) (a) four hundred bags, marked CAMEL/JS, of a total weight of nine tons, sixteen hundredweights, three quarters, and ten pounds, to Mr. J. A. Sloan, the average weight of each bag being fifty-five pounds; (iii) (b) two hundred bags, marked DITTA COMM.GDI LORENZO CASANDRINO CASTAGNE A.A., of a total weight of nine tons, sixteen hundredweights, three quarters, and ten pounds, also to Mr. Sloan, the average weight of each bag in this case being 110 pounds. By these findings I do not purport to find as facts that the number of bags entered in the bills of lading was actually loaded or that each consignment, when loaded, was of the weight or marks entered, but only that the entries in the book are correctly extracted from the bills.

When the hatches were taken off the Ravenspoint on the morning of Friday, Nov. 21, it was seen that the chestnuts had suffered damage during the voyage. The bags had become damp and stained so that in some cases the marks were undecipherable or difficult to decipher and many of the bags, some from each consignment though not an equal proportion in each, had burst so that there was in the hold a quantity of loose chestnuts. Mr. Roberts called together the representatives of the consignees on the quay, showed them the state of the chestnuts, and asked them to say what they wished to have done, for it was obvious, not only that part of the consignments had become mixed, but also that by the time the chestnuts were unloaded there would be a loss since some of the chestnuts were already damaged and more would be damaged or lost by the bursting of bags in the course of unloading. The evidence before me was that the usual practice in the port of Liverpool when such an event occurs has been for each consignee to supply suitable bags to the master porter or pay for bags procured by him, and the master porter at the expense of the consignees then re-bags the "mixed loose", as it is called, and apports it rateably between the consignees. The word "rateably" requires further definition, but I defer to a later stage in this judgment mention of the difficulties which may arise in deciding on the proportions into which the "mixed loose" should be divided.

In the present case the plaintiff company was represented on the quay by Mr. Goodman of Arbuckle Smith and Co., Ltd., forwarding agents, and it was to him that Mr. Roberts showed the state of the chestnuts in the hold. Mr. Goodman reported the damage to Mr. Fuller, a director and the manager of the plaintiff company, and he in turn informed his insurers, whom he asked to send a surveyor as soon as possible, but the insurers told Mr. Fuller that the earliest time at which the surveyor could attend was the following Monday, Nov. 24. On Friday, Nov. 21, Mr. Roberts requested all three consignees to tell him whether or not they agreed to his having the "mixed loose" chestnuts re-bagged by his men and, if so, to supply or agree to pay for the necessary bags and labour. Mr. Goodman, on Mr. Fuller's instructions, said that he could not give any answer until after the surveyor had inspected the damage, as Mr. Fuller thought it imprudent to have his consignment handled until after the insurers had seen it. Meanwhile the representatives of the other two consignees, Woodall and Co., Ltd., and Sloan, who had either managed to get the chestnuts surveyed at once or had dispensed with inspection by a surveyor, were pressing Mr. Roberts to be allowed to take delivery of their respective shares of the chestnuts—and not unreasonably, for the chestnuts were urgently required for the Christmas market. Each of them declined to supply bags to the master porter or to pay the master porter's charges for re-bagging, and each decided to bring bags and employ its own or his own labour to re-bag its or his proportion of the loose chestnuts.

During Friday and Saturday the work of discharging the cargo from the hold went on. Any bags bearing decipherable marks and in apparently sound condition were stacked or piled on the quay according to marks, and the

“mixed loose” was piled separately. It was said that an attempt was made to stack the sound or apparently sound bags belonging to each consignee in the form of a hollow square, or well, into which could be put loose chestnuts coming from bags which burst in the course of unloading but could be identified as belonging to a particular consignee. I do not think it was practicable to do that with any certainty. A good many bags burst while being handled and their contents or some of their contents became part of the “mixed loose”

A in one or more piles on the quay. By midday on Saturday the respective consignees had taken delivery of all the bags which seemed to them to be in sound condition. These bags were not weighed, but the manifest book attributes a total weight to the quantities so delivered on the assumption that each bag was of the average weight obtained by dividing the total weight of each consignment by the number of bags in each. On this footing the gross weights

B of the quantities of chestnuts contained in these apparently sound bags, duly delivered to the respective consignees, were as follows: to the plaintiff company thirty-five bags containing one ton, two quarters, nineteen pounds; to Woodalls 370 bags containing nine tons, two hundredweights, twenty-one pounds; to Sloans, from their first consignment, which I call (iii) (a), two hundred bags

C containing four tons, eighteen hundredweights, one quarter, nineteen pounds, and from their second consignment, viz. (iii) (b), 173 bags containing eight tons, ten hundredweights, one quarter, two pounds. This distribution having been made, the differences between the consignment weights and the weights actually delivered to each consignee were as follows: to the plaintiff company twenty-five tons, ten hundredweights, three quarters, five pounds; (ii) to Woodalls, ten

D tons, eleven hundredweights, one quarter, twenty-seven pounds; and (iii) to Sloan, on both his consignments, six tons, four hundredweights, three quarters, twenty-seven pounds.

During Saturday afternoon and Sunday workmen employed by Woodalls and by Sloan were given access to the remaining chestnuts, which consisted, in part, of bags recognisable as belonging to a particular consignment, but

E damaged, from many or, perhaps, most of which some of the contents had escaped, and, in part, of the “mixed loose” chestnuts. These men during those two days, on behalf of their respective employers, re-packed into fresh bags the contents of any damaged or unsound, but identifiable, bags and also quantities of the “mixed loose”. On Monday Woodalls and Sloan began to take delivery of re-packed bags of chestnuts and these bags were weighed by

F the master porter on the instructions of the shipowners’ agents, Messrs. MacAndrew and Co., who were, presumably, acting in expectation of claims for loss. Mr. Roberts, the counter-off, kept a note of these weights and added them to the assessed weights of the sound bags previously delivered, and when, on this reckoning, there had been delivered to Woodalls and Sloan chestnuts amounting to about four hundredweights less in each case than the total bill

G of lading weight of the consignment to each, he stopped each of them from re-bagging or taking delivery of any more. The delivery of re-bagged chestnuts to Sloan was completed on Monday, Nov. 24, and to Woodalls by Tuesday, Nov. 25.

Meantime, on the morning of Monday, Nov. 24, Mr. Fuller had gone to the quay with his insurers’ surveyor, who, after seeing the chestnuts, authorised him

H to have his share re-bagged and to take delivery of them. Thereupon Mr. Fuller told a representative of the defendant company that he would supply bags and that he wanted his chestnuts re-bagged. During Monday Mr. Fuller instructed Arbuckle Smith and Co., Ltd., to procure suitable bags and deliver them to the defendant company and this was done. On Tuesday the work of re-bagging the chestnuts for the plaintiff company began, but as it went on it became apparent that the difference between the total weight of chestnuts received by the plaintiff company and the consignment weight in the relevant

bill of lading would be far greater than the difference between the weights of the chestnuts delivered to the other two consignees and their respective bill of lading consignment weights, and so it proved, for the total weight received by the plaintiff company fell short of the consignment weight by four tons, three hundredweights, four pounds. The chestnuts which the plaintiff company received included most of those which had been the worst damaged by sweat and contamination. In the circumstances Mr. Fuller felt, not unnaturally, that his company had not received its fair share of the chestnuts, and, accordingly, the company has brought this action claiming damages from the master porter. The amount claimed is comparatively small—some £290 odd—but the defendant company desired that the liability of a master porter in such circumstances should be defined by the court, as there had never before arisen in the port of Liverpool a case in which one of the consignees sought to place on the master porter the responsibility for making on his own initiative an apportionment of the “mixed loose”. The contentions of the parties are as follows. By para. 5 of the statement of claim the plaintiff company say, in effect, (a) that it was the duty of the master porter, arising from his relationship to each of the consignees as agent for each and as bailee of the chestnuts for and on behalf of each, to divide the intermixed chestnuts between the three consignees in proportion to the bill of lading weights of each consignment; (b) that it was an implied term of the contract between each consignee and the master porter that the master porter should allocate the “mixed loose” chestnuts in due proportion calculated as in (a); and (c) that by the custom of the port of Liverpool a like duty rested on the master porter to apportion the “mixed loose”. The same paragraph sets out what, it is said, would have been the correct proportions in which these chestnuts should have been distributed. Paragraph 6 adds causes of action based on breaches of statutory duty, and the duties relied on are said to be imposed by the Mersey Docks (Corporation Purchase) Act, 1861, s. 23, and by the bye-laws of the Mersey Docks and Harbour Board relating to master porters. It was argued that s. 23 of the Act of 1861 imposes on the master porter a duty to weigh all cargo coming into his hands, and that, if the master porter had weighed the whole of the chestnuts and had also weighed the “mixed loose”, he would not have made the mistake of delivering to the two consignees other than the plaintiff company so much more than their fair share of the “mixed loose”. Counsel for the plaintiff company pointed to bye-law 2 (3) as the relevant bye-law. He contended that, for the cargo with which the master porter was dealing, it was necessary for him to perform the following operations set out in bye-law 2 (3) (a) and (b), viz., under sub-para. (a), sorting or selecting goods to bill of lading mark, examining for external damage and separating goods accordingly, weighing, watching, delivering and re-filling, all of which the master porter was bound to do without any charge; and, under sub-para. (b), cooping or mending when required by the consignee of goods and under his direction, for which operation the master porter might make an additional charge. As I understood the contention of counsel for the plaintiff company, it was this. The master porter could have called on the three consignees to direct him to deal properly with this cargo by re-bagging the chestnuts so that a fair delivery would be possible, and that would have given him the right to make a charge under bye-law 2 (3) (b). By para. 7 the statement of claim charges the master porter with conversion of so much of the goods as ought to have been delivered to the plaintiff company but was wrongly delivered to the other consignees. The defence, apart from the formal traverses, denies (a) that the master porter was under any duty to apportion the “mixed loose”, (b) that he was under any of the statutory duties alleged or was in breach of any of them, and (c) the alleged conversion. It goes on to assert that the plaintiff company received all the chestnuts to which it was entitled, that the share it received was a proportionate

share, and that it received all the chestnuts which had been consigned to it. Finally, the defence alleges that, if the plaintiff company did not receive its proportionate share or had suffered any loss, the blame rests solely on the plaintiff company itself by reason of its failure on Friday, Nov. 21, or Saturday, Nov. 22, to give instructions for the chestnuts to be re-bagged.

A I think it will be convenient to deal at once with the last contention. Either the master porter owed a duty to the plaintiff company to see that it received a due proportion of the "mixed loose" chestnuts landed or he did not. If he did owe such a duty and has not performed it, I am of the opinion that the plaintiff company, by failing to give instructions until the morning of Nov. 24 as to what was to be done with its chestnuts, did not forfeit its rights to the performance by the master porter of his duty. It was not unreasonable of the plaintiff company to wait until the insurers had surveyed the damage before giving instructions as to the disposal of the goods. The delay from Friday until Monday was not unreasonable in the circumstances and I cannot find that the plaintiff company was guilty of any breach of duty owed to the master porter such as could or would discharge him from performance or further performance of the duty owed by him to the plaintiff company.

C The next question is: What was the master porter's duty? It is clear, I think, that the "mixed loose" must have included some chestnuts from each of the consignments. Counsel agreed that the consignees became tenants in common of that "mixed loose". I think that I may properly accept that pleading without myself discussing in this judgment the principle of commixtio or all the learning which is to be found in the arguments and judgments or speeches in such cases as *Spence v. Union Marine Insurance Co., Ltd.* (1), *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.* (2) and other authorities. D The master porter, then, was in possession of an unidentifiable mass of "mixed loose" of which the three consignees were tenants in common. Counsel for the plaintiff company contended that in such circumstances the master porter was in the position of a trustee of the "mixed loose" for each of the consignees to the extent of the consignee's respective proportion thereof, and that he must equitably apportion the "mixed loose" between all the consignees, doing to the best of his power equal justice to each as would be done by a court of equity. Counsel for the plaintiff company made reference to the proof on which an average adjuster would distribute a loss between the various parties, and he referred me to HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 13, F title "Equity", at p. 84. The contention of counsel for the defendant company, on the other hand, was that the master porter was a bailee and that the bailee of goods for tenants in common has in law neither the right nor the duty to apportion the goods between the tenants in common, and that, should one of the tenants in common demand of the bailee the delivery up of the whole of the goods, the bailee is compelled in law to deliver them up, leaving the other tenants in common to pursue whatever remedy they may have against him who G has taken the whole of the goods. This principle, said counsel, applies by operation of law as soon as a bailment is established, and any party seeking to impose by implication of law any additional obligation on the bailee must fail unless he proves that the implication is necessary to give business efficacy to the bailment.

H I am not sure that there is any such universal rule as that for which counsel for the defendant company contends. In my view, the obligations of a bailee depend on all the circumstances of the bailment, and, while it may be true in many or even most cases of a bailment by tenants in common that any one of the joint bailors may demand delivery up to himself alone of the whole of the goods bailed, it is not necessarily true in all cases where a bailee is found in possession of goods belonging to tenants in common. The contention of counsel for the defendant company is, I think, that the obligations of the master

porter are the same as they would have been if the three tenants in common had voluntarily joined in delivering the "mixed loose" to the master porter as bailee for all three. There is a form of contract of bailment between the three of them jointly, on the one hand, and the master porter, on the other. Assuming counsel to be right in saying that thereupon, in the absence of an express term in the contract to the contrary, any of the joint bailors could lawfully have required the bailee to deliver up the whole of the goods to himself, it does not follow, in my opinion, that the same rule applies where the bailment—if, indeed, this can accurately be called a bailment—does not arise from the contracts at all, but is imposed on the parties by operation of law, and I do not think that the relation between the master porter and the plaintiffs in this case does arise from the contract. In the port of Liverpool the consignee has no choice whether or not a master porter is to be employed, nor, usually, any right to choose which master porter shall be employed, nor can he exercise any control over the master porter's duties or charges which are prescribed by the Mersey Docks and Harbour Board's regulations. It is, theoretically, conceivable that a consignee might arrive at the docks expecting to take delivery of goods from the shipowner at the ship's rail only to find his goods in the hands of a master porter of whom he had never heard. There can be no contract without agreement, express or implied, and I see no ground for basing the relations between master porter and consignee on any agreement between them. The master porter's services are imposed on the consignee by the statutes creating the Mersey Docks and Harbour Board and by the board's regulations. On this footing counsel for the defendant company next contends that, since the language of the relevant statutes or bye-laws does not provide expressly that the master porter's duty includes the apportioning of the "mixed loose", it is impossible to imply words in the statutes creating such an obligation. On the other hand, counsel for the plaintiff company says that the fact that the relationship between the master porter and the consignee is created by statute does not prevent the court from implying into that relationship an obligation on the master porter to deal fairly between the consignees whose goods have come into his hands. It seems to me that, if the statute compels the shipowner to deliver the cargo to the master porter rather than to the consignee direct, then in respect of the goods which actually come into his hands the master porter ought to be under an obligation to distribute them among the consignees in the same way as it would have been the shipowner's duty to do if he himself had made the delivery. In this case, on the authorities, I think that it would have been the shipowner's duty to apportion the "mixed loose" rateably between the consignees, or, at any rate, between those consignees who had elected to treat themselves as tenants in common, and for them to receive their rateable proportion, whatever it was, of the "mixed loose".

In these circumstances I am of opinion that the law does impose on the master porter a duty to act fairly between all the consignees whose goods come into his hands, and, in particular, that it was in this case the master porter's duty to apportion the "mixed loose" chestnuts between the three consignees. I think the duty may be said to be a statutory duty or to arise quasi ex contractu so as to be comparable in a sense to the duty to pay over money had and received to the use of another. If the master porter is not under such a duty, it appears to follow that the first consignee to reach the quayside could, presumably, have collected the whole of the "mixed loose", even though the quantity exceeded his total consignment, and, if all three arrived simultaneously, it would, presumably, be the duty of the master porter to keep the ring while the three consignees scrambled for the chestnuts on the quay like Westminster boys for the pancake on Shrove Tuesday. I observe in passing that practically every witness, including those called by counsel for the defendant company to prove the contrary, and, in particular, Mr. Roberts himself, conceded that

A he thought it was the duty of the master porter to apportion. In my opinion, all this evidence falls short of establishing a custom of the port, but it does show that the obligation to apportion, which, I think, the law imposes on the master porter, appears reasonable to those with knowledge of the trade. Mr. Roberts says that, if the consignees had agreed to pay the cost of re-bagging, he would have taken it on himself to apportion. The difficulty in this case has arisen because the three consignees failed for once to agree that the master porter should re-bag the loose chestnuts. This created an unusual situation in which Mr. Roberts did his best to apportion the chestnuts by stopping Woodalls' and Sloan's workmen when he thought that they had had enough, although he thinks, now that he knows the facts, that they had too much. In difficult circumstances I do not blame Mr. Roberts for having misjudged the weight of scattered piles of loose chestnuts, but I think the duty on the master porter is to make a fair apportionment—fair in the sense hereinafter defined—and, if the apportionment is, in fact, unfair, the master porter must, I think, take the responsibility.

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C That leads me to the question what would be a fair apportionment. Counsel for the defendant company contended that the master porter was not, and could not be, possessed of sufficient information to enable him to say what would be a fair apportionment. He pointed out that the whole or most of the loss might have arisen because the weight of chestnuts originally loaded fell below the consignment weights and that, if so, it may have been the plaintiff company's consignment alone which was of short weight, or that, since the bags in the plaintiff company's consignment were the most damaged, the greater loss had rightly fallen on the plaintiff company, and that, on the evidence, the plaintiff company had not discharged the burden of proving that it had not received its fair share. These and similar difficulties are not new. They are referred to in SCRUTTON ON CHARTERPARTIES, 15th ed., p. 331. LORD MOULTON, in his speech in *Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd.* (2), said ([1913] A.C. 694):

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E " . . . I do not think it a matter of difficulty to define the legal consequences of the goods of 'A.' becoming indistinguishably and inseparably mixed with the goods of 'B.' If the mixing has arisen from the fault of 'B.', 'A.' can claim the goods. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of 'B.' that possession necessarily implies the possession of the intruding goods of 'B.' he is entitled to it (2 KENT'S COMMENTARIES, 10th ed., 465). But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that 'A.' and 'B.' become owners in common of the mixed property. Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shown by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental commixtio. BLACKBURN, J., in *Buckley v. Gross* (3) (following KENT'S COMMENTARIES) considers that they would be tenants in common in equal shares. In *Spence v. Union Marine Insurance Co.* (1) they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be

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strictly adhered to in extreme cases where they would lead to substantial injustice."

I think it follows that a formula must be devised which, so far as possible, takes into account the circumstances of the particular case. I am far from saying that in every case or in this case there is only one formula which is fair. The assessment can be made only within fairly wide limits, and, in my opinion, the master porter does not finally determine the rights of the parties, for, presumably, it would still be open to a consignee who could prove that he had not received the goods consigned to him to bring an action in an appropriate case against the other consignee or consignees, or, it may be, against the shipowner, or, possibly, against the consignor, but, if the master porter had adopted a reasonable formula, I do not think any court would hold him guilty of a breach of duty even though it was of opinion that some other formula would have produced a more fair or more accurate result. In devising that formula certain assumptions have to be made, as is pointed out in the passage which I have already cited from SCRUTTON ON CHARTERPARTIES. In this case Mr. Roberts assumed that the bill of lading weights of the consignments of Woodalls and Sloan were correct, or, at least, that those weights should be the basis on which he would decide, as he did, what weight of chestnuts each of them should be allowed to take away. I do not think that it now lies in the master porter's mouth to say, as counsel for the defendant company said, that the same assumption should not be made in assessing the plaintiff company's share. Counsel says that, at the time when Woodalls and Sloan demanded to be allowed to take delivery of their goods, the master porter had not sufficient data to enable him to make any better apportionment than he did, and he would have rendered himself liable to actions for damages for loss of future markets if he had refused to give delivery to Woodalls and to Sloan. On the other hand, counsel for the plaintiff company says that the only information which the master porter needed was the total weight of the chestnuts and the weight of the "mixed loose", and that it was not only his right but his duty to weigh them, and, if he did not know the weights, it was his own fault. Counsel referred me to the Mersey Docks (Corporation Purchase) Act, 1861, s. 23 and s. 24. In my opinion, these sections do not impose an absolute obligation on the master porter to weigh all goods which he receives, but they do impose on him a duty, which he owes as well to the consignee as to the board, to weigh correctly and, having weighed accurately, to record the weights of all such cargoes as in the circumstances of any given case he may have been required to weigh. Bye-law 2 (3) (a) of the board's bye-laws relating to master porters makes it clear that, if weighing is necessary, he must weigh without any extra charge. This view is confirmed by the entry in the scale of charges in a booklet put before me which shows that the charges authorised to be made by the master porter for the landing of chestnuts in bags include the cost of weighing each bag separately. I do not think that the master porter was under a duty to supply bags if the consignee refused to pay for them, but he could have weighed the chestnuts in the hampers in which they were unloaded or in other containers and tared the containers. I am of the opinion that, if it was necessary for him to do so to apportion the chestnuts fairly, then he should have done so. If, as counsel for the defendant company contended, the master porter was under no obligation to weigh unless expressly required by one of the parties to do so, he need not have weighed the quantities actually delivered, although, in fact, he did so, apparently on the instructions of the shipowner. But if the master porter had not weighed the chestnuts which he actually delivered, he would have deprived every consignee, so far as I can see, of any information concerning the total weights for chestnuts unloaded or the quantities delivered to the other consignees, and thus deprived each consignee of the opportunity to find out whether or not he had received his fair share of chestnuts. Counsel for the defendant company further said that to weigh the "mixed loose" would

have been costly, so as to make the transaction unprofitable for the master porter. I dare say it would, but master porters, like almost everyone else exercising any profession or trade, must take the rough with the smooth and must not expect to be guaranteed a profit on every transaction. If a master porter finds the business unprofitable, he should give it up or else persuade the Mersey Docks and Harbour Board to increase his charges.

A I have next to select a method of apportionment which I think fair. As between these three consignees no injustice is done, in my opinion, by assuming for this purpose that the consignment weights were correct, but I reject the contention of counsel for the plaintiff company that, having found the weight of the "mixed loose", the master porter should have apportioned it in proportion to the consignment weights, because it does not follow that each consignment contributed in equal or near equal proportion to the loss. For example, Sloan
B received no fewer than 173 sound bags out of two hundred in his second consignment, and it is clear that the contribution of this consignment to the loss was proportionately less than that of the others. What should have been done, I think, was to divide the "mixed loose" in proportion to the differences between the total weight of the chestnuts—whether contained in sound or in damaged bags—
C which could be recognised as forming part of each consignment and the bill of lading weight of that consignment. I am satisfied that, if this had been done, the plaintiff company would have received a greater share, and it follows that, in my opinion, the master porter, in breach of his duty, failed to give the plaintiff company its fair share.

I must next seek to assess the damage suffered in consequence by the plaintiff company. I cannot now re-apportion the "mixed loose" because I do not know
D how much of the re-bagged chestnuts delivered to each consignee came from damaged but identifiable bags and how much from the "mixed loose", but I think that the plaintiff company's loss can be assessed with substantial accuracy by re-apportioning on the same principle the whole amount of the chestnuts which were re-bagged. [His LORDSHIP found that there were enough re-bagged chestnuts to make up, approximately, nine-tenths of the shortages of each con-
E signment, and assessed the value of the chestnuts which should have been, but were not, delivered to the plaintiff company at £175. He continued:] The conclusion at which I have arrived renders it unnecessary to discuss the question whether or not there was a conversion by the defendant company of any specific goods which could have been shown to be the property of the plaintiff company and I do not think I need express any opinion on that issue.

F *Judgment for the plaintiff company.*

Solicitors: *G. H. Hindley & Co.*, Liverpool (for the plaintiff company);
Weightman, Pedder & Co., Liverpool (for the defendant company).

[*Reported by MISS M. D. CHORLTON, Barrister-at-Law.*]

CITY OF WINNIPEG v. CANADIAN PACIFIC RAILWAY CO.

[PRIVY COUNCIL (Viscount Simon, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), May 13, 14, 18, 19, July 14, 1953.]

Privy Council—Canada—Manitoba—Business tax—Canadian Pacific Railway Company—Deed of covenant giving exemption from taxation—Validity.

On or about Oct. 21, 1880, a syndicate entered into a contract with the then Minister of Railways and Canals in Canada for the construction of the Canadian Pacific Railway and the incorporation of the Canadian Pacific Railway Company, the respondent company. This contract was approved and ratified by an Act of the Parliament of Canada (44 Vict. c. 1), and pursuant to this Act, letters patent incorporating the company were sealed on Feb. 16, 1881, cl. 4 of which charter provided: "All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company . . ." The appellant, the city of Winnipeg, was anxious to secure that the principal workshops and stockyards of the respondent company for the province of Manitoba should be situated in the city of Winnipeg, and, for this purpose, entered into an agreement with the respondent company, which was evidenced by bye-law No. 148 of the appellant, passed on Sept. 5, 1881. This bye-law provided, inter alia, that the respondent company should execute a bond and covenant that they would "establish and build within the limits of the city of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the province of Manitoba, and the branches thereof radiating from Winnipeg . . . and for ever continue the same within the said city of Winnipeg", and that, on the fulfilment of these conditions, all the property owned by the company within the limits of the city of Winnipeg for railway purposes, or in connection therewith, should be for ever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind. On Oct. 10, 1881, the respondent company executed a bond and covenant in fulfilment of the bye-law, and the workshops and stockyards were duly erected.

On Feb. 23, 1948, the appellant purported to repeal bye-law No. 148, and notified the respondent company that the lands and buildings owned by the respondent company in the city of Winnipeg for railway purposes, or in connection therewith, had been assessed for realty tax and business tax. The respondent company claimed that all its property in the city of Winnipeg was for ever exempt from all municipal taxes, rates and levies and assessments of every nature and kind, and, in particular, from any real property tax or business tax.

HELD: (i) clause 4 of the charter of Feb. 16, 1881, appeared to be couched in the widest possible terms, and empowered the respondent company to enter into the deed of covenant of Oct. 10, 1881, which did not infringe the principle that a company cannot contract not to use or carry out its chartered powers; the arrangement pursuant to which the deed of covenant was executed was incidental to those things which the legislature had authorised and ought not to be held by judicial construction to be ultra vires and, therefore, the exemption conferred on the respondent company by bye-law No. 148 was binding on the appellant.

Dicta of LORD SELBORNE, L.C., in *A.-G. v. Great Eastern Ry. Co.* (1880) (5 App. Cas. 478), applied.

(ii) on the facts, there was no material distinction between the exemption from taxation granted by bye-law No. 148 and the exemption from taxation in *A.-G. for Saskatchewan v. Canadian Pacific Ry. Co.* (ante, p. 970), whereby

the exemption granted by cl. 16 of the contract recited in its charter of incorporation relieved the respondent company of liability from the business tax referred to in the Saskatchewan City Act, 1947, and, therefore, the exemption from taxation granted by bye-law No. 148 granted relief from business tax.

Cases referred to:

- A (1) *Ontario Power Co. of Niagara Falls v. Stamford Corpn.*, [1916] 1 A.C. 529; 38 Digest 587, p.
 (2) *Canadian Pacific Ry. Co. v. City of Winnipeg*, (1900), 30 S.C.R. 558; 38 Digest 488, y.
 (3) *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623; 11 Digest 103, 4.
 (4) *Montreal Park & Island Ry. Co. v. Chateauguay & Northern Ry. Co.*, (1904), 35 S.C.R. 48; 13 Digest 378, m.
 B (5) *A.-G. v. Great Eastern Ry. Co.*, (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 13 Digest 357, 932.
 (6) *Ashbury Railway Carriage & Iron Co. v. Riche*, (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 13 Digest 354, 922.
 C (7) *Whitby v. Grand Trunk Ry. Co.*, (1901), 1 O.L.R. 480; 21 C.L.T. 226; 17 Digest 393, 2025 i.
 (8) *Canadian Pacific Ry. Co. v. A.-G. for Saskatchewan*, [1951] S.C.R. 190; *affd.*, P.C., *ante*, p. 970.

APPEAL by special leave from a judgment of the Supreme Court of Canada, dated Oct. 22, 1951.

D *W. P. Fillmore, Q.C.*, *G. F. D. Bond, Q.C.* (both of the Canadian Bar), and *R. O. Wilberforce* for the appellant.

C. F. H. Carson, Q.C. (of the Canadian Bar), *Gahan, Q.C.*, and *A. Findlay* (of the Canadian Bar) for the respondent company.

July 14. **LORD COHEN** delivered the following judgment of the Board.
 By notices given respectively in the months of March and June, 1948, the
 E appellant notified the respondent company that the appellant had assessed the lands and buildings owned by the respondent company in the city of Winnipeg for railway purposes, or in connection therewith, for realty tax and business tax respectively. Immediately after the service of the first of such notices the respondent company commenced proceedings against the appellant, and after receipt of the second notice amended its statement of claim. By the amended
 F document the respondent company claimed that all its property then owned or thereafter to be owned by it in the city of Winnipeg was for ever exempt from all municipal taxes, rates and levies and assessments of every nature and kind, and, in particular, from any real property tax or business tax in respect of such property. It based its claim on an alleged agreement, the terms of which were set out in City of Winnipeg Bye-law No. 148, dated Sept. 5, 1881, as amended
 G by City of Winnipeg Bye-law No. 195, dated Oct. 30, 1882. A number of issues were raised in the action and were decided in favour of the respondent company by the trial judge, WILLIAMS, C.J., on Oct. 7, 1949. The appellant appealed to the Court of Appeal for Manitoba, and on Apr. 17, 1950, that court varied the judgment of the trial judge by holding, among other things, that the respondent company was liable for business tax. Both parties then gave notice
 H of appeal to the Supreme Court of Canada, the respondent company seeking a restoration of the judgment of the trial judge, and the appellant seeking a reversal of that part of the order of the trial judge which had been affirmed by the Court of Appeal. On Oct. 22, 1951, the Supreme Court restored the order of the trial judge. The appellant then applied to this Board for leave to appeal and on July 18, 1952, leave was granted, but the appeal was limited to two questions: (1) Whether a deed of covenant dated Oct. 10, 1881, and executed by the respondent company in pursuance of the agreement mentioned in

bye-law 148 was ultra vires the respondent company with the result that the exemption from taxation conferred on the respondent company by bye-law 148 never became effective; and (2) whether, if perpetual exemption from taxation is conferred by the said bye-law, such exemption does or does not extend to the business tax.

To determine these issues it is necessary to have in mind the circumstances in which the respondent company was incorporated and to refer briefly to certain incidents in its history. On or about Oct. 21, 1880, a syndicate entered into a contract with the then Minister of Railways and Canals in Canada for the construction of the Canadian Pacific Railway and the incorporation of a company to be called the Canadian Pacific Railway Company. The said agreement provided among other things: (1) (by cl. 7) that the said company should for ever maintain, work and run the Canadian Pacific Railway; (2) (by cl. 21) that the said company should be incorporated with sufficient powers to enable them to carry out the contract and that the contract should only be binding in the event of an Act of incorporation being granted to the said company in the form thereto appended as sched. A; (3) (by cl. 22) that the Railway Act of 1879, in so far as the same might be applicable to the undertaking referred to in the contract, and in so far as not inconsistent therewith or inconsistent with, or contrary to, the provisions of the Act of incorporation to be granted to the said company, should apply to the Canadian Pacific Railway. No statute was passed incorporating the company, but the Parliament of Canada passed an Act, 44 Vict. c. 1, approving and ratifying the above-mentioned contract. Section 2 of this Act provided as follows:

“For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the CANADA GAZETTE, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.”

Pursuant to this Act, letters patent incorporating the respondent company were sealed on Feb. 16, 1881. Clause 4 of this charter was in the following terms:

“All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.”

It is unnecessary to refer in detail to the special provisions therein referred to, but it should be mentioned that they contain a provision in the terms mutatis mutandis of cl. 22 of the agreement, thus making applicable the Consolidated Railway Act, 1879. The appellant was anxious to secure that the principal workshops and stockyards of the respondent company for the province of Manitoba should be situated in the city of Winnipeg and entered into an agreement with the respondent company to this end. The agreement is evidenced by bye-law No. 148 of the appellant which was passed on Sept. 5, 1881. The bye-law recited, among other things, that it was desirable that the principal

workshops and stockyards should be situated as aforesaid and that, in consideration of the premises, it was expedient for the appellant to lend its aid to the respondent company by granting the respondent company by way of bonus debentures of the city as therein mentioned and by exempting the property then owned or thereafter to be owned by the respondent company for railway purposes within the city from taxation for ever. The operative part of the bye-law authorised the issue of the debentures to the respondent company when the respondent company should have performed certain conditions, two of which were in the following terms:

"3. The said Canadian Pacific Railway Company shall, immediately after the ratification of this bye-law as aforesaid, make, execute and deliver to the mayor and council of the city of Winnipeg a bond and covenant under their corporate seal, that the said company shall with all convenient and reasonable dispatch establish and build within the limits of the city of Winnipeg their principal workshops for the main line of the Canadian Pacific Railway within the province of Manitoba, and the branches thereof radiating from Winnipeg within the limits of the said province, and for ever continue the same within the said city of Winnipeg. 4. And by such bond and covenant the said company shall bind themselves as soon as they conveniently can to procure and erect within the city of Winnipeg, large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof."

The bye-law went on to provide, in cl. 8, that, on the fulfilment by the respondent company of the conditions aforesaid, all property then owned or thereafter to be owned by the respondent company within the limits of the city of Winnipeg for railway purposes, or in connection therewith, should be for ever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.

On Oct. 10, 1881, the respondent executed a bond and covenant which, if intra vires, is admitted to be a fulfilment of the conditions of the bye-law. On Oct. 30, 1882, the appellant passed bye-law No. 195 amending bye-law No. 148, but the alterations thus effected are not material to the issues now before the Board. Doubts appear to have arisen as to whether bye-laws 148 and 195 were intra vires the appellant, and, therefore, in 1883, on the petition of the appellant, an Act of the legislature of Manitoba was enacted expressly declaring these bye-laws valid. Their Lordships pause here to observe that this Act merely precludes any suggestion that the bye-laws in question were invalid and does not affect the construction of the agreement referred to therein: cf. *Ontario Power Co. of Niagara Falls v. Stamford Corpn.* (1) ([1916] 1 A.C. 534). The workshops and stockyards were erected and it was not suggested before this Board that they had not been duly erected and maintained in accordance with the provisions of the deed of covenant.

From 1881 until 1900, when the Railway Taxation Act of Manitoba came into force (Statutes of Manitoba, 63 & 64 Vict. c. 57), the appellant, were it not for the exemption provision contained in the said bye-law, would have been free to tax the respondent company's property in the city of Winnipeg owned for railway purposes or in connection therewith. The appellant did not, during that period, demand any taxes in respect of such property, except that it made an unsuccessful attempt in 1894 to collect school taxes. In each of the years 1890 to 1894, both inclusive, the appellant purported to assess certain lands of the respondent company for school taxes. In 1894 the appellant commenced action in the Court of Queen's Bench for Manitoba to recover the amount of such taxes. The litigation went to the Supreme Court of Canada which held that the Act of 1883 validating bye-law 148 made valid the exemption clause, and that the school taxes in question came within the exemption

(*Canadian Pacific Ry. Co. v. City of Winnipeg* (2)). A petition of the city for leave to appeal to the Judicial Committee was refused (King's Order, July 24, 1901).

By the Railway Taxation Act mentioned above a provincial tax was imposed on the gross earnings of railway companies operating any line within the province. The railroad companies paying such taxes were to be exempt from all municipal taxation within the province. This exemption was suspended in 1947. On Feb. 23, 1948, the appellant purported to repeal bye-laws 148 and 195, and in March and June issued the notices to which their Lordships have already referred.

With this short statement of the history of the matter in mind their Lordships turn to the issues now before the Board. The respondent company alleges that it was within its power to enter into the deed of covenant dated Oct. 10, 1881, either (a) because, being incorporated by royal charter, it had, to use the language of the trial judge, "all the powers possessed by a corporation at common law", or (b) because it had power to execute the said deed of covenant under the very wide powers conferred by cl. 4 of its charter of incorporation.

The appellant argued that the respondent company had not the powers of a corporation at common law, since the power of the governor-in-council to constitute a railway company by letters patent under the great seal had been abrogated by s. 3 of the Canada Joint Stock Companies Act, 1877, and the respondent company, therefore, owed its incorporation to the express power conferred on the governor by the Canadian Statute, 44 Vict. c. 1.

The trial judge rejected this argument, and in the Court of Appeal, MCPHERSON, C.J., COYNE, J., and ADAMSON, J., agreed with him, but RICHARDS, J., and DYSART, J., took the opposite view. In the Supreme Court, ESTEY, J. (with whom CARTWRIGHT, J., concurred) agreed with the trial judge, but KELLOCK, J., took the opposite view. LOCKE, J., and KERWIN, J. (with whom RINFRET, C.J., TASCHEREAU, J., and FAUTEUX, J., concurred) did not find it necessary to determine the point since they were satisfied that the enumerated powers to be found in the charter were sufficient to authorise the respondent company to enter into the deed of covenant. There is thus a considerable divergence of opinion in the courts of Canada on the first ground on which the respondent company sought to justify its entry into the deed of covenant. Their Lordships do not find it necessary to resolve this divergence since they are satisfied that the trial judge, the majority in the Court of Appeal for Manitoba, and the majority of the Supreme Court of Canada were right in holding that the enumerated powers in the charter of incorporation justified the respondent company in entering into the deed of covenant dated Oct. 10, 1881. The correctness of this finding depends on the proper construction of the charter and, in particular, of cl. 4 thereof, which confers on the respondent company:

"All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract."

This clause appears to be couched in the widest possible terms and counsel for the appellant does not dispute that it would have justified the respondent company in erecting main workshops and stockyards in Manitoba and in entering into agreements with that end in view. Nor could he dispute that it was in the interest of the respondent company to secure, if it could, the immunity from taxation granted by cl. 8 of bye-law 148; but he pointed out that under the agreement recited in its charter of incorporation the respondent company had contracted "for ever efficiently to maintain and use the Canadian Pacific Railway". He argued that it could not be certain in 1881 that at some future period it might not be necessary, or at any rate advisable, to move the main

workshops in Manitoba to some other place than the city of Winnipeg. Therefore, said counsel, it must be *ultra vires* the respondent company to enter into an agreement for ever to maintain its main workshops within the city of Winnipeg. He based this argument mainly on the line of authorities which establishes that a company cannot contract not to use or carry out its chartered powers: see *Ayr Harbour Trustees v. Oswald* (3); *Montreal Park & Island Ry. Co. v. Chateauguay & Northern Ry. Co.* (4) per DAVIES, J. (35 S.C.R. 57).
 A Their Lordships are unable to see that the deed of covenant of Oct. 10, 1881, infringes this principle. They agree with LOCKE, J., when he says ([1952] 1 S.C.R. 485):

“Thus, there was conferred upon the company by s. 4 of the letters patent all the powers necessary or useful to enable it to discharge its obligations under the contract. It was, in my opinion, for the railway company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city or municipality where these were to be located. By the fall of 1881 the directors of the company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and westerly through the Pembina Mountains areas, should have their eastern terminus. The company was not asked by the city in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the province.”

Their Lordships also agree with LOCKE, J., that the observations of LORD SELBORNE, L.C., in *A.-G. v. Great Eastern Ry. Co.* (5) are in point. LORD
 E SELBORNE says (5 App. Cas. 478):

“I assume that your Lordships will not now recede from anything that was determined in the *Ashbury Railway Carriage & Iron Co. v. Riche* (6); it appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with JAMES, L.J., that this doctrine ought to be reasonably, and not unreasonably,
 F understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.”

In the present case their Lordships are satisfied that the arrangement pursuant to which the deed of covenant of Oct. 10, 1881, was executed was so incidental
 G and, indeed, was “useful” to the respondent company within the meaning of cl. 4 of their charter and was within their power.

Counsel for the appellant sought to narrow the effect of cl. 4 of the charter by a reference to the Consolidated Railway Act, 1879, which, by cl. 17 of the charter, is made applicable to the undertaking of the respondent company so far as not inconsistent with, or contrary to, the provisions of the charter.

H Their Lordships are unable to find anything in the provisions of that Act to which their attention was directed justifying such a restriction. Moreover, cl. 4 contained an express provision that the powers thereby conferred were not to be impaired by any of the special provisions thereafter contained. Their Lordships cannot part with this branch of the case without referring to the decision of the Court of Appeal of Ontario in *Whitby v. Grand Trunk Ry. Co.* (7), where a contract by a railway company, a predecessor in title in respect of part of the system of the defendant company, to erect and maintain for

ever the chief workshops of the company at Whitby was held to be beyond the powers given to that railway company by its statute of incorporation. Their Lordships do not question the correctness of the actual decision that the contract in question did not bind the Grand Trunk Railway Company since, as pointed out by ARMOUR, C.J.O., there is great difficulty in holding that the agreement, if valid, was enforceable against the company, defendant to that action. Apart from that point, however, their Lordships agree with KERWIN, J., that the decision, if correct, can only be supported on the terms of the enactments conferring the particular powers then in question. A

The exemption from taxation granted to the respondent company by bye-law 148 is, therefore, binding on the city, but the question remains whether that exemption grants relief from business tax. The trial judge held that it did, but his decision on this point was reversed by the Court of Appeal for Manitoba. Before the matter came to the Supreme Court of Canada that court had delivered its judgment in *Canadian Pacific Ry. Co. v. A.-G. for Saskatchewan* (8), to the effect that the exemption granted by cl. 16 of the contract recited in its charter of incorporation relieved the respondent company of liability from the business tax referred to in the Saskatchewan City Act, 1947. That business tax differed from the business tax imposed by the city of Winnipeg in that the yard-stick by which the liability was measured was floor space in the case of the Saskatchewan tax, whereas in the case of the city of Winnipeg it was rental value. This difference is, however, immaterial since the Supreme Court decided that the exemption applied whether the yard-stick was floor space or rental value and the parties did not argue before this Board that in this respect the Supreme Court were in error. Counsel for the appellant who argued this part of the case did not address their Lordships at length since the hearing of this appeal followed immediately on the hearing of the appeal in the *Saskatchewan* case (8). He adopted the argument of counsel for the respondent in that case and pointed out that the terms of the exemption in bye-law 148 differed from that in cl. 16 of the agreement recited in the charter in that the bye-law exempted only property then owned or which might thereafter be owned by the respondent company, whereas cl. 16 exempted property required and used for the construction and working of the railway. He agreed, however, that there was no suggestion that any of the property in respect of which the respondent company was now seeking exemption from business tax was not owned by the respondent company. Their Lordships are, therefore, of opinion that the Supreme Court of Canada were right in thinking that, on the facts before them, there was no material distinction between the two exemptions. Their Lordships have already given their reasons for thinking that the decision of the Supreme Court of Canada in the *Saskatchewan* case (8) was correct (ante, p. 970) and they need not repeat them. B C D E F

Their Lordships would, however, observe that the wording of bye-law 148 is in one respect wider than the wording of cl. 16, in that it grants exemption not only from taxation but also from rates and levies and assessments of every nature and kind. There is, therefore, some support for the view expressed by MCPHERSON, C.J., in the Court of Appeal for Manitoba that an additional reason for holding that the exemption in bye-law 148 covered business tax was that the bye-law prohibited the city from making the assessment necessary before the amount of the tax could be ascertained. G

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent company's costs of the appeal. H
Appeal dismissed.

Solicitors: *Lawrence Jones & Co.* (for the appellant); *Blake & Redden* (for the respondent company).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

WARREN v. WARREN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Grazebrook, Q.C.), July 27, 31, 1953.]

Divorce—Insanity—Detention as incurable patient for five years preceding presentation of petition—Special report and certificate—Words of declaration instead of certification—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d)—Lunacy Act, 1890 (c. 5), s. 38 (4) (as substituted by Lunacy Act, 1891 (c. 65), s. 7)—Mental Treatment Rules, 1948 (S.I., 1948, No. 1071), r. 2 (2) and schedule.

By the Lunacy Act, 1890, s. 38 (4), as substituted by the Lunacy Act, 1891, s. 7, a reception order which expires at the end of one year after its date can be extended if a special report with a certificate is sent to the Board of Control. The Mental Treatment Rules, 1948, schedule, Form 20 (formerly the Mental Treatment Rules, 1930, schedule, Form 27) set out the form of the special report and certificate, in which appear the words: "I [the medical officer of the institution] hereby certify that he [the patient] is still of unsound mind . . ."

By a reception order dated June 17, 1947, the husband was admitted into a mental hospital. A special report and certificate, dated May 24, 1948, was sent to the Board of Control, but the words: "I hereby declare" were used instead of the words: "I hereby certify". Two further reports and certificates, dated May 23, 1949, and May 21, 1951, were sent to the Board of Control, and in these the words: "I hereby certify" were used.

In 1952 the wife petitioned for dissolution of the marriage on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition within s. 1 (1) (d) of the Matrimonial Causes Act, 1950. The husband, by his guardian ad litem, contended that since the special report and certificate dated May 24, 1948, were not in the proper form, the reception order had expired, and, therefore, that he had not been continuously under care and treatment for five years.

HELD: the word "declare" was merely in substitution for, and could be regarded as equivalent to, the word "certify", and so the special report and certificate dated May 24, 1948, were in appropriate form, and the reception order had continued in operation; the husband had, therefore, been continuously under care and treatment for the requisite period, and a decree could be granted.

R. v. Pinder, Re Greenwood (1855) (24 L.J.Q.B. 148), distinguished.

AS TO EVIDENCE IN SUPPORT OF RECEPTION ORDERS, see HALSBURY, Hailsham Edn., Vol. 21, p. 415, para. 722; and FOR CASES, see DIGEST, Vol. 33, pp. 265-267, Nos. 1850-1856.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 1 (1) (d), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 390.

FOR THE LUNACY ACT, 1890, s. 38 (4), as substituted by the Lunacy Act, 1891, s. 7, see *ibid.*, Vol. 17, p. 1076.

FOR THE MENTAL TREATMENT RULES, 1948, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 17, p. 67.

FOR THE MENTAL TREATMENT RULES, 1930 (S.R. & O., 1930, No. 1083), see now the Mental Treatment Rules, 1948 (S.I., 1948, No. 1071). Form 27 of the rules of 1930 is now Form 20 of the rules of 1948.

Cases referred to:

(1) *Re Shuttleworth*, (1846), 9 Q.B. 651; 16 L.J.M.C. 18; 8 L.T.O.S. 138; 10 J.P. 760; 115 E.R. 1423; 33 Digest 266, 1854.

- (2) *R. v. Minster (Inhabitants)*, (1850), 14 Q.B. 349; 20 L.J.M.C. 48; 16 L.T.O.S. 261; 15 J.P. 143; 117 E.R. 138; 33 Digest 254, 1733.
- (3) *R. v. Pinder, Re Greenwood*, (1855), 24 L.J.Q.B. 148; *sub nom. Ex p. Greenwood*, 25 L.T.O.S. 86; 19 J.P. 262; 33 Digest 266, 1855.
- (4) *Murray v. Murray*, [1940] 4 All E.R. 250; [1941] P. 1; 110 L.J.P. 1; 164 L.T. 199; 104 J.P. 447; 27 Digest, Replacement, 370, 3064.

PETITION by the wife for dissolution of the marriage.

The parties were married on Sept. 28, 1930. On June 17, 1947, the husband was found wandering at large, and by virtue of a reception order of that date he was admitted into a mental hospital where he had remained ever since. To continue the operation of the reception order under the Lunacy Act, 1890, s. 38 (4), as substituted by the Lunacy Act, 1891, s. 7, a special report and certificate was issued and dated May 24, 1948, in which the words: "I hereby declare that he is still of unsound mind" were used instead of the words: "I hereby certify, etc.", the words set out in the appropriate form in the schedule to the Mental Treatment Rules, 1930. Two subsequent special reports and certificates contained the words: "I hereby certify". The wife filed a petition for divorce, dated Nov. 26, 1952, on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The wife also prayed for the exercise of the court's discretion in her favour. The husband, by his guardian ad litem, in answer to the petition denied the wife's allegations on the ground that the special report and certificate dated May 24, 1948, was incorrectly made out so that the reception order dated June 17, 1947, had expired at the end of one year from that date.

F. E. C. Grundy for the wife.

G. K. Newman for the guardian ad litem.

Cur. adv. vult.

July 31. **MR. COMMISSIONER GRAZEBROOK, Q.C.**, stated the facts and continued: The petition is brought under the Matrimonial Causes Act, 1950, s. 1 (1) (d), and under s. 1 (2) of that Act it is stated:

"For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . and not otherwise."

By the Lunacy Act, 1890, s. 38 (4), as substituted by the Lunacy Act, 1891, s. 7:

"A reception order shall remain in force for a year after the date by this Act or by an order of the Board of Control appointed for it to expire, and thereafter for two years and thereafter for three years, and after the end of such periods of one, two, and three years for successive periods of five years, if not more than one month nor less than seven days before the expiration of the period at the end of which, as fixed by this Act or by an order of the Board of Control under sub-s. (2), the order would expire, and of each subsequent period of one, two, three, and five years respectively a special report of the medical officer of the institution or of the medical attendant of the single patient as to the mental and bodily condition of the patient with a certificate under his hand certifying that the patient is still of unsound mind and a proper person to be detained under care and treatment is sent to the Board of Control."

By the Mental Treatment Rules, 1930, r. 2 (2), the forms to be used were set out in the schedule. Form 27 was the appropriate form and indicated the

matters that were to appear in the special report and certificate, the last clause of that form being in these terms:

"I hereby certify that he is still of unsound mind, and a proper person to be detained under care and treatment."

That has to be signed by the medical officer.

A In this case the special report and certificate, which is dated May 24, 1948, and signed by the medical officer, contains all the matters required and indicated in the schedule, but the final clause is as follows:

"I hereby declare that he is still of unsound mind, and a proper person to be detained under care and treatment."

B That is to say, the word "declare" appears in the printed form instead of the word "certify" which appears in the form in the schedule. In the next special report and certificate dated May 23, 1949, it is interesting to note that the word "declare" is struck out and the word "certify" is typed in and initialled by the medical officer signing that form; and in the next special report and certificate, dated May 21, 1951, there appear for the first time, so far as this case and as this institution are concerned, in the printed form, the words: "I hereby certify". From the printing at the foot of these forms it appears that the first two forms were printed in 1947 and that the last form was printed in 1949, so that those in the institution apparently had in mind at some time that the printed form which had been used at this institution was wrong in that "declare" appeared instead of "certify". It has been argued that "declare" does not mean the same as "certify" and that, therefore, the special report and certificate of May 24, 1948, not being in the proper form, the reception order came to an end at the expiration of the year; that the husband was not continuing to be kept in the institution under the original reception order; and that, therefore, the case brought by the wife must fail as the husband was not under care and treatment.

D In the cases to which I was referred there was not a vast amount of assistance on this particular matter, so far as I could find. In *Re Shuttleworth* (1), in so far as it can be said to have some bearing on this case, the headnote reads (9 Q.B. 651):

E "Under stat. 8 & 9 Vict. c. 100 . . . sched. (C) [relating to the medical certificate then required] a medical certificate is sufficient which states, as grounds for the opinion that the party is insane, 'that she labours under delusions of various kinds;' and 'that she is dirty and indecent in the extreme.' A medical practitioner, signing the certificate, instead of the words 'from the following fact or facts,' inserted, 'from the conversation I have had this day with the said' lunatic. Held sufficient, without more."

F The court there held that, although the contents of the certificate were not in the form according to the schedule, they were sufficient. In *R. v. Minster (Inhabitants)* (2) it is stated in the headnote (14 Q.B. 349):

G "It is no valid objection to an order of maintenance made, under stat. 8 & 9 Vict. c. 126, s. 62 . . . that the medical certificate, annexed to the order for removal to the asylum, varies from the form in sched. (E), No. 1 of stat. 8 & 9 Vict. c. 126, in not stating the place of abode of the person signing it, or that he was a fellow or licentiate of the College of Physicians or a graduate in medicine, or a member of the College of Surgeons, or an apothecary authorised by the Apothecaries' Company."

H In that case the fact that the certificate was not in the form required was held to be no valid objection.

R. v. Pinder. Re Greenwood (3) again related to the form of the medical certificate, and it was decided that s. 4 of the statute 16 & 17 Vict., c. 96, which enacted that no person (not a pauper) was to be received as a lunatic into any

licensed house or hospital without the medical certificate, according to the form in sched. (A) No. 2, of two persons, being physicians, surgeons, or apothecaries, was not merely directory, but compulsory. In that case it appeared on the return to a habeas corpus that the certificates under which the person had been received into a private asylum as a lunatic omitted to state the name of the street and number of the house where the examination took place, in accordance with the form in sched. (A) No. 2; and it further appeared by affidavit that the examination did in fact take place in a certain house in a certain street, and that the alleged lunatic was not dangerous either to the public or himself. In the circumstances it was held that the certificates were defective in a material particular, and the lunatic was ordered to be discharged from confinement. COLERIDGE, J., said (24 L.J.Q.B. 151):

"When from this enactment we turn to the schedules referred to, we find them full of minute particulars, manifestly framed with anxious carefulness, as if to secure some important object. It would seem dangerous to enter into a comparison of these, and to class some as material which must be observed, and some as immaterial which may be disregarded . . . It should be remembered, this is not a case of the sufficiency of an equivalent phrase; if it were, different considerations might arise; but here, that which the statute requires has been wholly omitted, and nothing substituted in its place. I come to the conclusion, then, upon principle, that the certificate is defective in a particular which I have no right to consider is immaterial."

I was also referred to *Murray v. Murray* (4). In that case a wife, incurably of unsound mind, was in 1935 discharged relieved, but not recovered, from a mental hospital under s. 25 of the Lunacy Act, 1890, for the purpose of her being detained at an institution technically a "workhouse" within the meaning of that Act, but the further statutory requirement under the same section that the medical superintendent of the latter institution should issue a certificate to a certain effect was not complied with. In 1939 the husband petitioned for the dissolution of his marriage on the ground that the wife was incurably of unsound mind and had been under care and treatment for at least five years continuously immediately preceding the presentation of the petition within the meaning of s. 2 (d) and s. 3 of the Matrimonial Causes Act, 1937, having been under detention continuously in the two institutions since 1923. It was held that the detention in the "workhouse" was not justified, owing to the lack of any certificate by the medical officer of that institution, and that the petition, therefore, failed. SIR WILFRID GREENE, M.R., stated ([1940] 4 All E.R. 253):

"Periodical certificates are required in order to keep a reception order in force under the Lunacy Act, 1891, s. 7, which substitutes a new sub-s. (4) for the original sub-s. (4) of s. 38 of the Act of 1890. That sub-section requires that at stated intervals, beginning with a year and running up to five years, there must be a special report of the medical officer of the institution as to the mental and bodily condition of the patient, with a certificate certifying that the patient is still of unsound mind and a proper person to be detained. Unless that report and those certificates are given, the reception order automatically expires. That is one of the safeguards which the legislature has laid down for the benefit and protection of persons detained under reception orders, and one would not expect to find that the Act would allow any case to exist where a person detained as an alleged lunatic could be detained indefinitely without the necessity of periodical reports and certificates. In the present case, the reports and certificates required by that sub-section were duly given, and the date of the expiration of the first five-yearly period would have been July 17, 1935—that is to say, about a month after the transfer to Leavesden."

Then he goes on to deal with the facts of that case.

In the present case I have to consider whether the use of the word "declare" instead of "certify" is sufficient compliance with the requirements of the Act. In arriving at a conclusion I derive assistance from *Re Greenwood* (3) where there was a total omission of the requirements in the medical certificate, and COLERIDGE, J., as I have already read from his judgment, stated (24 L.J.Q.B. 152):

A

"It should be remembered, this is not a case of the sufficiency of an equivalent phrase; if it were, different considerations might arise . . ."

In the present case I consider that the word "declare" is merely in substitution for, and can be regarded as equivalent to, the word "certify". In those circumstances, I hold that the special report and certificate of May 24, 1948, was in appropriate form and that, therefore, the wife has proved not only that the husband is incurably of unsound mind but that he has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

B

Decree nisi.

C Solicitors: *F. W. P. Lupton* (for the wife); *Official Solicitor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

D

NOTE.

R. A. H. (TRANSPORTERS), LTD. v. EDGAR.

E

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 7, 1953.]

Case Stated (by Justices)—Form—Magistrates' Courts (Forms) Rules, 1952 (S.I., 1952, No. 2191), Form No. 119.

F

LORD GODDARD, C.J. (after the court had dismissed the appeal): I am not referring to the drafting of the Case here, but I do want the attention of practitioners and magistrates' clerks directed to the fact that the form of Case Stated is now prescribed by Form No. 119 of the Magistrates' Courts (Forms) Rules, 1952. I have been oppressed for a long time with the unnecessary recitals which are always put into Cases, by which we are told that some person is dissatisfied with the justices' decision and are referred to the provisions of statutes and so forth. Therefore, I have settled a form in which Cases should be stated, which has been accepted by the Rules Making Committee, and will be found to omit a great deal of the unnecessary recitals to which I have referred, consequently reducing the costs. I hope that practitioners and magistrates' clerks will remember that there is this form now prescribed, and will use it.

G

F.G.

GORE-BOOTH v. GORE-BOOTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), June 22, 23, 1953.]

Divorce—Insanity—Guardian ad litem—“Person of unsound mind”—Need to apply for appointment of guardian—No appearance by person of unsound mind after service of petition—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (9).

On Oct. 5, 1951, the husband was received into a mental hospital as a temporary patient. On Apr. 7, 1952, the wife filed a petition for dissolution of the marriage on the ground of the husband's cruelty. The petition, accompanied by the memorandum of appearance in duplicate, the form of acknowledgment of service, and the notice of petition, was served on the husband personally in the mental hospital. The husband refused to complete the form of acknowledgment of service and entered no appearance. On May 6, 1952, the wife's solicitors wrote a letter to the medical superintendent in answer to which the latter replied on May 17, 1952: "I think it is most unfortunate that at this stage he should have the stress and strain of dealing with a legal matter . . . I should be most grateful if you could postpone taking any action in the matter for, say, six months, when I hope that [the husband] will be able to deal with the matter himself. Certainly as long as he is in hospital I think it would be inadvisable for him to deal with the matter . . ." On July 31, 1952, the petition was heard undefended, and a decree nisi made in favour of the wife. On an application by the husband for a re-hearing,

HELD: rule 64 (9) of the Matrimonial Causes Rules, 1950, which provided that "where a petition . . . has been served on . . . a person of unsound mind and no appearance has been entered . . . by or on behalf of the . . . person of unsound mind" the petitioner should apply for the appointment of a guardian ad litem, was mandatory, and, as there was sufficient information in the letter of the medical superintendent of May 17, 1952, to necessitate an application under r. 64 (9), the decree would be set aside.

Stanga v. Stanga (1953) (Feb. 18, not reported) (in which a Divisional Court of the Divorce Division held that r. 64 (9) was mandatory in the case of service on an infant), applied.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 64, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 226.

Case referred to:

(1) *Stanga v. Stanga* (Feb. 18, 1953), Unreported.

MOTION for re-hearing of divorce suit.

The parties were married on Aug. 14, 1948, and there were two children of the marriage. On Oct. 5, 1951, the husband was received into St. Patrick's Hospital, Dublin, as a temporary patient under the Mental Treatment Act, 1945, a statute of the legislature of Eire. On Mar. 20, 1952, the husband was transferred to the convalescent branch of the hospital, namely, St. Edmondsbury, Lucan, Dublin. On Apr. 7, 1952, the wife filed a petition for dissolution of the marriage on the ground of the husband's cruelty, relying for the purpose of jurisdiction on the provisions of the Matrimonial Causes Act, 1950, s. 18 (1) (b). On Apr. 16 an agent of the wife's solicitors served on the husband personally at St. Edmondsbury the petition together with the memorandum of appearance in duplicate and the form of acknowledgment of service. On Apr. 22 the agent served on the husband personally the notice of petition. The husband refused to complete the form of acknowledgment of service. On May 6, 1952, the wife's solicitors wrote to the medical superintendent at St. Edmondsbury saying, *inter alia*:

"We are very loth to take steps for the action to be set down for trial

in the undefended list until we have satisfied ourselves that [the husband] understands that his wife has taken proceedings for divorce, and that unless he forthwith takes some action in the matter the case will be heard by the court in his absence. Might we trouble you to let us know whether, bearing in mind his recent mental illness, you have any reason to suppose that he has not understood the nature and purport of the documents that were recently served on him."

A On May 17, 1952, the medical superintendent replied, *inter alia*:

"I think it is most unfortunate that at this stage he should have the stress and strain of dealing with a legal matter . . . I should be most grateful if you could postpone taking any action in the matter for, say, six months, when I hope that [the husband] will be able to deal with the matter himself. Certainly as long as he is in hospital I think it would be inadvisable for him to deal with the matter . . ."

B On June 21 the husband left the hospital. On July 31 the petition was heard undefended by Mr. Commissioner FLOWERS, Q.C., who granted a decree nisi in favour of the wife. On Aug. 17 the husband entered an appearance and filed a notice of motion (largely drafted by himself) applying for a re-hearing under the Matrimonial Causes Rules, 1950, r. 36, on the grounds:

C " (i) Illness when the petition was supposed to be heard, and, therefore, of inability to file a defence; (ii) that the petition was not supposedly properly served; and (iii) that the matter be re-heard, application being made for restoration (*sic*) of conjugal rights."

D On Nov. 3 the motion came before the Divisional Court (LORD MERRIMAN, P., and DAVIES, J.), but the husband did not appear and the motion was adjourned in the hope that the Official Solicitor might be able to look after the husband's affairs. On Jan. 16, 1953, the medical superintendent wrote in answer to the Official Solicitor, *inter alia*:

E "During the period Apr. 16-22, 1952, I consider that [the husband] was a person of unsound mind in the sense that he was not capable of (i) making up his mind rationally whether or not he wished his marriage dissolved and (ii) of conducting his defence to his wife's petition unaided or properly instructing solicitors so to do."

The motion was now restored for hearing.

F *Comyn* for the Official Solicitor, as guardian ad litem for the husband.
Melford Stevenson, Q.C., and *Victor Williams* for the wife.

G LORD MERRIMAN, P., stated the facts and continued: It is plain that the illness to which the husband refers in his notice of motion was mental illness, and when he speaks of the papers being "not supposedly properly served" he is referring to the fact that personal service was effected on him when he was in a branch of a mental hospital in Eire. It is that which he says constituted his inability to file a defence, and he has applied to be able to file an answer or cross-petition for restitution of conjugal rights. The substance of the matter is that he has not had an opportunity, in accordance with the proper procedure of this Division, to put his case before the court.

H The Matrimonial Causes Rules, 1950, r. 64, which is headed "Infants and Persons of Unsound Mind", governs procedure in these matters. The relevant sub-rules read:

"(5) Where in any [matrimonial] cause any document is required to be served and the person on whom service is to be effected is of unsound mind, then, unless otherwise directed, that document shall, if the Official Solicitor has consented to act as guardian ad litem, be served on him and shall, in any other case, be served upon the person with whom the person of unsound mind

resides or under whose care he is, and service so effected shall be deemed good service upon the person of unsound mind . . . (9) Where a petition or answer has been served on a person who is an infant or a person of unsound mind and no appearance has been entered in the cause by or on behalf of the infant or person of unsound mind . . . the party at whose instance the petition . . . was served shall, before proceeding further with the cause, apply for an order that some proper person be assigned guardian of the . . . person of unsound mind by whom he may appear and defend or intervene in the proceedings."

The cardinal issue, therefore, is whether at the material time the husband was, within the meaning of this rule, a person of unsound mind. If so, it is clear, and, indeed, there is no dispute about it, that the service effected was an improper and unauthorised service. I would like to say in passing that it is evident that the solicitors for the wife wished and intended the service to be effected in some way through the authorities of the place at which the husband was—(I am using the most non-committal phrases)—but that for some reason which has not been made apparent their instructions to the agent who was to effect service were not carried out. He effected service on the husband personally, and on a later occasion tried to get him to sign an acknowledgment of service, which he refused to do. It is not necessary, in my opinion, for us to consider whether, in the circumstances which afterwards happened, that by itself would be fatal to the service. Suffice it to say that it was admitted that it was a bad service if the husband could be properly described within the rule as a person of unsound mind. The second step is, if anything, more important, because whether or not he was served in the technical sense of the word, it is clear that at no material time has he entered an appearance. Therefore, if he was a person of unsound mind, it was the duty of those representing the wife, if the Official Solicitor or some other guardian had not already been appointed, to apply for the appointment of a guardian ad litem for the express purpose of enabling him to appear and defend the proceedings. I say no more than that it has been held in this court, in the corresponding case of an infant, that sub-r. (9) is mandatory, and that non-compliance with it vitiates the whole proceedings: *Stanga v. Stanga* (1), a decision of a court consisting of DAVIES, J., and myself. In my judgment I gave the history of this rule and said it was drawn for the Rules Committee by LORD GREENE and LORD CLAUSON as being an exposition of the recognised Chancery practice in connection with persons under disability. So far as I know, it has remained unchanged ever since.

This petition was brought in the jurisdiction of this court under the authority of the Matrimonial Causes Act, 1950, s. 18 (1) (b), on the ground that the wife is resident in England and has been ordinarily resident here for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. It is said, though I must not be taken to be stating that this is absolutely established, that he was domiciled in Eire, and manifestly the fact that the proceedings are thus complicated demands that no less than the ordinary care is necessary to ensure that the rules concerning service, and the appointment of a guardian, if the husband is under a disability, should be strictly observed.

It is common ground that the husband did not at any time material for the purposes of this application enter an appearance. An appearance was entered later, but not before the trial, and, it being common ground that no application for the appointment of a guardian ad litem was made, I come back to the question which is the cardinal question in this case—whether, for the purposes of r. 64 of the Matrimonial Causes Rules, 1950, this man was a person of unsound mind. It is evident that, although the learned commissioner was informed that the petition was brought under the Matrimonial Causes Act, 1950, s.

18 (1) (b), and that when the petition was served the husband was in a mental home as a temporary patient, neither the rule, nor the Act of Parliament, nor the definition in the Act of Parliament was considered in detail. I think that the most convenient approach to the question whether the husband was under the disability in question is to take the series of questions which the Official Solicitor addressed to the medical superintendent. The first question elicited the date on which the husband entered St. Patrick's Hospital, Oct. 5, 1951. The second question elicited that the nature of his illness, which necessitated treatment there, was schizophrasia, and the third that he was a temporary patient under the Mental Treatment Act, 1945. To the question when the husband left St. Patrick's Hospital and in what circumstances—that is to say, whether he was then fully recovered or was still suffering from some form of mental illness, the answer was that he left St. Edmondsbury, Lucan, on June 21, 1952, and it is as well to incorporate with that the answer to the next question, that St. Edmondsbury, Lucan, is a convalescent part of St. Patrick's Hospital. The medical superintendent continues: "I had arranged his discharge care of his relatives. Actually he left before his relatives called for him, and went away without leaving an address. He was not fully recovered at this time, though, in my opinion, well enough to be discharged from hospital." We do not know whether or not there was at that time an effective extension of the original order, and, therefore, it would not be right to lay too much stress on the use of the word "discharge". Suffice it to say that it is consistent, but not exclusively consistent, with the discharge from detention of a man who is detained under an effective order. It is made clear, however, by the answer to question 6, that the husband had proceeded direct from the principal hospital to the St. Edmondsbury branch, and that when he went to St. Edmondsbury on Mar. 20 he was still under the care of the hospital medical and nursing staff. Finally, the medical superintendent was asked the following questions:

"During the period Apr. 16-22, 1952, do you consider that [the husband] was a person of unsound mind in the sense that he was or was not capable of (i) making up his mind rationally whether or not he wished his marriage dissolved and (ii) of conducting his defence to his wife's petition unaided or properly instructing solicitors so to do?"

To that the answer was:

"During the period Apr. 16-22, 1952, I consider that [the husband] was a person of unsound mind in the sense that he was not capable of (i) making up his mind rationally whether or not he wished his marriage dissolved and (ii) of conducting his defence to his wife's petition unaided or properly instructing solicitors so to do."

If that answer holds good, it is, in my opinion, clear that, although there is no definition for the purposes of r. 64, and, indeed, for many other purposes, of "unsound mind" or "being a person of unsound mind", the husband at the time of the purported service was a person of unsound mind within the meaning of the rule. But it is said that this answer does not hold good and that this court ought not to accept it, and the principal reason why that is submitted is that it is said to be inconsistent with an answer given by the medical superintendent to the wife's solicitors on May 17, 1952. On May 6, 1952, the wife's solicitors wrote to him, saying that they were acting for the wife, and continuing:

"You will appreciate that it was necessary for us to arrange for [the husband] to be served with a copy of the petition and other papers connected with the divorce, and with this object in view we instructed agents in Dublin. We advised our agents that [the husband] was a patient at your hospital, and had assumed that they would get in touch with you for guidance as to when service could be effected. We have now ascertained,

however, that our agent interviewed [the husband] at St. Edmondsbury, Lucan, Dublin, on both Apr. 16 and 22, when, on the latter occasion, service of the documents was duly completed. [The husband] refused to sign the acknowledgment of service form which was handed to him by our agent, and has not caused an appearance to the action to be entered on his behalf. We are very loth to take steps for the action to be set down for trial in the undefended list until we have satisfied ourselves that [the husband] understands that his wife has taken proceedings for divorce, and that unless he forthwith takes some action in the matter the case will be heard by the court in his absence. Might we trouble you to let us know whether, bearing in mind his recent mental illness, you have any reason to suppose that he has not understood the nature and purport of the documents that were recently served on him. We look forward to hearing from you in this matter at your earliest convenience."

The reply which is said to be inconsistent with the medical superintendent's oath a year later is as follows:

"He [the husband] has had a serious illness and has recently completed a prolonged course of treatment and is now convalescing at our branch hospital in Lucan. I am glad to say that he has made excellent progress with treatment and I hope before long he will be able to leave hospital. I think it is most unfortunate that at this stage he should have the stress and strain of dealing with a legal matter such as you mention in your letter. In the interests of his health and complete recovery I should be most grateful if you could postpone taking any action in the matter for, say, six months, when I hope that [the husband] will be able to deal with the matter himself. Certainly as long as he is in hospital I think it would be inadvisable for him to deal with the matter, and I am sure you too would feel it more satisfactory that he should be out of hospital before proceeding with the action."

I say no more by way of analysis of that statement than that it is implicit, if not actually expressed, that on May 17, 1952, a month after the purported service had been effected, the husband was still ill, was still unable to leave hospital, was not completely recovered (though it was hoped that complete recovery might occur), and, above all, that he was not at the date of writing capable of dealing with the matter. I am bound to say that I have some difficulty in understanding how, with that expression of opinion, it was thought proper to proceed without complying with r. 64 (9) and obtaining the appointment of a guardian ad litem.

In my opinion, there is no inconsistency between what the medical superintendent said on May 17, 1952, and the considered and more detailed opinion that he has given to the Official Solicitor. I think that the question posed in the letter of May 6, 1952 (which, as I have already stated, assumes that his mental illness was "recent", whereas, in fact, it persisted at that date), whether the medical superintendent had any reason to suppose that the husband had not understood the nature and purport of the documents that were recently served on him raises too narrow an issue. That, in my opinion, is why the medical superintendent, very properly, declined to be pinned down to that aspect of the matter alone, and gave a more comprehensive answer which seems to me to have demanded more serious consideration than it received. I must speak plainly about this. I think that there was sufficient information in the letter of May 17, 1952, from the medical superintendent to necessitate an application under r. 64 (9), and that the wife went on at her peril. In my opinion, we have no option but to set aside this decree.

PEARCE, J.: I agree. There has not been a compliance with the provisions of r. 64 as required when a suit is brought against an infant or a person

of unsound mind. It may be necessary in some future case to investigate with more particularity the precise area covered by the words "of unsound mind" in this rule, but I see no necessity here. This is not a border-line case. The doctor's answers to the Official Solicitor's questionnaire are verified by affidavit. They satisfy me that for the purposes of r. 64 the husband was, in the doctor's opinion, of unsound mind at the material dates. There is no evidence to the contrary. The doctor's earlier letter gives me no reason to doubt the accuracy and honesty of that opinion, and, in my view, it is consistent with that. I accept the doctor's opinion as correct. It is important that this court should guard jealously the provisions of r. 64, which were carefully framed, as LORD MERRIMAN, P., explained in *Stanga v. Stanga* (1), for the express purpose of protecting infants and those of unsound mind. Whatever the merits of a case this court must set a decree aside where the provisions of r. 64 (9) have not been carried out. I agree, therefore, that the decree must be set aside.

Application granted.

Solicitors: *Official Solicitor; Trower, Still & Keeling* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

R. v. BARRY (GLAMORGAN) JUSTICES. *Ex parte* KASHIM.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 6, 1953.]

Justices—Clerk—Presence in retiring room while justices consider decision.

While on a point of law justices are entitled to the advice of their clerk, they ought not to invite him to retire with them to consider a question of fact. If the clerk is so invited, he should advise the justices that it would be improper for him to accept that invitation.

Where the clerk retired with justices who had to consider only a question of fact, *held*, the defendant's conviction would be quashed.

Dicta of LORD GODDARD, C.J., in *R. v. East Kerrier JJ. Ex p. Mundy* ([1952] 2 All E.R. 146), and *R. v. Welshpool JJ. Ex p. Holley* (ante, p. 809), applied.

AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918.

Cases referred to:

(1) *R. v. East Kerrier JJ. Ex p. Mundy*, [1952] 2 All E.R. 144; [1952] 2 Q.B. 719; 116 J.P. 339; 3rd Digest Supp.

(2) *R. v. Welshpool JJ. Ex p. Holley*, [1953] 2 All E.R. 807.

MOTION for an order of certiorari.

On Feb. 13, 1953, the applicant, Nagi Kashim, was convicted at a petty sessional court sitting at Barry, Glamorgan, of being knowingly concerned in keeping a quantity of uncustomed American cigarettes with intent to defraud Her Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876, and was fined £25. He applied for an order of certiorari to quash the conviction on the ground that the clerk accompanied the justices when they retired to consider their decision without being requested to do so in defiance of the remarks of LORD GODDARD, C.J., in *R. v. East Kerrier JJ. Ex p. Mundy* (1), to which the attention of both the justices and their clerk had been drawn.

Rhys-Roberts for the applicant.

R. Geraint Rees for the justices.

J. P. Ashworth for the Commissioners of Customs and Excise.

LORD GODDARD, C.J.: In the course of the hearing in this court of *R. v. East Kerrier JJ. Ex p. Mundy* (1) it emerged that the justices' clerk had retired with the justices when, apparently, the only question that was before the justices was a question of fact. This court came to the conclusion that the conviction in that case must be quashed, but not merely on the ground that the justices' clerk had gone into the room with the justices, because we did not think at that time that it had been made sufficiently clear that this court disapproved of the practice of justices' clerks so retiring with the justices. When, in my judgment, I had announced the decision of the court, I said ([1952] 2 All E.R. 146):

"Another matter which I feel bound to mention is this. Although I cannot for the moment trace the authority, I think it has certainly been said more than once in this court that it is not right that the justices' clerk should retire with the justices. It has been said over and over again that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk, and, if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices, or may take some course which it is for the justices alone to take. The justices can always send for the clerk if they require advice on a point of law because that is what the clerk is there for, but it is not desirable, and it is not, I would say, regular, for a clerk to retire with justices as a matter of course at the time they are considering the facts. He should remain in the court until the justices either return into court or send for him. Whether we should have quashed the conviction on the ground that the justices' clerk retired with them (although I believe it has been done in one case), I need not say. But we think it is undesirable and we hope that in future justices' clerks will not retire with their bench, unless their advice is required."

In *R. v. Welshpool JJ. Ex p. Holley* (2), which, it is only fair to say, had not been reported when the present case came before the Barry justices, I was at some pains to explain the position, and I said (ante, p. 809):

"Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case (1) merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered."

We did not mean, of course, in the *East Kerrier* case (1), that if a question of law were raised the clerk ought to stay in the court till the justices said: "Come out with us".

In the present case, at the end of the case for the prosecution, counsel for the defendant submitted that there was no case to answer in law. That, of course, raised a legal point, and the justices were entitled to tell their clerk to come out with them to give them his advice on that question of law. The question of law having been decided against the defendant, it remained for the defendant to try to satisfy the justices, if he could, he being charged with being in possession of uncustomed goods, that he was in possession of them innocently or that they were not, in fact, uncustomed. That was a pure question of fact. The justices then left the court and they took their clerk with them. All the justices have filed affidavits, and not one of them has suggested that there was any question on which they required the advice of their clerk. The justices cannot get round the direction this court gave in the *East Kerrier* case (1) merely by asking their clerk to go out with them when they do not require his assistance on any matter whatever—and they do not pretend in this case that they required his assistance. Therefore, they ought not to have asked him to go out, and when the clerk found there was nothing on which

A they required his assistance, he ought to have left the room to which the justices had retired. It is as well that clerks and justices should understand that this court requires them to follow directions which this court has given from time to time. Ever since there have been justices of the peace in this country, they have been subject to the control of the Court of Queen's Bench (now the Queen's Bench Division of the High Court) and if justices, knowing quite well the directions this court has given, act contrary to them, this court will have no hesitation in sending their names to the Lord Chancellor calling attention to what has been done.

B The direction given in the *East Kerrier* case (1), which the judges of the Queen's Bench Division, speaking generally, have approved, was given because the decision must be that of the bench, but, on a point of law, the bench are entitled to take the advice of their clerk. On a point of fact it is essential that the public should be able to see, and to understand, that the decision is that of the justices and of nobody else. One of the considerations which the court had in mind in the *East Kerrier* case (1) was the very thing that has happened in this case. The applicant has previous convictions in courts in which this very clerk has sat as clerk. I do not impute to the clerk any misconduct in the justices' room, but it is important to bear in mind that justice must not only be done but must be manifestly seen to be done. If it appears that there has been an opportunity for information to be given to the justices apart from that proved in open court, doubts may arise whether the trial has been fair.

D I have no doubt that the right course for the court to take is to quash this conviction in order to show that this court is resolved that justices shall obey the directions which this court gives, and if they do not obey the directions in the spirit as well as in the letter, other consequences will follow. The order will go for certiorari to quash.

E **SELLERS, J.:** I agree. I would only emphasise that it is the clerk's function to advise the justices as to his own powers as they have been defined by this court, and even if the justices do ask him to retire with them, if he is satisfied that the only matter for consideration is one of fact, he should indicate that to his justices.

HAVERS, J.: I entirely agree, and I have nothing to add.

Order of certiorari.

F Solicitors: *D. B. Levinson & Co.*, agents for *F. P. Jones-Lloyd & Jones*, Barry (for the applicant); *Torr & Co.*, agents for *R. H. C. Rowlands*, County Prosecuting Solicitor, Glamorgan (for the justices); *Solicitor of Customs and Excise*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SOUTHGATE CORPORATION v. PARK ESTATES (SOUTHGATE), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 6, 1953.]

Highway—Private street works—"Unreasonable"—Proposed works premature—Proposal to make up street before land fully developed—Private Street Works Act, 1892 (c. 57), s. 7 (d).

By s. 7 of the Private Street Works Act, 1892: "... any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the [private street] works may ... object to the proposals ... on any of the following grounds ... (d) that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive ..."

The respondents owned a building estate on which they had built a certain number of houses. They were intending to build on the remaining vacant land. In 1951 the appellants resolved to execute certain private street works in a road on the estate, which road had been a private street since about 1934, the proposed works being to place three inches of tar macadam on a basis of hard core, the existing surface of the road being retained insofar as it provided this basis. The respondents, as owners under s. 5 of the Act, were liable to be charged about £3,000 towards the cost of making up the road, and in January, 1952, they objected under s. 7 (d) to the appellants' proposals to execute the works on the grounds that they were insufficient or unreasonable or that the estimated expenses were excessive, which objections were dismissed by a court of summary jurisdiction. In May, 1952, the respondents applied to the appellants, as agents for the planning authority, pursuant to the Town and Country Planning Act, 1947, Part III, for permission to develop the vacant land by erecting houses on it, but permission was refused by the appellants in June, 1952. The respondents intended to appeal to the Minister of Housing and Local Government, and, if their appeal were allowed, their building operations would necessitate cutting into the road to lay on gas, water, and electricity, and the heavy traffic on the road which the building operations would involve would inevitably churn up the proposed new surface. In July, 1952, the respondents appealed to quarter sessions against the dismissal of their objections under s. 7 (d) of the Act of 1892, and the appeal was allowed on the ground that the proposed works were unreasonable because they were premature. On appeal,

HELD: the word "unreasonable" in s. 7 (d) of the Act of 1892 was a word of very wide import and was not to be construed in a narrow or restricted sense; it gave quarter sessions and justices jurisdiction to say whether or not, having regard to the scheme as a whole, it was reasonable that the proposed works should be done at all, and, therefore, whether it was reasonable or not that the proposed works should be done at any particular time; and accordingly, quarter sessions had power to come to the decision they did.

Mansfield Corpn. v. Butterworth ([1898] 2 Q.B. 274), applied.

Hornchurch Urban District Council v. Allen ([1938] 2 All E.R. 431), explained.

AS TO OBJECTIONS BY OWNERS, see HALSBURY, Hailsham Edn., Vol. 16, p. 457, para. 663; and FOR CASES, see DIGEST, Vol. 26, pp. 543-547, Nos. 2409-2447.

Cases referred to:

(1) *Sheffield Corpn. v. Anderson*, (1894), 64 L.J.M.C. 44; *sub nom. Sheffield Corpn. v. Alexander*, 72 L.T. 242; 26 Digest 544, 2422.

- (2) *Mansfield Corpn. v. Butterworth*, [1898] 2 Q.B. 274; 67 L.J.Q.B. 709; 78 L.T. 527; 62 J.P. 500; 26 Digest 544, 2424.
- (3) *Chester Corpn. v. Briggs*, [1924] 1 K.B. 239; 93 L.J.K.B. 69; 130 L.T. 221; 88 J.P. 1; 26 Digest 547, 2447.
- (4) *Hornchurch Urban District Council v. Allen*, [1938] 2 All E.R. 431; *sub nom. Allen v. Hornchurch Urban District Council*, [1938] 2 K.B. 654; 107 L.J.K.B. 741; 159 L.T. 473; 102 J.P. 393; Digest Supp.

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CASE STATED by Middlesex Quarter Sessions.

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At Middlesex Quarter Sessions sitting at the Guildhall, Westminster, on July 29, 1952, the respondents appealed against the dismissal of all objections made by them under the Private Street Works Act, 1892, s. 7 (d), in respect of private street works to be done in Seafield Road in the borough of Southgate, which was heard and determined by a court of summary jurisdiction sitting at Tottenham on May 2, 1952. It was proved or admitted that on July 31, 1951, the present appellants resolved to execute certain private street works in Seafield Road pursuant to s. 6 of the Act. On Nov. 27, 1951, the appellants resolved to approve the specification of the works, together with the plans, sections, estimate of probable expenses and the provisional apportionment. They complied with s. 6 (3) of the Act. The respondents were the owners (as defined in s. 5 of the Act) of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. They were also the owners of vacant land on the same site, on which they desired to build houses. This vacant land had been zoned in the draft development plan for the county of Middlesex as a permanent open space, subject to compulsory purchase within ten years. If the respondents' objection to this draft plan were not successful, the appellants would, in due course, purchase the vacant land at its existing value. Seafield Road had been a private street since 1934, the approximate date when the respondents completed building some of the houses. The approximate cost of making up the road, which the appellants proposed to do by putting three inches of tar macadam on a basis of hard core, the existing surface of the road being retained insofar as it provided this basis, would have been £6,000, of which the respondents would have been liable to pay about £3,000. On Jan. 22, 1952, the respondents objected to the appellants' proposals to execute the proposed works on the grounds that they were insufficient or unreasonable, or that the estimated expenses were excessive. On May 21, 1952, the respondents applied to the appellants, pursuant to the provisions of Part III of the Town and Country Planning Act, 1947, for permission to develop the vacant land by building houses on it. On June 24, 1952, the appellants, acting as agents for the local planning authority, the county council of the administrative county of Middlesex, refused permission to develop the vacant land in accordance with the application. The respondents intended to appeal against this decision to the Minister of Housing and Local Government. The building operations, which the respondents proposed to carry out if the appeal was allowed, would have necessitated the cutting into the road to lay on the gas, electricity and water services, and the heavy traffic, which would have been necessitated for a substantial period of time by those building operations, would have inevitably churned up the proposed new surface of the road, with the result that the £6,000 spent on the making up of the street would have been wholly, or to a large extent, wasted.

It was contended on behalf of the appellants that, in considering an objection under s. 7 (d) of the Act of 1892 that the works were unreasonable, the justices were not entitled to consider whether it was reasonable that the works should be executed at all, and the possibility of damage to the road as a result of the development proposed by the respondents was not a matter to be taken into consideration by the justices in determining such an objection. Whether or not private street works should be carried out in the road was a matter solely

within the discretion of the appellants, and the justices had no power to adjudicate on the exercise of that discretion in considering an objection under s. 7 (d) of the Act. There was no evidence before the justices on which they could find that the appellants had exercised their discretion in respect of the making up of the road on any wrong principle. The works were not unreasonable within s. 7 (d) of the Act. It was contended on behalf of the respondents that the appellants' proposal to make up the road was premature, in that, in the event of the Minister allowing the respondents' appeal against the appellants' refusal to grant them permission to develop the vacant land, then the road, as made up, would have to be cut into to provide some or all of the various public utility services for the new houses on the land, and, further, having regard to the very light form of surface construction proposed, the road would be churned up by heavy vehicles used in the construction of the houses which the respondents proposed to build. The work was "insufficient" within the meaning of s. 7 (d) of the Act, in that the appellants proposed to adopt a very light form of surface construction for the road, which would suffer very serious damage from the continuous heavy traffic to which it would be subjected for a substantial period in the event of the Minister granting the respondents permission to develop the land. The appellants were not making a bona fide exercise of their powers under the Act of 1892 in requiring the respondents to pay approximately £3,000 towards making up the road on land now belonging to the respondents, which land they refused to allow the respondents to develop and which they would, in due course, compulsorily purchase if the Minister approved its zoning as a permanent open space, which zoning the appellants had originally recommended.

Quarter sessions allowed the respondents' appeal and ordered that the resolution, specifications, estimates and provisional apportionments, the subject of the appeal, be quashed, and the appellants now appealed.

J. R. Willis and C. C. P. Hodson for the appellants, the corporation.
Ackner for the respondents.

LORD GODDARD, C.J.: This is a Case stated by Middlesex Quarter Sessions, and raises a rather difficult point under the Private Street Works Act, 1892, an Act which frequently does raise difficulties and has been the subject of a good many decisions in this court. [HIS LORDSHIP stated the facts and continued:] The case came before this court originally in April, 1953, and the position was this. Quarter sessions had allowed the appeal, so the work was stopped. By that time the respondents had heard that the Minister of Housing and Local Government had allowed their appeal, and, therefore, it was open to them to build, and they were proposing to build. It seemed to the court then that it would be rather absurd to hear this appeal and give a decision which might be completely academic because, if the building was going on, it was obvious that this work might easily be entirely thrown away, and work which would have to be done if the street became a street with houses on both sides would be very different from what was required when it contained only a few houses. We adjourned the case in the hope that there would be some settlement between the parties, but by a series of misfortunes the respondents' building work has not yet been started.

Section 7 of the Private Street Works Act, 1892, provides that the persons liable to contribute may object to the proposals "on any of the following grounds", and among them are: "(d) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive". There are three disjunctive terms: "insufficient", "unreasonable", and "the expenses are excessive". Section 8 provides for a determination of the objections, which are to be heard by a court of summary jurisdiction, and by sub-s. (1):

" . . . The court may quash in whole or in part or may amend the

resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority . . .”

If the statute allows an objection on the ground that works are unreasonable, and if a court has to decide on the validity of that objection, that is to say, whether the objection is well founded, it seems to me that it follows from that that the court must consider whether the works are reasonable or not. The word “unreasonable” is a very wide word and is intended, I think, to give a very wide power to a court that has to decide whether an objection to the works is well founded or not.

Counsel for the appellants has contended that the statute, on its true construction, does not enable the justices, or, ex hypothesi, quarter sessions on appeal from the justices, to consider whether or not the works are, if I may put it so, desirable, or whether they should be done at one particular time or another. So far as the last objection is concerned, I do not think quarter sessions would have power to say: “We think these works are desirable, but they must be put off. We think they ought to start, not this week, but next week”, or anything of that sort. But, in considering whether the works are reasonable or not, the real question is: Can the justices or quarter sessions say: “We have come to the conclusion on a review of all the circumstances that, at any rate for the present, there is no need to make up this road”? The contention of counsel for the appellants is that the cases have established that the justices have no power to upset what I call the original resolution, that is to say, the resolution of a council resolving that it is desirable that the work should be done. It has been held in *Sheffield Corpn. v. Anderson* (1), that it is only the second resolution, that is to say, the resolution approving the specification and apportionment, which can be attacked, but it seems to me that, however that may be, if the justices give effect to the objection, the statute enables them to quash the second resolution, and that would, at any rate, put a stop to the proceedings for the time being. Whether there can be another resolution and another apportionment, and so forth, we have not to consider; we have to consider whether the justices had power to give the decision they have given because, in their opinion, these works were premature.

In my opinion, this case has really been decided for us by *Mansfield Corpn. v. Butterworth* (2), and more especially by the judgment of WILLS, J. The court there had to take into account what was the meaning of s. 7, and he said this, dealing first with the word “insufficient” ([1898] 2 Q.B. 281):

“I think ‘insufficient’ means that the specified works are insufficient to carry out the purpose which is proposed to be effected by them; it does not mean that they are insufficient having regard to something which, if done, might make a better scheme for the neighbourhood in general; it does not enable the justices to take into consideration other things which are altogether outside the character of the works in respect of their sufficiency to produce the effect desired. The word ‘insufficient’, in my opinion, points exclusively to a comparison between that which is proposed to be done and the means of effecting it. The word ‘unreasonable’ has undoubtedly a wider meaning, and I think that it does give the justices jurisdiction to say whether, having regard to the scheme as a whole, it is reasonable or not that the proposed works should be done at all. That seems to follow from the decision of the Court of Appeal in *Sheffield Corpn. v. Anderson* (1), where the court held that a resolution approving plans for draining a street, the drainage of which the justices thought was already sufficiently provided for, might be quashed on the ground that it was unreasonable.”

KENNEDY, J., who was the other member of the court, said (*ibid.*, 283):

“Now, the insufficiency meant by the Act must, in my view, mean

the insufficiency of the proposed works to carry out the object for which they are proposed. The justices have held that the proposed works were unreasonable, not in respect of the street as a street which wanted paving, sewerage, and lighting, but because the scheme did not go further and say that the street should also be widened."

That case has stood for fifty-five years, and counsel has not been able to draw our attention to any case in which it has ever been questioned. Accordingly, we must take it that that case is binding on this court. It surely must follow that, if the court was right in saying that the justices could hold that the proposed work should not be done at all, they can say at any particular time: "This work is not required and is not to be done". That does not mean that the justices are saying that the work is never to be done, but that they consider that it is unreasonable to do the work at the present time, and when I say "at the present time", what the justices are saying is that the street, as a street (to use KENNEDY, J.'s words), does not require paving, sewerage, and lighting. It may in the future, one cannot say. It seems to me that, on the plain words used by both the learned judges in the *Mansfield* case (2), it follows that the justices have power to say: "You are asking us to decide on an objection that this work is unreasonable. We have come to the conclusion that it is unreasonable because we do not think it should be done now. We are not saying it should never be done, but not now".

The only two other cases to which our attention has been drawn are, first, *Chester Corpn. v. Briggs* (3), in which SALTER, J., at the end of his judgment said ([1924] 1 K.B. 247):

"In considering an objection under s. 7 (d) that the proposed works are unreasonable, the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense."

In the subsequent case of *Hornchurch Urban District Council v. Allen* (4), the court said that that was a dictum of one judge which was not supported by the other two judges, and so the court did not follow it and it must be regarded as overruled. But it was because of that dictum that the justices who decided *Hornchurch Urban District Council v. Allen* (4) came to the decision that the particular work would cast an unreasonable burden on the frontagers and, I suppose, it ought, therefore, to have been contributed to by the local authority, as they can, under s. 15. But that case does not, it seems to me, throw any doubt on the decision in the *Mansfield* case (2) because it really deals with a different point. It simply says that Parliament puts on the frontagers, the burden of paying for these improvements, and, therefore, it is not an objection to the carrying out of the improvement that the court may think it rather hard on the frontagers that they have to pay for some particular form of road. If the justices had found in the *Hornchurch* case (4) that the road was unreasonable—that it was unreasonable to put down a road of that sort or that the expense would be excessive—that would have given them ground within the *Mansfield* case (2) for quashing the resolution and setting aside the subsequent apportionment.

For these reasons, I think this court must consider itself bound by *Mansfield Corpn. v. Butterworth* (2). Therefore, quarter sessions were entitled to come to the decision they did, and this appeal fails.

SELLERS, J.: I agree. The power of the justices is derived from s. 7 (d) of the Private Street Works Act, 1892, and it depends, in this case, on the proper interpretation to be given to the word "unreasonable". My Lord has pointed out that that part of the Act, including, particularly, the word "unreasonable", was construed as far back as 1898, and, as my Lord has said,

I do not think this court can place a different interpretation on it. If the interpretation given by WILLS and KENNEDY, JJ., in the *Mansfield* case (2) is right, then, on the facts before quarter sessions, they were amply justified in coming to the conclusion which they did.

- HAVERS, J.:** I agree with both the judgments which have been delivered. Quarter sessions held, on the facts of the particular case which was before them, which have been adequately stated by my Lord, that the proposals of the appellants were premature and on that ground were unreasonable. Few people, I think, having heard the facts which were before the justices, would doubt that the conclusion at which they arrived was a very practical and common-sense conclusion, but counsel for the appellants has contended before us that quarter sessions had no jurisdiction to come to the conclusion at which they arrived, and that the word "unreasonable" has to be construed in a somewhat narrow and restricted sense. Obviously, the word "unreasonable" is a word of very wide import, and I agree with my Lord that we are bound by the decision of this court in *Mansfield Corpn. v. Butterworth* (2). If that is so, accepting the interpretation that WILLS, J., put on the word "unreasonable" in this section, it seems to me to follow that quarter sessions had jurisdiction to take the course they did.

Appeal dismissed.

Solicitors: *G. H. Taylor*, town clerk, Southgate (for the appellants); *Vincent & Vincent & Rawlinson & Son* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

D W. v. W.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), July 6, 7, 8, 1953.]

Legitimacy—Presumption of legitimacy—Rebuttal—Birth in lawful wedlock—Access by husband—Use of contraceptives.

- The husband filed a petition for divorce alleging that the wife had committed adultery with the co-respondent on occasions on and after Apr. 21, 1947. He further alleged: "That on Dec. 11, 1946, the [wife] gave birth to a child [A], the paternity of which is not admitted". The wife entered an appearance, but filed no answer. The co-respondent defended the suit and called the wife as a witness, but she was asked no questions as to the paternity of the child. On May 10, 1950, the husband was granted a decree nisi. By a summons dated June 15, 1950, the wife applied for an award of maintenance for herself and the child A. The husband, by affidavit, denied that he was the father, and on Oct. 31, 1950, an order was made for the trial of the issue as to paternity with leave to the husband to raise a plea of *res judicata*. In evidence, the husband stated that he had had sexual intercourse with the wife on and after Mar. 5, 1946, but had used contraceptives, that he had accepted the child as his own and had registered her in his name, and that in June, 1948, he had been told for the first time by the wife that he was not the father.

- HELD:** (i) the only issue between the husband and wife in the divorce suit was adultery, no order for custody of the child had been made, and, therefore, the issue of legitimacy had not previously been in issue and could not be *res judicata*.

Lindsay v. Lindsay ([1934] P. 162), distinguished.

(ii) nothing except evidence that the husband did not have sexual intercourse with the wife at the period of conception could render illegitimate a child born in wedlock, and the mere use of contraceptives did not alter that proposition; the husband had failed to rebut the presumption of legitimacy and the issue must be decided in favour of the wife.

Observations of SIR FRANCIS JEUNE, P., in *Gordon v. Gordon* ([1903] P. 142), applied.

AS TO RES JUDICATA, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469; and FOR CASES, see DIGEST, Vol. 21, pp. 159-161, Nos. 213-218.

AS TO PRESUMPTION OF LEGITIMACY, see HALSBURY, Simonds Edn., Vol. 3, pp. 87-92, paras. 139-145; and FOR CASES, see DIGEST, Vol. 3, pp. 358-368, Nos. 1-97. A

Cases referred to:

- (1) *Lindsay v. Lindsay*, [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; 27 Digest, Replacement, 614, 5746.
- (2) *Green v. Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; 27 Digest, Replacement, 664, 6286.
- (3) *Gordon v. Gordon*, [1903] P. 141; 72 L.J.P. 33; 89 L.T. 73; 27 Digest, Replacement, 677, 6459. B

ISSUE.

By a petition dated Mar. 30, 1949, the husband prayed for a dissolution of the marriage on the ground of the wife's adultery with the co-respondent, which was alleged to have taken place on divers dates on and after Apr. 21, 1947, and he alleged, inter alia: C

"3. That save as hereinafter appears there is issue of the said marriage now living one child [B] born on July 10, 1939 . . . 10. That on Dec. 11, 1946, the [wife] gave birth to a child [A], the paternity of which is not admitted."

The husband also prayed for the exercise of the court's discretion in his favour and for custody of the child, B. The wife entered an appearance, but did not file an answer to the petition. The co-respondent entered an appearance and, by his answer, pleaded condonation, connivance and collusion. At the hearing before BARNARD, J., the co-respondent called the wife as a witness, but she was asked no question as to the paternity of the child, A. On May 10, 1950, BARNARD, J., granted a decree nisi in favour of the husband, awarded him the custody of B, and, in the course of his judgment, said: D

"There is one child of the marriage, a boy born in July, 1939. There was a further child, the [husband] does not admit the paternity of this, born in December, 1946." E

By a summons dated June 15, 1950, the wife applied for an award of maintenance for herself and for A. On July 6, 1950, the decree was made absolute. By an affidavit, dated July 19, 1950, the husband denied that A was a child of the marriage. On Oct. 31, 1950, WALLINGTON, J., ordered that an issue be tried as to the paternity of A, and that in the issue the husband be at liberty to raise as an answer the submission that the question of paternity was res judicata. F

Marston Garsia for the wife.

Van Oss for the husband. G

BARNARD, J., stated the facts and continued: I fail to see how one could possibly say that this issue of paternity is res judicata. There has never been any issue before the court as to the legitimacy or illegitimacy of this child. The only issue as between the husband and the wife in the divorce suit was whether or not the wife had committed adultery. There is no allegation in the petition that the co-respondent is the father of the child. There is not even a definite allegation that the husband is not the father of the child himself. The husband merely said in his petition with reference to the child "the paternity . . . is not admitted", and the wife made no answer. In support of the husband's argument, I was referred to *Lindsay v. Lindsay* (1). H

In that case the child was born in 1927, seven years after the marriage. The wife alleged in her petition that the child was a child of the marriage and asked for its custody. The husband answered that petition and never denied that the child was a child of the marriage, and, in due course, the wife was granted a decree and given the custody of the child; it was only at a later stage that the husband denied paternity. SIR BOYD MERRIMAN, P., in the course of his judgment, said that it was not open to the husband at that stage to say that the child was not a child of the marriage, and he allowed the order as to custody to go in favour of the wife. I think the crux of the matter is a quotation by SIR BOYD MERRIMAN, P., from *Green v. Green* (2), in which LORD MERRIVALE, P., said ([1929] P. 104):

“An order for custody in a divorce suit—for reasons which I will presently point out—implies a finding of legitimacy.”

There is no order yet for custody of this child and the question is in issue. I am satisfied that this case does not in any way come within that decision and the matter is not *res judicata*.

[HIS LORDSHIP referred to the evidence and said that the husband had said that he was almost certain he had had sexual intercourse with his wife on and after Mar. 5, 1946, but had used a rubber sheath; that the child A was born on Dec. 11, 1946; that the husband had accepted her as his child and had registered her as such, and that in June, 1948, the husband was told by the wife for the first time not only that she had been committing adultery with the co-respondent, but also, and he believed what he was told, that he was not the father of A. On three occasions the wife had told an inspector of the Royal Society for the Prevention of Cruelty to Children and his wife that the co-respondent was the father of A. HIS LORDSHIP continued:] I am dealing here with the legitimacy or illegitimacy of a child, and the law on the subject is strict. Counsel for the husband agreed that the burden of proof lay on him. *Gordon v. Gordon* (3) was decided in 1903, and, I think, the principles are the same today as they were then. The facts were different from the facts in this case, but SIR FRANCIS JEUNE, P., lays down the law on this subject as follows ([1903] P. 142):

“The law says that what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration . . . In the well-known text-book on bastardy, by SIR HARRIS NICOLAS [A TREATISE ON THE LAW OF ADULTERINE BASTARDY (1836), p. 186] the learned author, after commenting on certain cases, says this, and it appears to me to represent accurately the law on the subject: ‘ . . . Sexual intercourse between man and wife must be presumed, and nothing, except evidence that the husband did not have such intercourse at the period of conception, can illegitimise a child born in wedlock. If the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one, two, or twenty other men ’.”

It is true that since 1903 the use and knowledge of contraceptives has become more common and, although I am satisfied that the husband has told me the truth and that he was using them, I do not feel that the mere use of contraceptives in any way alters that proposition of law. The husband himself, knowing he was using contraceptives, did not at the time doubt that he was the father of the child, but thought that the contraceptives might have let him down—and it is part of his case that contraceptives of another nature let him down when B, whose paternity is not disputed, was conceived. Although I am satisfied that the wife made statements against her own interests that

the co-respondent was the father of her child, I do not think that such statements, coming from a woman utterly regardless of the truth, who would say anything to suit her own purpose, whatever that might be at the moment, are sufficient to rebut the presumption of law in favour of legitimacy. It is to be noted that although the wife wrote letters to the co-respondent's wife, letters bitter against the co-respondent and obviously intended to harm him with his wife, there is no reference in those letters, written in December, 1948, to the co-respondent being the father of A born in December, 1946. Although I am satisfied that the wife had been committing adultery with the co-respondent from about June, 1944, I have come to the conclusion that at the critical time when this child might have been conceived the husband was having sexual intercourse with his wife, and, although that sexual intercourse took place with rubber sheaths, I think the presumption of law must nevertheless prevail.

If I had to decide this issue merely on a balance of probability I would decide in the husband's favour, but the presumption of law—which means that he must satisfy me beyond all reasonable doubt—has not been displaced, and, therefore, I decide the issue in favour of the wife.

Solicitors: *F. N. W. Lockyer* (for the wife); *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Re HEILBRONNER (*deceased*). NATHAN AND ANOTHER *v.* KENNY AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), October 2, 1953.]

Will—Gift of “my bank deposit at M. bank”—Current account, but no deposit account at bank—Certificates of title to investments deposited at bank—Current account closed shortly before testator's death, as testator too ill to sign cheques—Balance of account transferred to relative to pay testator's expenses—Sum in hand at testator's death.

By a home-made will, dated Oct. 23, 1947, the testator, after appointing executors and directing the payment of his debts and funeral expenses, gave and bequeathed to A.K. “my bank deposit at the M. bank”. He then gave some pecuniary and specific legacies. At the date of the will he had over £1,700 standing to the credit of his current account at the M. bank, and both at the date of the will and at the date of his death the certificates of title to a number of investments in his name were deposited with the bank. He never had a deposit account at any bank. On Apr. 20, 1951, as he was very ill, he gave to N., his cousin and one of the executors named in the will, a cheque for £100, drawn on his current account, to pay his household accounts. On May 3, 1951, being too ill to go out or to sign cheques, the testator instructed the bank to pay to N. the balance of his current account, which amounted to £176 ls. 5d. On May 10, 1951, the testator died. At the date of his death N. held on his behalf the sum of £235 16s. 7d., i.e., the balance from the sums received on Apr. 20 and May 3, 1951.

HELD: (i) the words “my bank deposit at the M. bank” meant, not everything that the testator had deposited at that bank, but the money which he had there on current or deposit account, and, therefore, the gift to A.K. did not include the investments, the certificates of title to which were deposited with the bank.

(ii) the sum of £235 16s. 7d., which N. held as trustee at the date of the testator's death, was money drawn from the testator's current account at the bank for a temporary purpose, viz., the payment of the household expenses during the testator's illness, and, therefore, it should be deemed

to have been on current account at the bank at the date of the death, and it passed under the bequest to A.K.

Rawlinson v. Rawlinson (1876) (3 Ch.D. 302), applied.

AS TO BEQUEST OF GIFT IN A PARTICULAR LOCALITY, see HALSBURY, Hailsham Edn., Vol. 34, p. 241, para. 294; and FOR CASES, see DIGEST, Vol. 44, pp. 675-677, Nos. 5157-5175.

A Case referred to:

(1) *Rawlinson v. Rawlinson*, (1876), 3 Ch.D. 302; 34 L.T. 848; 44 Digest 676, 5170.

ADJOURNED SUMMONS to determine, inter alia, whether, on the true construction of the will of the testator, Alfred Salamon Heilbronner, a gift to Nurse Ada Kenny of "my bank deposit at the Midland Bank" comprised (a) certain investments to which the testator was entitled at his death and the certificates of title to which were deposited by him at the Gracechurch Street branch of the Midland Bank; (b) the sum of £235 16s. 7d. cash held at the death of the testator by the plaintiff, Lionel Nathan, on his behalf.

For some time before his death, which took place on May 10, 1951, the testator was very ill, and on Apr. 20, 1951, he gave to the plaintiff a cheque for £100, drawn on his current account, to pay his household expenses. On May 3, 1951, being too ill to go out or sign cheques, he instructed the bank to pay to the plaintiff the balance of his current account, which amounted to £176 1s. 5d. The sum of £235 16s. 7d. held by the plaintiff on the testator's behalf was the balance of the sums received by him on Apr. 20 and May 3, 1951. It was contended by the personal representative of Nurse Kenny (who died on Sept. 26, 1951) that the gift to her included the testator's investments and the sum held by Mr. Nathan as trustee.

Parbury for the plaintiffs, the executors.

N. S. S. Warren for the first defendant, the personal representative of Nurse Kenny.

A. P. McNabb for the second and third defendants, interested under an intestacy.

ROXBURGH, J.: The testator, who was of German birth but who acquired considerable facility in the English language, unfortunately considered himself able to make his own will. I am quite certain that nothing that I could decide would really accord with his intention, because it is my duty to give due weight to the meaning of the English language and the propositions of law which have been established in England, and, as regards the latter, I am sure that the testator was wholly ignorant. The will was made on Oct. 23, 1947, and the testator died on May 10, 1951. The will, so far as material, is as follows:

"I appoint my cousin Lionel Nathan . . . and Mr. George F. Patrick . . . to be my executors and direct that all my debts and funeral expenses shall be paid as soon as conveniently may be after my decease. I give and bequeath unto Nurse Ada Kenny in recognition for her sacrificing work and unselfish behaviour during my various illnesses my bank deposit at the Midland Bank. I further bequeath £50 each to both my executors as well as £50 to Mr. Jai Haas, my late ledger clerk of Embassy House, also £50 to the Misses Lottie and Susan Vogel and Mrs. Lottie Langley née Adelsberger of Lymington Road. I also bequeath to Nurse Kenny all my furniture and linen. The diamond bracelet and the two diamond rings (in my safe keeping) to be left to the owner Mrs. Helma Maria Salerno née Nenburger, at Venice. I wish that Nurse Kenny should hand over any small remembrance my relations should like to have in memory of me. My sealing ring and wedding ring to go to Nurse Kenny, the family memory ring to Helma Maria Salerno."

Nurse Ada Kenny died on Sept. 26, 1951, and the first defendant is her personal representative.

Counsel for the first defendant reminded me that the courts act on the presumption that, if a testator has attempted to make a will, he did not intend to die intestate in regard to the greater part of his estate, and I feel the great force of that contention. Moreover, there is, in my view, plain indication in this will of an intention to confer a pecuniary benefit on Ada Kenny, and I am certain that the testator did not intend her to have no money at all. But for this view, I might have felt it necessary to decide wholly against the first defendant. On the other hand, I have to face up to the meaning of English words, which, to my mind, are reasonably clear, and to the extraordinary consequences which would follow on the construction of the will if I accepted the major contention of counsel for the first defendant. I can well believe that what the testator intended to do was to give his property to Ada Kenny charged with the payment of his debts and funeral expenses and the legacies which he has bequeathed. But I can see no possible way in which I could so construe the will, and that is why I said at the outset that I do not feel that I can, consistently with legal principles, achieve what I suspect the testator intended.

Before discussing the meaning of the will, I must refer to some of the evidence. In an affidavit, sworn on Nov. 13, 1952, the plaintiff, Mr. Nathan, said:

"The testator had no deposit account at the Midland Bank either at the date of his said will or the date of his death and so far as can be ascertained never at any time had any deposit account at the Midland Bank or any other bank. He had a current account at the Midland Bank, 60, Gracechurch Street branch . . ."

but the whole of the balance standing to the credit of that account was drawn out shortly before his death "because he was unable to go out or to sign cheques." I stress the words "unable to sign cheques" because I am sure that, at the date when the testator authorised the bank to transfer any cash balance in hand to the account of Mr. Nathan, which was done to enable Mr. Nathan to pay housekeeping and similar expenses, he (the testator) was not in a state of health to consider how such an action would affect the testamentary dispositions which he had made in 1947. The result, therefore, was that at his death, strictly speaking, he had nothing on any account, whether current or deposit, at any bank, and, therefore, if I put a strict meaning on the language of the will, Ada Kenny would get no money at all.

In regard to the money transferred to him, Mr. Nathan said, in a further affidavit, sworn on Mar. 19, 1953:

"On May 3, 1951, there was standing to the credit of the testator's current account at the said branch of the Midland Bank the sum of £176 ls. 5d. On this date the balance of the said account was paid to me . . . The testator gave written instructions to the bank for this purpose . . . The testator had previously, namely on Apr. 20, 1951, given me a cheque for £100 drawn on his said account. These sums were paid to me by the testator in order that I could pay his household accounts for him. At the date of the death of the testator I held on his behalf the sum of £235 ls. 7d. . . . being the balance of the said sum of £100 after payment of accounts amounting to £40 4s. 10d. and the said sum of £176 ls. 5d."

In his affidavit of Nov. 13, 1952, Mr. Nathan said:

"At the date of his said will there were deposited at the Midland Bank, 60, Gracechurch Street branch, in the name of the testator the documents of title relating to the following investments: two hundred and fifty national savings certificates £1 issue, five hundred national savings certificates 7th issue, £1,500 three per cent. savings bonds 1960/70, £250 three per cent. savings bonds 1965/75. The documents of title relating to these

investments remained so deposited at the date of his death, and in addition thereto there was also so deposited at such date the document of title relating to a further sum of £750 three per cent. savings bonds 1965/75 "

which were purchased a few days after the date of the will. At the date of the will there was £1,734 1s. 5d. standing to the credit of the testator in his current account, though that sum was reduced a few days afterwards by £750, more or less, for the purchase of the £750 three per cent. savings bonds. But even after that transaction, as the current account then stood, there would have been £1,000 for Ada Kenny and there would have been plenty of assets, viz., the bonds and certificates, to discharge all the pecuniary legacies and all the debts and expenses. Therefore, it would not be unreasonable to hold that the disposition at that date in favour of Ada Kenny was intended to be, in effect, about £1,000. I stress that because I do not think I am going to put an unreasonable construction on the will.

Counsel for the first defendant, however, contended that the will gave everything to Ada Kenny. I must enter one caveat. In his affidavit, Mr. Nathan said that, in addition to the assets which I have mentioned, the testator had some furniture and jewellery, most of which is specifically bequeathed by the will. Mr. Nathan then said:

"In addition to the above assets it is possible that the testator had a sum of three thousand three hundred marks or thereabouts at Mainz in Germany. Inquiries are being made but so far they have been without result."

I cannot possibly act on that piece of evidence as proof that the testator had in 1947 a sum of three thousand three hundred marks or thereabouts. It is much too vague. Moreover, I do not know whether the marks referred to are Reichmarks or Deutschmarks. If they are Reichmarks they are practically valueless, and if they are Deutschmarks they would have a very considerable value. This point is, in my judgment, a very important feature in this case. But counsel for the executors told counsel for the first defendant at the Bar all that he knew about these marks, which was not very much, and counsel for the first defendant, probably very wisely in the circumstances, elected not to take the risk of incurring the costs of pursuing the question of the marks, although I offered him the opportunity, because I do think it is of importance. If I disregard the marks, then it is quite plain, if I accept the major contention of counsel for the first defendant, that there was nothing out of which to pay either the debts, funeral and testamentary expenses, or the legacies. By the will the testator appointed executors and directed them to pay his debts and funeral expenses. I am quite certain that he meant the executors to pay the debts and funeral expenses and that he meant them to have funds out of which to pay them. Moreover, he bequeathed a number of pecuniary legacies, and I am quite certain that he intended the executors, and not Ada Kenny, to pay them. I am certain, therefore, that he must have contemplated that there would be assets out of which to pay them. Therefore, I do not approach this will with any conviction that the testator meant to give everything to Ada Kenny. It may well be that he did intend to give everything to her charged with these other outgoings, but I cannot possibly hold that he has, in fact, done so.

I do not find the words "my bank deposit at the Midland Bank" difficult to construe. I would stress that the phrase is not "my deposit at the Midland Bank", nor is it "my bank deposit". I think that that is important. "My bank deposit" might mean "my deposit at the Midland Bank", but "my bank deposit at the Midland Bank" cannot, in my judgment, mean merely all that is deposited at the Midland Bank. That would give no meaning whatever to the word "bank", which qualifies the word "deposit" and which cannot in this context be an indication of local situation. I wish to stress that. I

might well have reached a different conclusion if the phrase had been "my deposit at the Midland Bank" or "my bank deposit". It is "my bank deposit at the Midland Bank", which is reasonably clear. It means the money deposited at the Midland Bank whether on current or deposit account. It is asked why, in that case, the testator did not say "current account". I do not know why he did not, but a possible explanation is that he thought he might have some money deposited at the bank at the date of his death and that he wished to include that as well as the current account.

In my judgment, it is going too far to say that "my bank deposit at the Midland Bank" has not got a reasonably clear meaning. It is true, in one sense, that no money is really deposited at a bank because the relation between the banker and customer is that of debtor and creditor. The actual money which is deposited is, of course, free for the bank to spend as it thinks fit. But that is a legal notion. It is common to speak of "deposit account" and "current account", but there is no difference between a deposit account and a current account except that, in one case, interest is usually paid and, in the other case, it is usually not paid, though that is not invariable. In the case of a deposit account notice is required, though it is very often waived, and in the case of a current account it is never required. Those are differences in the terms of the loan and nothing else. The relationship between the banker and the customer is that of debtor and creditor. Therefore, there is no great art in the words "deposit account", and, in my judgment, when a man says "my bank deposit" at a particular bank, primarily he means "the money which I have on current or deposit account". I can only repeat that, if the words had been different, I might have reached a different conclusion. It seems to me that I must hold that these words mean the money which is at the Midland Bank on deposit or current account.

If I were to adhere strictly to that conclusion, Ada Kenny's estate would get nothing. There is, however, a line of cases which establishes that, where there is a bequest of, e.g., furniture in a house and the furniture is removed to a warehouse, or some other place, for a purely temporary purpose, the bequest operates on the furniture in its temporary habitation: see *Rawlinson v. Rawlinson* (1), and *THEOBALD ON WILLS*, 10th ed., p. 128. Whether this doctrine has ever been applied to a subject-matter such as that in the present case, I do not know, and I do not very much care, because I am quite willing to be the first person to apply it, feeling as strongly as I do that the testator intended to give Ada Kenny some money. There is no doubt that this money, both the £100 which was drawn in favour of Mr. Nathan on Apr. 20, 1951, and the balance of £176 which was drawn on May 3, 1951, on authority, was drawn for a temporary purpose, namely, so that Mr. Nathan should pay household expenses when the testator was too ill to go out or sign cheques. It was, of course, hoped that he would get better, or, at any rate, get sufficiently well to re-arrange his affairs and, perhaps, make a new will, but, unfortunately, that opportunity never occurred. I think that I can, by analogy, apply the doctrine which I have mentioned, so that the sum of £235 16s. 7d., though actually in the hands of Mr. Nathan as trustee at the date of the death of the testator, must be deemed to have been on current account at the bank and, therefore, to pass under the bequest to Ada Kenny. This will not achieve, I am sure, the intention of the testator in full, but it is the best thing that I can do for Ada Kenny on the language which he has used and by which I am bound. The result will be that there will be residue which will be available for the funeral and testamentary expenses and payment of the legacies, and any balance will go to the persons entitled, under the Administration of Estates Act, 1925, s. 46 (1), on an intestacy.

Order accordingly.

Solicitors: *Gasquet, Metcalfe & Walton* (for the plaintiffs and the third defendant); *Charles Russell & Co.* (for the first defendant); *Hunters* (for the second defendant). [Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WHITE v. JOHN WARRICK & CO., LTD.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), June 23, 24, 1953.]

Negligence—Exclusion of liability—Primary object of clause in agreement to relieve defendant from liability for breach of contract—Hire of tricycle—Exclusion of liability for personal injuries to riders—Owners' liability for negligence.

A A contract of hire of a carrier tricycle provided that: "Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired." The machine was defective and the hirer was thrown off and was injured.

HELD: the clause in the contract relieved the owners of the carrier tricycle only from liability under the contract, but not from liability in tort, and they would be liable for negligence if it were established.

B Dicta of LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 609) and of LORD GREENE, M.R., in *Alderslade v. Hendon Laundry, Ltd.* ([1945] 1 All E.R. 245), applied.

Hall v. Brooklands Auto-Racing Club ([1933] 1 K.B. 205), distinguished.

C AS TO CONDITIONS LIMITING LIABILITY, see HALSBURY, Hailsham Edn., Vol. 23, p. 670, para. 952; and FOR CASES, see DIGEST, Vol. 3, pp. 73-75, Nos. 134-144.

Cases referred to:

- (1) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- D (2) *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.*, [1895] 1 Q.B. 134; 64 L.J.Q.B. 6; 71 L.T. 596; 59 J.P. 100; 42 Digest 970, 21.
- (3) *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944; 64 L.J.Q.B. 568; 72 L.T. 551; 59 J.P. 437; 42 Digest 970, 22.
- (4) *Olley v. Marlborough Court, Ltd.*, [1949] 1 All E.R. 127; [1949] 1 K.B. 532; [1949] L.J.R. 360; 2nd Digest Supp.
- E (5) *Rutter v. Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; Digest Supp.
- (6) *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.
- (7) *Hyman v. Nye*, (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest 87, 211.
- F (8) *Elder, Dempster & Co. v. Paterson, Zochonis & Co., Griffiths Lewis Steam Navigation Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 41 Digest 478, 3118.
- (9) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; *sub nom. Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- G (10) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205; 101 L.J.K.B. 679; 147 L.T. 404; Digest Supp.

APPEAL by the plaintiff from an order of PARKER, J., dated Jan. 26, 1953, dismissing an action for damages for breach of a contract of hire and for negligence on the ground that liability was excluded under a clause in the contract.

H Donald Macintyre for the plaintiff (the hirer).

E. B. Gibbens for the defendants (the owners).

SINGLETON, L.J.: The plaintiff, a newsagent and tobacconist carrying on business at Canonbury, entered into an arrangement with the defendants that they should supply him with a tradesman's tricycle, a tricycle with a large carrier in front, for use in the delivery of newspapers. The arrangement was embraced in a written contract dated Apr. 13, 1948. The contract was on a

printed form used by the defendants, on which their name appears in print, and the agreement is stated to be made between them (described as the owners) and the plaintiff, who is described as the hirer. By cl. 1:

"The owners agree to let, and the hirer agrees to hire, Carrier Cycles Nos. 13409 for the term of three years from the date hereof (and thereafter from year to year) at the weekly rent of 5s. each payable quarterly in advance at the owners' above address, the first payment being due on delivery of the machines."

By cl. 2:

"In consideration of such sum the owners agree to maintain the machines in working order and condition (punctures excepted) and to supply spare carriers as soon as possible when the hirer's machines are being repaired without any charge beyond the agreed amount as above . . ."

The owners also agree to supply lamps and accessories and the like, and to repair damage in certain cases.

On that the owners supplied a machine which was used by the plaintiff for a considerable period, and which, so far as we know, was kept in order until towards the end of May, 1950, when the machine, which was in the plaintiff's possession under the contract, was in need of repair, and the owners were so informed. On Saturday, June 3, a representative of the owners went to the plaintiff's shop and left a spare tricycle instead of that which was out of order, which he took away. In so doing, the owners were purporting to perform their obligation under cl. 2 of the contract. The plaintiff did not examine the tricycle, but very soon mounted it to go about his work. When he had gone about a quarter of a mile the saddle went forward in such a manner that he was thrown off the tricycle on to the ground, and was injured. He said he got up and pushed the tricycle back to his shop, the saddle then sloping down on to the cross-bar, and when he examined the tricycle he found that the saddle was loose. He was not thought at first to be badly hurt, but unfortunately he had suffered an injury to his knee. He was in hospital some considerable time suffering from synovitis. PARKER, J., who heard the plaintiff's claim, said that, if he had found the plaintiff entitled to damages, he would have awarded £505. That was a provisional assessment and no more.

The evidence given by the plaintiff and by his wife, and by a young man named Anthony employed by the plaintiff, seemed to show that the tricycle was out of order in that some nuts under the seat were rusty and could not be moved. Anthony, the chief witness, whose evidence impressed the judge on that point, was not employed by the plaintiff at the time of the trial, but was engaged on delivering newspapers and the like for the plaintiff in June, 1950. He told the judge that, after hearing of the accident, he saw the tricycle, and the saddle had been tilted back. He said that on several occasions thereafter he used the tricycle, and the saddle used to slip backwards and cause him to lose control. He tried to tighten the nut, but it was too rusty to move. There was other evidence on that on both sides.

The plaintiff set up two causes of action against the owners. The first was that the owners were responsible to him in damages for breach of warranty. It was said that they were under a duty under the contract to supply a tricycle which was reasonably fit for the purpose for which it was required, that they did not do so, and that the plaintiff was entitled to damages. The alternative claim in para. 6 of the statement of claim reads:

"The said accident was due to the negligence and/or breach of contract of the [owners] their servants or agents whereby the plaintiff has sustained personal injury and suffered damage. Particulars of negligence and/or breach of contract. The [owners] their servants or agents failed to take any or any proper care to ensure that the said spare carrier tricycle was

in proper working condition or in a proper state of repair or equipped or prepared for use by the plaintiff and handed over the same and permitted the plaintiff to mount and ride such spare tricycle without warning when they knew or ought to have known that by reason of its defective condition as aforesaid the saddle thereof was not properly fastened and was dangerous whereby an accident and injury such as occurred was to be apprehended."

- A The second claim of the plaintiff thus was: You, the persons from whom I had this tricycle, owed a duty to take reasonable care, i.e., to take that care which a reasonably careful tricycle owner would take on the hiring to another of a tricycle for his use, and you failed in that duty. If you had examined the tricycle, you would have found that the nuts were rusty and that the saddle was loose.
- B I used the tricycle in the way in which it was intended that I should use it, and I sustained an accident because you had not fulfilled your duty. You had not taken reasonable care, you were negligent, and I am entitled to damages.

In reply to both those claims the owners denied negligence and breach of duty and breach of contract. They added a plea in para. 4 of the defence:

- C "By cl. 11 of the written agreement between the parties the [owners] are not liable for any personal injuries to the plaintiff when riding a machine provided for him."

Clause 11 of the agreement is:

- D "Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machines hired nor for any third-party claims, nor loss of any goods, belonging to the hirer, in the machines."

It is conceded by counsel for the plaintiff that that clause would prevent the plaintiff from succeeding on a claim based on breach of contract, but his submission is that, in the circumstances proved, there was negligence on the part of the defendants, and that that clause is no bar to an action for damages

E for negligence.

- PARKER, J., gave judgment for the owners and against that judgment the plaintiff appeals. PARKER, J., appears to have accepted the evidence of the plaintiff as to the condition of the tricycle in preference to the evidence given on behalf of the owners, but he did not say in so many words that he found there was negligence on the part of the owners or of their servants. [HIS LORDSHIP
- F referred to a contention of the plaintiff that the contract applied only to the hired machine and not to a spare machine provided to replace it, held on construction of the contract that the exception clause applied to the spare machine, and continued:] The plaintiff submitted that, though cl. 11 relieves the owners in respect of a claim for breach of contract arising from the agreement, it does not absolve them if there is a cause of action established on the ground of
- G negligence. Counsel for the owners submits that, if there was negligence, it was negligence in connection with the performance of the contract, that the machine which was supplied was supplied in performance of the obligation arising under the contract, and that that which was done was under the agreement. He contended that the cause of action, if there was one, arose out of the agreement, and that, whether there was negligence or not, cl. 11 prevents
- H the plaintiff from succeeding in an action of this nature.

That gives rise to a question of some nicety. I am inclined to think for this purpose most help is given by reference to the speech of LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* (1) ([1932] A.C. 609):

"On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured

by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject. 'It appears', says SIR FREDERICK POLLOCK, *LAW OF TORTS*, 13th ed., p. 570, 'that there has been (though perhaps there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect'."

It is clear from those words of LORD MACMILLAN that an action for damages for breach of contract and an action for a tort may arise from the same set of facts. It is said that that position arises in this case, and that, though an action for damages for breach of contract may be said to be barred by cl. 11 of the contract, it cannot be said that the words of that clause shut out the hirer from what he would normally have, an action for damages for the tort of negligence.

In *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.* (2), A. L. SMITH, L.J., said ([1895] 1 Q.B. 140):

"It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not."

We were also referred to *Kelly v. Metropolitan Ry. Co.* (3) and *Olley v. Marlborough Court, Ltd.* (4). In the latter case ([1949] 1 All E.R. 132) there is a reference in the judgment which I delivered to words of SCRUTTON, L.J. ([1922] 2 K.B. 92) in *Rutter v. Palmer* (5):

"'First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used . . .'"

DENNING, L.J., said (*ibid.*, 134):

"In cases where the establishment is clearly a common inn or, indeed, where it is uncertain whether it is a common inn or a private hotel, I am of opinion that a notice in these terms would not exempt the defendants from liability for negligence but only from any liability as insurers."

In *Olley's* case (4) the words of the notice were:

"The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody. Valuables should be deposited for safe custody in a sealed package and a receipt obtained."

Counsel for the plaintiff referred the court to *Alderslade v. Hendon Laundry, Ltd.* (6), and, in particular, to the words of LORD GREENE, M.R., summarising the effect of the authorities in this way ([1945] 1 All E.R. 245):

"The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other

than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence."

A In the circumstances of the present case the primary object of the clause, one would think, is to relieve the owners from liability for breach of contract or for breach of warranty. Unless, then, there be clear words which would also exempt from liability for negligence, the clause ought not to be construed as giving absolution to the owners if negligence is proved against them. The result is that cl. 11 ought not, I think, to be read as absolving the owners from liability for negligence if it is proved that the injury which the plaintiff sustained was due to lack of that care which one in the owners' position ought to take when supplying a tricycle for the use of a hirer. If that is proved, then the owners do not escape liability by reason of cl. 11.

B The difficulty in this case arises from the fact that there is no finding on negligence. It may well be said that the learned judge, in accepting the plaintiff's evidence in preference to that of the owners, was inclined to the view that there was negligence on the part of the owners, but he did not so say. He placed an interpretation on cl. 11 which would cover negligence on the part of the owners. He assumed that it would. In those circumstances, we are not in a position to deal with this case finally, and it appears to be necessary that there should be a new trial on the subject of negligence, with the expression of opinion of this court that, if negligence is proved against the owners, they do not escape liability by reason of the terms of cl. 11. In that sense, I think this appeal ought to be allowed, and there ought to be a direction for a new trial between the parties.

D **DENNING, L.J.:** In this case the owners supplied a tricycle on hire to the plaintiff, who was a newsvendor, intending that he and his servants should ride it. The tricycle was defective, and, in consequence of the defect, the plaintiff was thrown off and injured. He now claims damages for breach of contract or negligence. The owners claim to be protected by the printed clause which my Lord has read. In this type of case, two principles are well settled. The first is that, if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is that, if there are two possible heads of liability on the defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence.

E In the present case, there are two possible heads of liability on the owners, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligent: see *Hyman v. Nye* (7). In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability for negligence. Counsel for the owners admitted that, if the negligence was a completely independent tort, the exemption clause would not avail, but he said that the negligence here H alleged was a breach of contract, not an independent tort. The facts which give rise to the tort are, he said, the same as those which give rise to the breach of contract, and the plaintiff should not be allowed to recover merely by framing his action in tort instead of contract. That was the view which appealed to PARKER, J., but I cannot agree with it.

In my opinion, the claim for negligence in this case is founded in tort and not on contract. That can be seen by considering what would be the position if, instead of the plaintiff himself, it was his servant who had been riding the

tricycle and had been injured. If the servant could show that the owners had negligently sent out a defective machine for immediate use, he would have had a cause of action in negligence on the principle stated in *M'Alister (or Donoghue) v. Stevenson* (1), and, as against the servant, the exemption clause would be no defence. That shows that the owners owed a duty of care to the servant. A fortiori they owed a like duty to the hirer himself. In either case, a breach of that duty is a tort which can be established without relying on any contract at all. It is true that the hirer could also rely on a contract, if he had wished, but he is not bound to do so, and if he can avoid the exemption clause by framing his claim in tort he is, in my judgment, entitled to do so.

Counsel for the owners relied on a passage in the speech of VISCOUNT FINLAY in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.* (8). In that case, a clause in a bill of lading exempted the charterers and the owners from liability for bad stowage, and the question was whether the owners (who were not parties to the contract) could take advantage of the exemption. It was held that they could. The decision, as I read it, was that, when a party to a contract has deliberately in plain words agreed to exempt a third party from liability for negligence, intending that the third party should have the benefit of the exemption, he cannot go back on his plighted word and disregard the exemption. It is one of the cases where a third party can take advantage of a contract made for his benefit, of which I gave some illustrations in *Smith v. River Douglas Catchment Board* (9) ([1949] 2 All E.R. 188). It has, however, no application to this case.

Counsel for the owners also relied on the judgment of SCRUTTON, L.J., in *Hall v. Brooklands Auto-Racing Club* (10), when he said ([1933] 1 K.B. 213):

" . . . where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort."

This passage only refers to cases where there is a contract by the plaintiff which plainly gives an exemption to the defendant from liability for the tort. For instance, if a transport company expressly stipulates with the plaintiff for exemption from liability for damage, howsoever caused, the plaintiff cannot overcome that exemption by suing in negligence instead of contract. But the contract in such a case must be by and with the plaintiff. In a case such as *M'Alister (or Donoghue) v. Stevenson* (1), a manufacturer cannot exempt himself from liability to the consumer simply by putting an exemption clause in his contract with the wholesaler, even though the clause is brought to the consumer's notice and says that the consumer is to have no claim for negligence. It is not a clause for the benefit of a third party, but to his prejudice and is not binding on him.

Neither of those cases affect the present case, which turns on the construction of the exemption clause. In my judgment, it exempts the owners from liability in contract, but not from liability in tort. If the plaintiff can make out his cause of action in negligence, he is, in my opinion, entitled to do so, although the same facts also give a cause of action in contract from which the owners are exempt. I agree, therefore, with my Lord that this appeal should be allowed, but, as there is no definite finding of negligence or no negligence, and we have no transcript of the evidence with which to decide it ourselves, there must be a new trial to decide that point.

MORRIS, L.J.: The determination of the matters raised in this appeal depends on construing cl. 11 of the agreement. [HIS LORDSHIP held that "machines hired" in cl. 11 of the contract applied to spare machines provided during the repair of the originally hired machine and continued:] The far more difficult part of the case concerns the interpretation of cl. 11, so as to decide whether it does, or does not, provide an exemption from liability in all circumstances. During the argument I entertained some doubt in regard to

this matter, but on consideration I have reached the clear conclusion that cl. 11 does not provide an exemption if negligence is alleged and proved, and I am in agreement with the judgments which my Lords have delivered.

A Although the wording of this clause differs from the wording of other clauses, and, perhaps, by its special language raises certain difficulties, there is no doubt in regard to the general approach in a case of this kind. That approach was clearly laid down by SCRUTTON, L.J., in *Rutter v. Palmer* (5), when he set out three considerations ([1922] 2 K.B. 92):

B "In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him."

C To the same effect were the words of LORD GREENE, M.R., in *Alderslade v. Hendon Laundry, Ltd.* (6), in the passage quoted by SINGLETON, L.J. ([1945] 1 All E.R. 245).

D Applying those principles to the words in cl. 11, it seems to me that counsel for the plaintiff is right when he says that the words in the clause may refer to matters other than matters based on an allegation of negligence. The opening words of cl. 2 are as follows:

E "In consideration of such sum the owners agree to maintain the machines in working order and condition."

Clause 11 as an exempting clause might operate on such a provision as those opening words of cl. 2, and, doubtless, other provisions also. The clause can apply to some injury occurring without negligence. Applying the principles of construction laid down by SCRUTTON, L.J., and by LORD GREENE, M.R., I have reached the conclusion that cl. 11 is not clear so as to exempt from liability if negligence is proved. I, therefore, concur in the course which has been proposed for the reasons which my Lords have given.

Appeal allowed. New trial on issue of negligence.

Solicitors: A. H. Silvertown & Co., agents for Arnold K. Maplesden (for the hirer); Doyle, Devonshire & Co., agents for Dennis Berry & Co., Reading (for the owners).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

D'ANDREA v. WOODS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 9, 1953.]

Criminal Law—Receiving stolen property—"Property"—Money known by receiver to be proceeds of theft and conversion—Larceny Act, 1916 (c. 50), s. 46 (1).

By s. 46 (1) of the Larceny Act, 1916: "The expression 'property' . . . includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

A number of savings stamps were stolen and converted for their cash value. Some of the Bank of England notes received for them were handed to the appellant who knew that the money was part of the proceeds of the theft and conversion of the stamps.

HELD: the money received by the appellant fell within the definition of property into which other property has been converted or for which it has been exchanged in s. 46 (1), and the appellant was rightly convicted of receiving the money, contrary to the Larceny Act, 1916, s. 33 (1).

FOR THE LARCENY ACT, 1916, s. 46 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1041.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at North London on Apr. 4 and May 4 and 27, 1953, the respondent, Leonard Woods, a detective inspector, preferred an information against the appellant, Dominic D'Andrea, charging that, on Mar. 19, 1953, he received £4 10s., moneys of one Sheila Cox, knowing the same to be stolen, contrary to s. 33 (1) of the Larceny Act, 1916. It was proved or admitted that in March, 1953, three girls, Jeanne Boorer, Doreen Stone and Sheila Cox, lived in a hostel at 15, Highbury New Park, London, N.5. Between Mar. 18 and 19, 1953, Jeanne Boorer and Doreen Stone together stole a quantity of savings stamps to the value of £17 5s. belonging to Sheila Cox at the hostel. Jeanne Boorer converted the stamps for their full cash value and gave half the proceeds to Doreen Stone. On Mar. 19, 1953, Jeanne Boorer handed the appellant four £1 Bank of England notes and one 10s. Bank of England note, being part of the proceeds of the conversion of the stolen stamps, and at the same time told him how she had obtained the money. At the time, therefore, he received the £4 10s. from Jeanne Boorer, the appellant knew they were the part proceeds of the conversion of the stolen savings stamps, and on Mar. 20, 1953, when the respondent found him in possession of the £4 10s., he admitted he knew how the notes had been obtained.

It was contended on behalf of the appellant that, as the Bank of England notes were only the proceeds of stolen property and not themselves stolen, the charge of receiving could not be sustained since they could not be identified with the stolen property. It was contended on behalf of the respondent that the word "property" in s. 33 (1) of the Larceny Act, 1916, included any property into, or for which, the same had been converted or exchanged, by virtue of s. 46 (1) of the Act.

The magistrate convicted the appellant who appealed.

C. L. Collymore for the appellant.

Paul Wrightson for the respondent.

LORD GODDARD, C.J.: This is a Case stated by one of the metropolitan stipendiary magistrates, before whom the appellant was convicted of the offence of "receiving the sum of £4 10s., moneys of Miss Sheila Cox, knowing the same to have been stolen, contrary to s. 33 (1) of the Larceny Act, 1916". [His

LORDSHIP stated the facts and continued:] What were stolen were stamps, and they were the property of Miss Cox. Those stamps were converted into money, and under s. 46 (1) of the Larceny Act, 1916, it is provided:

A “The expression ‘property’ includes any description of real and personal property . . . and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.”

Obviously the Act was contemplating the theft of property which was then changed into some other property or into money, and that money being used to buy something else, because s. 46 (1) says:

B “. . . not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.”

C It is quite sufficient to say here, without going further, that this £4 10s. falls exactly into the definition of property converted or exchanged. Therefore, as the appellant knew that these notes had been acquired by theft, he was properly convicted and this appeal fails and is dismissed.

SELLERS, J.: I agree.

HAVERS, J.: I agree.

Appeal dismissed.

D Solicitors: *A. P. B. Gould* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

KING v. KING.

E [COURT OF APPEAL (Singleton, Denning and Morris, L.JJ.), July 30, October 12, 1953.]

Husband and Wife—Maintenance—Application to High Court—Decree of judicial separation already obtained by the wife—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

F The power of the court to make an order for maintenance against a husband under s. 23 (1) of the Matrimonial Causes Act, 1950, “if it would have jurisdiction to entertain proceedings by the wife for judicial separation”, applies whenever jurisdiction is conferred by domicile or residence, “jurisdiction” having this special connotation in relation to suits for judicial separation in the Divorce Court. A wife who has already obtained a decree of judicial separation, and could not on that account obtain another, is not debarred, therefore, from applying for an order for maintenance under the section.

G Decision of DAVIES, J. (ante, p. 595), affirmed.

H FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410.

Cases referred to:

(1) *Woodward v. Woodward*, [1952] 2 All E.R. 226; [1952] P. 299; 3rd Digest Supp.

(2) *Cooper v. Cooper*, [1952] 2 All E.R. 857; [1953] P. 26; 116 J.P. 593; 3rd Digest Supp.

APPEAL by the husband against an order of DAVIES, J., dated July 6, 1953, and reported ante, p. 595, on a summons by the wife for a maintenance order

under the Matrimonial Causes Act, 1950, s. 23 (1). DAVIES, J., held that the wife was entitled to apply for an order for maintenance against her husband under the Act of 1950, notwithstanding that the court could make such an order only if it had jurisdiction to entertain proceedings for judicial separation and that the wife had already obtained a decree of judicial separation against her husband and so could not be granted a further such decree.

Colin Duncan for the husband.

Fairweather for the wife.

Cur. adv. vult.

Oct. 12. SINGLETON, L.J.: I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J., read the following judgment. On Jan. 28, 1953, the wife obtained a decree of judicial separation. On May 7, 1953, she took out a summons against her husband in the High Court under s. 23 (1) of the Matrimonial Causes Act, 1950. In this summons she alleged that he had wilfully neglected to provide reasonable maintenance for her, and she asked for an order on him to make periodical payments for her maintenance, and for an order to secure such payments. The question is whether a wife who has obtained a decree of judicial separation can avail herself of s. 23 (1). The husband contends that she has no right to apply under s. 23 (1), and that her only right is to apply for alimony under s. 20 (2) of the Act. This would look at first sight to be a somewhat barren dispute. It would not seem to matter under which section she applies, so long as an order is made for payments to her. But the difference is this. Under s. 23 the court can order the husband to secure the payments by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood, whereas under s. 20 (2) the court has no power to order any such security to be provided for her.

The origin of s. 23 (1) is well known. Before 1949 the only way in which a wife (who did not seek a divorce or separation) could get maintenance from her husband in the High Court was to bring a suit for restitution of conjugal rights. If he disobeyed the order, the court would order him to make periodical payments for her support. This procedure was expensive and cumbersome, and, moreover, the wife had to assert on oath that she wanted her husband back, which was often the last thing she wanted. There was, however, a remedy to be had from the magistrates. Ever since 1895 a wife has been able to apply to the magistrates for maintenance, but this was only suited to people of small means because the magistrates could award her at most £2 a week. In 1949, therefore, a new procedure was introduced, whereby a wife could apply direct to the High Court for maintenance instead of having to bring a suit for restitution. This procedure was originally enacted in 1949 by s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, which has now been replaced by s. 23 of the Act of 1950.

In introducing this new procedure, the legislature put the wife into as good a position as if she had brought a restitution suit. The High Court was given jurisdiction, not only to order periodical payments, but also to order the husband to give security for them. It must be remembered that, before 1884, the court had no power in a restitution suit to order a husband to make payments or to give security. It had power to commit him to prison if he did not obey the decree, but that was all. In 1884, however, the power to commit to prison was taken away, and instead of it the court was given jurisdiction to order the husband to make periodical payments and also to give security. In 1949 this jurisdiction was extended to the new maintenance suit.

Alongside all these developments, however, there has always been available to a wife, who did not want a divorce, the procedure for judicial separation.

If she could prove one of the recognised grounds, such as cruelty or adultery, she could obtain a decree of judicial separation, and thereupon the court could order the husband to pay her permanent alimony, but it could not order him to give security for the payments. This has been the law from 1857 onwards, and it finds its place now in s. 20 (2) of the Act of 1950.

A The question in this case is: What is the position of a wife who has obtained a decree of judicial separation and seeks payments for her support? Is she confined to the old procedure set forth in s. 20 (2), or can she apply under the new procedure laid down in s. 23? On this question, the critical words are those in s. 23 (1), which says that the powers under that section are only available to the court on this one condition:

B “ . . . if it would have jurisdiction to entertain proceedings by the wife for judicial separation . . . ”

C At first sight it would appear from these words that s. 23 (1) is dealing with cases where the wife has not proceeded for judicial separation, but could have done so had she wished. I must say that I think the words are most unhappily chosen. Take a case where a wife is deserted by her husband and left penniless. She cannot bring proceedings for divorce or judicial separation until the desertion has lasted for three years. The court has in one sense no jurisdiction to entertain proceedings by her for judicial separation until three years have elapsed. But surely she is entitled meanwhile to bring proceedings for maintenance under s. 23 (1). If she could not do so, one of the main objects of the legislature would be defeated.

D This leads me to the conclusion that the word “ jurisdiction ” in s. 23 (1) is not used in its ordinary sense. It is used in a special sense peculiar to the Divorce Court. The practitioners in that court use the word “ jurisdiction ” to denote the personal qualifications of domicile or residence which are required of the parties before the court will adjudicate between them. Thus, it is said that, in suits for divorce, jurisdiction depends on domicile. In suits for judicial separation, it depends on domicile or on residence. In restitution suits, it depends on domicile or residence or the matrimonial home. In nullity suits, it is not easy to say on what it does depend. When this terminology is borne in mind, it becomes fairly plain what was the object of the legislature in inserting this condition in s. 23 (1). It was introducing into the Divorce Court a suit, of a kind unknown before, in the shape of a maintenance suit, and it was felt desirable to specify the qualifications of domicile or residence which should be fulfilled to enable the court to entertain the suit. Out of the mixed bag available, the new maintenance suit was put on the same basis as a suit for judicial separation.

F In these circumstances I feel that we ought to give the word “ jurisdiction ” in s. 23 (1) the special connotation of the Divorce Court. The condition “ if it would have jurisdiction ”, etc., only means that the parties must have such qualification of domicile or residence as would enable the court to entertain a suit by the wife for judicial separation. It has nothing to do with the validity or merits of a claim for judicial separation. The liability of the husband does not depend on desertion or cruelty or adultery (as it would in a suit for judicial separation), but simply on his wilful neglect to provide reasonable maintenance for his wife. WILLMER, J., has so held in *Woodward v. Woodward* (1), and I find myself in entire agreement with him.

H Applying this test, it is clear that the parties in this case have all the personal qualifications necessary to enable the court to consider a claim for judicial separation. They are both domiciled in this country and also resident here. That is sufficient to satisfy the condition in s. 23 (1). It is true that, if a claim for judicial separation were made, it would be bound to fail, because the wife has already obtained a decree for judicial separation and the court would not permit a second decree for the same cause, there being no change of circumstances since the first decree. But that does not defeat the claim under s. 23 (1),

because the test is not whether the court would grant a decree for judicial separation, but whether the parties have the requisite domiciliary or residential qualifications, which they clearly have.

Once this point is decided in favour of the wife, there seems no reason why she should not have the right to proceed under s. 20 (2) or s. 23 (1) at her choice. If there are advantages under s. 23 (1) which are not available under s. 20 (2), she is entitled to seek them. LORD MERRIMAN, P., has so said in *Cooper v. Cooper* (2), and I think we should follow his guidance on it. I find myself in agreement with DAVIES, J., and I would dismiss this appeal. A

MORRIS, L.J.: I have had the opportunity of considering the judgment which has just been delivered, and I am in agreement with it.

SINGLETON, L.J.: I agree that the appeal should be dismissed. The wording of s. 23 (1) of the Matrimonial Causes Act, 1950, gives rise to some difficulty, but after full consideration I feel that the judgment of DAVIES, J., is right. It is in accordance with common sense and with justice. B

Appeal dismissed.

Solicitors: *Bird & Bird* (for the husband); *Scadding & Bodkin* (for the wife).

[Reported by F. A. AMES, Esq., Barrister-at-Law.] C

Re NORTH DEVON AND WEST SOMERSET RELIEF FUND TRUSTS. HYLTON (BARON) AND ANOTHER v. WRIGHT AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), June 11, 1953.]

Charity—Benefit to community—Public and charitable purpose—Appeal for contributions for relief of flood victims in certain area—Application of surplus assets—General charitable intention—Cy-près doctrine. D

On Aug. 15, 1952, as the result of torrential rain, floods were caused over a wide area in north Devon and west Somerset. On Aug. 18, 1952, an appeal relating to the damage caused was issued in these terms: "We invite not only the people of the west country, but everyone who has known and loved Lynmouth and the quiet villages of north Devon and west Somerset, which have suffered so grievously in this disaster, to contribute to a fund for the relief of all who have suffered . . . But those who have suffered are not only the local people. Many holiday-makers . . . have suffered grievously. These need help every bit as much as our own people, and for that reason we do ask the whole country to support this fund . . ." The response was very great and it was contemplated that there would be a large surplus after providing for all requirements. The questions arose whether the trusts of the fund were charitable and whether the surplus should be applied cy-près or be repayable to the donors to the fund in proportion to their donations. E

HELD: (i) on the wording of the appeal taken as a whole, there was an intention to apply the money subscribed to relieve hardship and suffering experienced both by "the local people" and others who were within the affected area, and that purpose was both public and charitable. F

(ii) the true inference from the nature of the appeal was that subscribers intended to part with their contributions out and out, and, notwithstanding that the primary object was to alleviate distress caused directly by the floods to the people of the relevant district, the intention of the donors must be taken to be generally charitable, and surplus funds must be applied cy-près. G

Re Welsh Hospital (Netley) Fund ([1921] 1 Ch. 655), applied. H

AS TO APPLICATION OF SURPLUS FUNDS CY-PRÈS, see HALSBURY, Simonds Edn., Vol. 4, pp. 323, 324, paras. 661, 662; and FOR CASES, see DIGEST, Vol. 8, p. 349, Nos. 1436-1444.

Cases referred to:

- (1) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 2nd Digest Supp.
- (2) *Re Foveaux*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 8 Digest 259, 206.
- (3) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.
- (4) *Re Wilson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.
- (5) *Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest 349, 1444.

A

B

ADJOURNED SUMMONS to determine (i) whether the trusts affecting the North Devon and West Somerset Relief Fund arising under an appeal dated Aug. 18, 1952, issued by the lords lieutenant of the counties of Devon and Somerset were valid and charitable trusts; and (ii) whether any surplus of the fund beyond what was required for the purposes of the trusts was (a) applicable cy-près for some other charitable purpose or (b) was repayable to the donors who contributed to the fund in the proportions of their gifts or how otherwise the same ought to be applied.

C

On Aug. 15, 1952, torrential rain fell over a wide area in north Devonshire and west Somersetshire, causing disastrous floods and great damage and devastation. On Aug. 18, 1952, an appeal by the lords lieutenant of Devon and Somerset was issued in the following terms:

D

"We invite not only the people of the west country, but everyone who has known and loved Lynmouth and the quiet villages of north Devon and west Somerset, which have suffered so grievously in this disaster, to contribute to a fund for the relief of all who have suffered. These villages have been overwhelmed by a tragedy terrible in its suddenness and completeness. Homes have been swept away with whole families. Others are bereaved,

E

or homeless, or have nothing left. In the darkness of a single night part of the town of Lynmouth itself has disappeared for ever. The material damage will run into a figure far beyond the resources of the inhabitants of these stricken valleys. In human suffering it can perhaps never be computed. At Lynmouth alone twenty houses and two hotels have disappeared and at least forty houses are damaged; at least thirty people,

F

including six from one family, are missing. We hope and believe that this fund will meet a generous response far beyond the confines of the west country, for in its romantic beauty and appeal Lynmouth in particular was a possession not of one county, but of the nation. But those who have suffered are not only the local people. Many holiday-makers, notably the boy scouts who were camping at Filleigh, have suffered grievously.

G

These need help every bit as much as our own people, and for that reason we do ask the whole country to support this fund. This countryside, that has given pleasure to so many, will, we feel sure, be generously remembered in its hour of need by all those who have known it in happier days. We hope that lord mayors, mayors, chairmen of urban and rural district councils, and philanthropic bodies will, where they think fit, inaugurate their own fund and send the proceeds to [the treasurer]."

H

The response to the appeal was very great. In addition to donations sent direct to the treasurer, large sums were collected in streets from passers-by, from collecting boxes placed in hotels and boarding houses, and at stations and other public places, and by means of collections in churches. Local authorities made collections, and organisations such as the Red Cross contributed. The fund so collected was in excess of the amount necessary to meet claims in respect of direct personal loss by persons mentioned in the appeal.

Cross, Q.C., and *J. V. Nesbitt* for the plaintiffs, the trustees of the fund.
Gray, Q.C., and *Winterbotham* for the first defendant, representing donors to the fund.

The Attorney-General (Sir Lionel Heald, Q.C.) and *Denys B. Buckley* for the Attorney-General.

WYNN-PARRY, J.: The first question which I have to decide on this summons is whether the trusts affecting the funds mentioned in the evidence are valid charitable trusts. I accept, as, indeed, I am bound to do, that in the case such as this where the trust is clearly of a public nature, for the trusts to be good charitable trusts they must be shown not only to be beneficial to the community, or a defined section of the community, but beneficial in the way which the law regards as charitable. For that I need refer to no other authority than the opinion of LORD SIMONDS in *Williams' Trustees v. Inland Revenue Comrs.* (1). A B

The method by which such a question as this should be approached is, I conceive, laid down authoritatively by CHITTY, J., in *Re Foveaux* (2), where he says ([1895] 2 Ch. 504):

"Cases arise, such as the present, in which it is not easy to ascertain whether a particular institution is or is not a charity. Charity in law is a highly technical term. The method employed by the court is to consider the enumeration of charities in the statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances." C D

Before turning to the vital document in this case, I would observe in passing, that in the recent case of *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (3), LORD GREENE, M.R., said in the course of his judgment ([1946] 1 All E.R. 506): E

"I am not concerned for one moment to dispute the proposition that a fund put up for air-raid distress in Coventry generally would be a good charitable gift. I have very little doubt that it would be. But there is all the difference in the world between such a fund and a fund put up by, it may be, a dozen inhabitants of a street, or, it may be, a thousand employees of a firm, to provide for themselves out of moneys subscribed by themselves some kind of immediate relief in case they suffer from an air raid. The Attorney-General and Mr. Upjohn wish to attribute to the fact that these people were putting up money for their own benefit a very slight importance. To my mind, it is of the greatest importance and is quite conclusive in stamping the character of a private and personal trust upon this fund." F G

Again, at the end of his judgment MORTON, L.J., said (*ibid.*, 511):

"No doubt the provision of relief for air-raid distress is a most excellent object, and I should not myself doubt that a fund for the relief of air-raid distress in Coventry was a fund held upon charitable trusts." H

With those considerations in view, I turn to the appeal for contributions which was launched in this case, because, in my judgment, the question is solely one of construction of this comparatively short document. In the first place, it is, I think, legitimate, and, indeed, necessary, to remember that this appeal was issued only three days after the disaster of Aug. 15, 1952, and it bears the stamp of having as its authors people who had not had time, if, indeed, the desirability ever crossed their minds, of consulting their legal advisers. I say

that because in the case of such a document issued in such circumstances it does not appear to me proper that the court should be astute to fix on any particular word and give to it too wide or, in some circumstances, too narrow a meaning.

The appeal is headed: "Appeal by the Lords Lieutenant of Devon and Somerset", and it opens with these words:

- A "We invite not only the people of the west country, but everyone who has known and loved Lynmouth and the quiet villages of north Devon and west Somerset, which have suffered so grievously in this disaster, to contribute to a fund for the relief of all who have suffered."

In my view, too much emphasis can very easily be put on that word "all", and, indeed, reliance was sought to be placed on the use of that word by counsel B for the first defendant in their respective arguments. I think that that sentence, applying the elementary rule of construction, must be read together with the whole of the rest of the document. The document proceeds:

- C "These villages have been overwhelmed by a tragedy terrible in its suddenness and completeness. Homes have been swept away with whole families. Others are bereaved, or homeless, or have nothing left. In the darkness of a single night part of the town of Lynmouth itself has disappeared for ever."

That, if I may say so, with all respect, is a most dramatic and, for the purposes of the appeal, well-framed paragraph, and the whole emphasis there is on the results of the disaster so far as concerns distress, either through pecuniary suffering or through bodily suffering. The document goes on:

- D "The material damage will run into a figure far beyond the resources of the inhabitants of these stricken valleys."

That is a sentence which, in my judgment, it is most material to bear in mind, because it places great emphasis on the circumstances taken into consideration by the authors of the document and put by them before those to whom they E appeal, and shows that the intention is to help financially those who, by reason of the magnitude of the disaster, are, whatever otherwise would have been their means, unable adequately to help themselves.

The document then condescends to a number of details as regards material damage, and mentions the serious loss of human life and human suffering, and proceeds:

- F "We hope and believe that this fund will meet a generous response far beyond the confines of the west country, for in its romantic beauty and appeal Lynmouth in particular was a possession not of one county, but of the nation."

- G In my view, in so far as that sentence could, on a strict view, be regarded as an intimation that the funds are required merely to restore amenities, it should not be given that construction in so far as that construction might tend to defeat what might otherwise have been said to be capable of being extracted from the document, viz., an intention to help relieve hardship and suffering by the charity of the community. It is merely a paragraph, to my mind, put in to emphasise that this distress and suffering which the appeal is designed H to relieve has fallen on a district which was particularly beautiful. The document goes on:

"But those who have suffered are not only the local people. Many holiday-makers, notably the boy scouts who were camping at Filleigh, have suffered grievously. These need help every bit as much as our own people, and for that reason we do ask the whole country to support this fund."

The reasoning there is that it is desirable to put forward some ground which

will help to justify an appeal to the whole country, and the ground put forward is that persons who could not be regarded as local people, but who, being in the area at the time of the disaster, themselves have suffered grievously, need help; and the help that is appealed for is, of course, financial help, because that is of the essence of the appeal. Then comes a general statement:

"This countryside, that has given pleasure to so many, will, we feel sure, be generously remembered in its hour of need by all those who have known it in happier days."

The last paragraph is one which deals merely with machinery and which, for this purpose, I need not read.

Looking at that document as a whole, I extract from it an intention on the part of the authors to apply the money which may be subscribed at their invitation to relieve hardship and suffering which has been experienced both by what are called "the local people" and others who were within the area at the time of the disaster and to achieve that by the charity of the community. I am unable to dissect this document in such a way as to discover in it, either by looseness of phrasing, and, therefore, by inference, or by express words, any intention to benefit this part of the community in a way which the law would not regard as charitable.

For those reasons, I propose in answer to question (i) of the summons to declare that the trusts affecting the fund are valid charitable trusts.

[HIS LORDSHIP heard argument on the second question.]

WYNN-PARRY, J.: I confess that I do not find this question altogether easy to answer. I take as the statement of the principles on which the court should proceed the opening passage from the judgment of PARKER, J., in *Re Wilson* (4), where he says ([1913] 1 Ch. 320):

"For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question. Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument."

It is to be observed that in that case the court had to construe a will, the instrument by which a single donor had made the disposition which gave rise to the question. A number of authorities were cited to me, and most of them, I think it is true to say, arose substantially in that way. I have to deal with a very different type of case, a case in which I have to discover the intention of many

hundreds—it may be thousands—of donors, and the only document that I have to assist me is not a document brought into existence by any one of those donors, but by those who invited them to become donors.

A The nearest case to be found in the reports to the present case is *Re Welsh Hospital (Netley) Fund* (5). That was a decision of P.O. LAWRENCE, J. The facts were that on the outbreak of the war in 1914 a hospital was erected at Netley, and equipped and run during the war, for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. In 1919 the hospital was closed, the staff disbanded, and the property sold to the War Office, and, after winding-up the affairs of the hospital, there was a surplus of some £9,000. It was held, on the evidence, that there was not a resulting trust of the surplus for the subscribers to the hospital, but a general charitable intention for sick and wounded Welshmen which enabled the court to apply the fund *cy-près*. In the judgment of P.O. LAWRENCE, J., reference is made to the terms of the appeal by which the subscriptions were invited. He says ([1921] 1 Ch. 659):

C “The appeal shows that the first idea was that the hospital should be one serving with the expeditionary force at the front in France. It also shows that six months’ service in France was estimated to cost £15,000, and it continues: ‘But the sum subscribed is not limited to this amount, as further subscriptions can be used for prolonging the service or increasing the accommodation of the hospital’, and it winds up with this expression: ‘We believe that Wales will rise to the full height of its responsibilities in this great national crisis, and by subscribing the necessary sum within a few days prove that it is foremost in seeking to relieve and comfort by the hands of their own fellow countrymen our sick and wounded across the seas.’”

D The appeal, as the learned judge points out, was an appeal to the inhabitants of Wales for subscriptions to a Welsh hospital. In the course of his judgment, P.O. LAWRENCE, J., says (*ibid.*, 660):

E “The first question to be determined is whether there is a resulting trust in favour of the subscribers to the fund. Mr. Greene has argued on behalf of the subscribers that there is a resulting trust for them, and that the surplus ought to be paid back to the various subscribers. All the other parties to the summons have argued that in the circumstances it must be inferred that there was a general charitable intent and that the court is at liberty to apply the surplus *cy-près*. In my judgment this latter contention is well founded. The fund was created by contributions from various sources and in varying amounts, partly by donations from private individuals of more or less substantial amounts, and partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales.

F So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked.

H

They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end. In the result I hold that although all the contributions were in the first instance made for the particular purpose of building, equipping and maintaining the Welsh Hospital at Netley, the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen, and that all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen."

It appears to me, on careful consideration, that it is impossible to draw a distinction of any substance between the facts of that case and the facts of the present case. It appears to me not in the least decisive that there is a reference in the appeal to persons other than local residents who suffered distress by the disaster. The main underlying object of that appeal was to benefit the people of the district in question. The appeal proceeds in this case, as it did in the case of the Welsh hospital, by emphasising what in the Welsh case was called the immediate object, but which might quite easily in either case have been treated, on a strict construction of the appeal, as the only object. In *Re Welsh Hospital (Netley) Fund* (5), P.O. LAWRENCE, J., found no difficulty in drawing the conclusion, for the reasons which he gives, that there was a more extended object than might be said at first sight to appear on the face of the appeal; and when I apply his reasoning to the appeal in question in this case, I feel driven to exactly the same conclusion, namely, that there was a general charitable intent. All the reasons which militated in the mind of P.O. LAWRENCE, J., to the conclusion to which he came are present in this case. I, therefore, find it impossible to distinguish that case from this case. In those circumstances, it appears to me to be unnecessary to travel through the rest of the authorities. I need only say that I find nothing in the judgment of P.O. LAWRENCE, J., which is in any way inconsistent with the passage from the judgment of PARKER, J., in *Re Wilson* (4) which I have read. It is true that the latter case was not apparently cited to P.O. LAWRENCE, J., but, no doubt, that learned judge was well aware of its existence. Indeed, the judgment of PARKER, J., in *Re Wilson* (4) did no more than state the effect of the authorities as it then existed; nor do I find anything in the later cases which carries the matter further. So far as I am aware, no adverse comment has ever been passed on the decision or judgment of P.O. LAWRENCE, J., in *Re Welsh Hospital (Netley) Fund* (5). I regard it as authority binding on me and as covering this case.

For those reasons, I propose, in answer to question (ii) of the summons, to make a declaration in the sense of para. (a).

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. G. Godsall*, clerk of the county council, Exeter (for the plaintiffs); *Sharpe, Pritchard & Co.* (for the first defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

CHRISTOPHER BROWN, LTD. v.
GENOSSENSCHAFT OESTERREICHISCHER WALDBESITZER
HOLZWIRTSCHAFTSBERTRIEBE REGISTRIERTE GENOS-
SENSCHAFT MIT BESCHRANKTER HAFTUNG.

[QUEEN'S BENCH DIVISION (Devlin, J.), October 5, 7, 1953.]

A *Arbitration—Evidence—Presumption of validity of submission—Ambiguity in award raising doubt as to jurisdiction—Admissibility of extrinsic evidence as to dispute—Right of arbitrators to consider questions as to their jurisdiction.*

In an action to enforce an arbitration award, the defendants filed a defence and conducted interlocutory proceedings, but did not appear at the trial. The defence was substantially that the agreement in which the submission to arbitration was contained was not a binding contract between the parties. The award stated: "A dispute having arisen between [the parties] regarding the execution of the contract . . ." the arbitrators awarded the plaintiffs £1,650.

B
C
D HELD: (i) the word "execution" in the award was ambiguous in that it could mean either the making of the contract or its performance, and evidence of the dispute entertained by the arbitrators was admissible (i) to resolve the ambiguity in the award and (ii) to prove the nature of the dispute independently of the award; the evidence showed that the word was used in the sense of performance, but, even if the arbitrators had inquired into the facts relating to their jurisdiction, not to determine their jurisdiction, but to ascertain whether they should proceed with the arbitration or whether they clearly lacked jurisdiction, that would not vitiate the award.

(ii) the plaintiffs, in proving the contract between the parties, that it contained a submission, and that the document was duly signed, had tendered prima facie proof that a valid submission, binding on the parties, had been made, and they were not obliged to go into matters which might have been raised by the defence if it had been heard and might have rebutted the prima facie presumption to be drawn from the execution of the document that the document was binding on the parties.

E *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Zerek* ([1951] 1 All E.R. 482), applied.

F Cases referred to:

(1) *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Zerek*, [1951] 1 All E.R. 482; [1951] 2 K.B. 1; 115 J.P. 132; 2nd Digest Supp.

(2) *Falkingham v. Victorian Railways Comr.*, [1900] A.C. 452; 69 L.J.P.C. 89; 82 L.T. 506; 2 Digest 451, 984.

G (3) *R. v. All Saints, Southampton (Inhabitants)*, (1828), 7 B. & C. 785; 6 L.J.O.S.M.C. 53; 108 E.R. 916; 37 Digest 334, 1377.

(4) *London Corpn. v. Cox*, (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 Digest 101, 23.

ACTION to enforce an arbitration award.

H The plaintiffs were timber importers carrying on business in West Hartlepool and the defendants were timber exporters carrying on business in Austria. A written contract between the parties for the import of timber dated Dec. 22, 1950, contained, inter alia, an agreement to submit disputes to arbitration. A dispute under the contract having arisen because of non-delivery of timber, the plaintiffs appointed an arbitrator in accordance with the agreement, and, as the defendants failed to appoint an arbitrator, a second was appointed (as the agreement provided) by the president of the Timber Trades Federation.

The arbitrator awarded the plaintiffs £1,650. The award was in the following terms:

"A dispute having arisen between [the parties] regarding the execution of the contract dated Dec. 22, 1950 . . . we, the undersigned, hereby determine and award that the sellers [defendants] shall pay to the buyers [plaintiffs] the sum of £1,650."

The defendants having failed to pay, the plaintiffs issued a specially indorsed writ to enforce the award. By their defence the defendants alleged that the document of December, 1950, was not a binding contract between the parties in that the plaintiffs and defendants were not "ad idem" and that consequently there was no submission to arbitration. At the trial, the defendants, after delivering their defence and conducting interlocutory proceedings, did not appear.

I. H. Jacob for the plaintiffs.

The defendants did not appear.

Cur. adv. vult.

Oct. 7. **DEVLIN, J.**, stated the facts and continued: The plaintiffs are entitled, on proof of their case, to obtain the judgment for which they ask. The matters that are set out in the defence—and it is not, of course, any part of the duty of the plaintiffs to disprove them—show that the defence consists substantially of an allegation that the contract alleged in the statement of claim was not a binding contract inasmuch as the parties were never ad idem. If that is so, of course, the submission which is contained in the contract would also not be binding on the defendants and the award would, therefore, be valueless.

To succeed, therefore, the plaintiffs, first, must prove the making of the contract which contains the submission; secondly, they must prove that the dispute which arose was within the terms of the submission; thirdly, that arbitrators were appointed in accordance with the clause that contains the submission; fourthly, they must prove the making of the award; and, lastly, they must prove the amount awarded has not been paid. They do not in this task get any substantial assistance from any admissions in the defence. The defence alleges, as I have said, that there was no contract at all and what admissions the defendants make are implied rather than expressed and are guarded by the general denial clause which provides that they must be taken as denying anything that they do not expressly admit. At any rate, the plaintiffs have undertaken to prove all these matters, and as to four of them they have offered clear proof. The only one which gives rise to any doubt is the second that I have mentioned, whether the dispute that arose was within the submission.

That doubt arises in this way. In the course of proving their case, the plaintiffs naturally produce the award on which they are suing and the award reads:

"A dispute having arisen between [the parties] regarding the execution of the contract dated Dec. 22, 1950 [the matter has been referred to the arbitrators]. Having carefully examined the documents and correspondence relating to the dispute we, the undersigned, hereby determine and award that the sellers shall pay to the buyers the sum of £1,650."

They direct that the costs of the arbitration shall be paid as to half by the buyers, that is the plaintiffs, and as to half by the sellers. The award, therefore, recites the dispute as being a dispute regarding the "execution" of the contract, and, of course, if that means execution in the sense of the making of the contract, then it would be a dispute which the arbitrators would have no power to determine or award on at all. The contract contains the submission, and, if the contract was never validly made, then there is no submission, and the arbitrators are stripped of any authority, or, indeed, put

more accurately, no authority was ever conferred on them to deal with the dispute. This, of course, naturally directs attention to the fact that the defendants in their defence are denying that the contract was validly made and was binding on them. The word "execution" is, I think, an ambiguous word. It has been argued by counsel for the plaintiffs that it should be taken to mean in its place in the award, not the execution in the sense of the making of the contract, but execution in the sense of the performance or carrying out of the contract. In law, as well as in the ordinary use of terminology, one talks of an executed contract or an executory contract as meaning a contract that has been fully performed or has not been fully performed. In that sense I think the word is ambiguous and there is no doubt that the principle to apply is that the court should endeavour in its construction of the document to uphold the validity of the award rather than to destroy it. It might be, therefore—and I say no more than it might be—that the word in its place in the award should be given the interpretation for which the plaintiffs contend.

Counsel for the plaintiffs, I think rightly, did not elect to rely on that, but preferred to tender evidence to show what, in fact, the dispute which came before the arbitrators was. I think that such evidence was clearly admissible. It would be admissible, I think, to resolve the ambiguity in the award itself, but a better ground for admitting it is, I think, that the nature of the dispute is something which has to be determined outside the award and outside whatever may be said about it in the award. What is said or implied about it in the award is not conclusive one way or the other; it is a fact which has to be proved by evidence extrinsic to the award. In those circumstances, one of the arbitrators, the arbitrator who was appointed by the plaintiffs, Mr. Gain, was called in order to give evidence about what the dispute was and what was referred to them. In the first place, Mr. Gain was never formally appointed and there was no formal reference as far as he was concerned. He was appointed by being called up on the telephone and asked whether he would act. That telephone call was followed on the same day by a letter of Dec. 5, 1951, from the plaintiffs in which they set out what their points were in relation to the dispute. They enclosed the contract and the correspondence relating to it, and they said: "We should be obliged if you would proceed to arbitration on our behalf". They then set out the points which they wanted him to consider, and their arguments. The letter cannot, I think, be regarded in any way as defining the area of dispute, but it indicates the nature of some, at any rate, of the matters which were in dispute from the plaintiffs' point of view. It makes it plain that the plaintiffs' cause of action, as it would have been formulated in legal proceedings, was for damages for non-delivery of the timber which they had contracted to buy and non-delivery by the dates specified in the contract, and they anticipated that this claim would be met by various defences. The main defence which they anticipated appears to have been that the sellers could not get an export licence or could not get their export licence renewed, and, consequently, they would or might rely, on the force majeure clause. There was also the possibility that they might contend that certain terms as to the furnishing of a letter of credit which were part of the obligation of the buyers had not been fulfilled, and the letter deals with these points.

Mr. Gain having been appointed by the plaintiffs, the defendants did not appoint an arbitrator and, accordingly, under the terms of the submission, the president of the Timber Trades Federation was called on to appoint one for the defendants, and he appointed Mr. James. The two arbitrators met and considered the matter several times and they looked at the whole of the correspondence with which they had been furnished. The correspondence indicated the points which I have mentioned and also that the defendants were contending that the contract was not valid and was not binding on them. I am satisfied that the arbitrators gave consideration to that point among others.

I am satisfied that they went into the question, so far as they could, whether the contract was valid or binding, and they decided that it was, and, having decided that it was, they went on to determine the other matters likewise in favour of the plaintiffs. I am satisfied, however, that when the word "execution" was put into the draft award it was not put in with the intention of referring merely to the making of the contract, but was also intended to refer to the performance or carrying out of the contract. Whether the intention of the arbitrators had any materiality on that point, I do not know, but, at any rate, so far as it is a question of fact, I find that this part of the award, at any rate, was drafted by Mr. Gain and that when he used the word "execution" he intended to use it in the sense of performance.

That is how the matter stands on the facts. If the facts had shown that the only dispute which the arbitrators had considered was the dispute whether the contract was validly made or not, then, of course, the award would have been valueless. The arbitrators cannot determine their own jurisdiction. The question which has arisen is: What is the position if the dispute embraced not merely the question whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine? I think that the answer to that question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not. If it became abundantly clear to them that they had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well decide not to proceed with the hearing. They are entitled, in short, to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever on the rights of the parties. That is plain, I think, from the burden that is put on a plaintiff who is suing on an award. He is obliged to prove not only the making of the award but that the arbitrators had jurisdiction to make the award. The principle *omnia praesumuntur* does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made that, therefore, it is a valid award. It has to be proved by the party who sues on it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

If the plaintiff takes on himself the burden of proving the award and fails to prove that the arbitrators had jurisdiction, of course, his action fails and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds and his success is not destroyed because the arbitrators themselves went into the matter and came to the same

conclusion which, *ex hypothesi*, was the right one. In short, any view that is expressed by the arbitrators expressly or impliedly in the award, any finding, if it can be called a finding, that they had jurisdiction, does not make the award any better and likewise does not make it any worse. This approach to the matter and the principles to which I have referred are, I think, substantially those which were laid down in the judgments in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Zerek* (1), which was a decision of the Divisional Court. The court there was dealing with a similar question in relation to a rent tribunal and the circumstances in which a rent tribunal could properly inquire into matters affecting its own jurisdiction. I think the same principles apply to an arbitration tribunal. That is shown by a short passage to which counsel for the plaintiffs referred me in *Falkingham v. Victorian Railways Comr.* (2). The Privy Council was there considering a contention that the award was bad because the arbitrators had considered claims which they were not authorised to consider as well as claims which they were authorised to consider. LORD DAVEY, delivering the advice of the Judicial Committee, said ([1900] A.C. 463):

“ Their Lordships are not aware of any authority for this position, and they think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the award. It is true that in inferior courts the maxim ‘*Omnia praesumuntur rite esse acta*’ does not apply to give jurisdiction, as was laid down by the Court of Queen’s Bench in *R. v. All Saints, Southampton (Inhabitants)* (3), and by WILLES, J., in *London Corpn. v. Cox* (4). That rule is applicable to the award of an arbitrator where no jurisdiction is shown to make the award, but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application. In such a case the award can only be impeached by showing that the arbitrator did in fact exceed his jurisdiction.”

London Corpn. v. Cox (4) was one of the authorities relied on in *R. v. Fulham, Hammersmith & Kensington Rent Tribunal* (1), and I am satisfied that the principle which applies to inferior tribunals generally, as laid down in that case, ought to be applied to arbitration tribunals as well.

Thus, the question becomes simply this: Have the plaintiffs discharged the burden of proving that the arbitrators had jurisdiction? If they have, then what the arbitrators may have thought about it, or may have inquired into about it, is, as I have said, irrelevant. In my judgment, the plaintiffs have discharged that burden. It is, indeed, the very issue of the case and would have been the very issue of the case if it had been fought. They have proved the contract, they have proved that the contract contained a submission, and they have proved that the submission was duly signed. They have thus discharged all that they are required to do by tendering *prima facie* proof that a valid submission was made, and, accordingly, that, the contract being validly executed, the arbitrators were entitled to act on the submission. That *prima facie* proof is sufficient for their purpose. They are not obliged to go into matters which might have been raised by the defence if that had been heard, and which might have rebutted the *prima facie* presumption to be drawn from the execution of the document that the document was binding on the parties. On these grounds, therefore, I think that the plaintiffs have proved their case and that they are entitled to judgment for which they ask.

Judgment for the plaintiffs.

Solicitors: *Franks, Charlesly & Leighton* (for the plaintiffs).

[Reported by MICHAEL MALONEY, Esq., *Barrister-at-Law*.]

MOHAHIR ALI *v.* ELLMORE AND OTHERS.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), October 2, 1953.]

Court of Appeal—Extension of time for appeal—Fresh evidence—Evidence discrediting witnesses—R.S.C., Ord. 58, r. 15, Ord. 64, r. 7.

The plaintiff brought an action for damages for wrongful imprisonment and malicious prosecution, and for conspiracy in agreeing to give false evidence in order to secure the plaintiff's conviction on a criminal charge, against a police superintendent and three other police officers. All four defendants gave evidence and were presented as men of high character by the prosecution to the jury, the issue of their integrity being left clearly to the jury, on whose answers judgment was entered for the defendants. Three months afterwards the chief constable of the city police force announced in the Press an investigation into the conduct of certain of his police officers and two months later the police superintendent and one of the other defendants were found guilty of breaches of the police disciplinary code in wrongfully receiving moneys from bookmakers, the second officer also being found to have divulged police secrets. After the time for appealing had expired the plaintiff applied for leave to appeal against the judgment given against him on the ground that fresh evidence had come to light which was not available at the trial, but was now available for him to use in cross-examination of the defendants on a re-trial.

HELD: as the new evidence went only to the credit of two defendants who were witnesses in the case, and did not go directly to any issue in the case, and as an appeal or new trial was unlikely to serve any public good or to be of great advantage to the plaintiff, in the interests of finality leave to appeal out of time must be refused.

Braddock v. Tillotson's Newspapers, Ltd. ([1949] 2 All E.R. 306), applied.

Case referred to:

(1) *Braddock v. Tillotson's Newspapers, Ltd.*, [1949] 2 All E.R. 306; [1950] 1 K.B. 47; 2nd Digest Supp.

MOTION for leave to appeal out of time, on the ground that new evidence had become available since the trial of the action.

Elwes, Q.C., and *A. W. Stephenson* for the plaintiff.

G. D. Roberts, Q.C., and *Merriton* for the first and second defendants.

R. Lyons, Q.C., and *A. G. Sharp* for the third and fourth defendants.

SINGLETON, L.J.: This is a motion by the plaintiff that he may have leave to appeal notwithstanding the time limited by the rules of the court for appealing has expired. In my opinion, the motion must be dismissed, but as this is an important and a somewhat unusual case it is right that I should state the reasons which lead me to that opinion. The plaintiff in the action is an Indian by name Mohahir Ali, and the four defendants are Albert Ellmore, who was a superintendent in the Leeds city police force, and three others who were members of that police force. In August, 1950, two other Indians were in the custody of the Leeds police on charges in relation to drugs. The plaintiff lived in Hull, and, according to his case, he went to Leeds to arrange that those two Indians should be granted bail. According to the affidavit of his solicitor, Mr. Rosen, he was unable to see the officer in charge of the case on his first visit—that officer was the first defendant, Superintendent Ellmore—but on some later date he received a telephone communication and went to Leeds and saw the first defendant. He was invited into the police station, and, according to the affidavit, was told to pay off his taxicab as the police would arrange for his journey back to the station. He was welcomed by the first defendant, who shook him by the hand. Thereafter he had an interview with the first defendant.

A According to the case for the defendants, there had been installed a two-way microphone set, one end of which was in an adjoining room where the other three police officers were stationed so that they could listen to that which was said. Before the interview ended the first defendant arrested the plaintiff on a charge of seeking to corrupt him by offering him money to induce him to show favour towards the other two Indians. The plaintiff was imprisoned until the following day, when he was brought before the magistrate. The first defendant then opposed bail, whereupon the plaintiff was remanded in custody until Sept. 6. There were two further remands. On each occasion the first defendant objected to bail, and the plaintiff was kept in custody until Sept. 19.

B It is said that the opposition to bail was unreasonable. It is for the magistrate on such an occasion to consider whether bail should be granted or not, and the magistrate is not always guided by the view of a police officer on such matters. The plaintiff was committed for trial at the Leeds Assizes. His trial commenced on Nov. 29, 1950, and after a long hearing, in spite of the evidence of the four police officers against him, the jury returned a verdict of Not Guilty, and he was discharged.

C At some date thereafter the plaintiff commenced proceedings in this action, in which he claimed damages for wrongful imprisonment and for malicious prosecution, and also damages for conspiracy against all four police officers, in that, as he alleged, they had agreed together to give false evidence in order to secure his conviction. That action was heard by DONOVAN, J., at the assizes at Leeds in November and December, 1952, and on the jury's answers the learned judge entered judgment for the defendants. The answers to the various questions put to them by DONOVAN, J., were in favour of the defendants, and thus the plaintiff's action failed. That was on Dec. 2, 1952. This motion, asking for leave to appeal though time for so doing has elapsed, is dated Sept. 16, 1953.

D In the meantime certain matters had come to light in regard to some members of the Leeds city police force. So far as I can see from the affidavit, these matters have nothing whatever to do with the plaintiff or with the plaintiff's action, or with the plaintiff's arrest. The affidavit of the plaintiff's solicitor states in para. 16:

E "On Mar. 13, 1953, the chief constable of Leeds announced through the Press that information had been received concerning alleged payments made to officers of the Leeds city police force by bookmakers, and that he, the chief constable, proposed to hold an investigation . . ."

F Paragraph 18 of the affidavit states:

G "On May 14, 1953, I am informed, the [defendants], Ellmore and Simpson, were found guilty, after a full investigation by the Leeds Corporation watch committee, of breaches of the police disciplinary code, in that they had wrongfully received moneys and also that the [defendant], Simpson, had wrongfully divulged secrets. I understand that the [defendant] Mann was acquitted by the said watch committee on similar charges and subsequently withdrew his resignation."

Paragraph 19 of the affidavit states:

H "I respectfully submit that the above facts constitute evidence of corrupt practices by the [defendants] and particularly by the [defendants] Ellmore and Simpson, and that the same constitute fresh evidence which has come to light since the trial in 1952, and which was not, and could not have been available to the [plaintiff] at the said trial."

Paragraph 20 is in these terms:

"Such evidence would have been highly relevant for the purpose of the 1952 trial, in that :—(a) If the same had then been available, the jury would have formed, and been compelled to have formed, an entirely different view of the character and integrity of the [defendants]. (b) The [defendants],

Ellmore and Simpson, could not have truthfully denied in cross-examination that they had not previously been guilty of corrupt practices. (c) The facts that the [defendants] or some of them are corrupt men would have been invaluable on the issue of motive, in that it is and always has been the case for the [plaintiff] that the motive of the [defendants] in arresting and prosecuting the [plaintiff], and giving evidence against him, was to show that they were themselves above the suspicion of bribery."

The plaintiff denied throughout that he had sought to corrupt Superintendent Ellmore, and he was found Not Guilty on his trial on the criminal charge. Moreover, on the hearing of the civil action, which also was before a jury, not only were the four police officers called, but also the chief constable of Leeds. Counsel for the plaintiff told us that he was called to give evidence to the fact that the four police officers were of good standing and that they were officers on whom he could place reliance. It appears to me that that evidence was irrelevant and unnecessary. The fact that a witness who is also a defendant, is a superintendent of Leeds city police force shows that he is of good standing and that he has the confidence of his superior officers. Counsel for the third and fourth defendants told the court that the chief constable was in fact called on other matters, and that this evidence to which I have referred was given by him as he was in the witness box. I quite accept this.

I repeat that this is solely an application for leave to appeal though the time for appealing has expired. If the court thought it right to give leave to appeal, the same court or another Division of it would have to consider the merits of the appeal itself. When one looks at the affidavit of the plaintiff's solicitor, it seems clear to me that the plaintiff and the plaintiff's advisers desire to have new evidence before the Court of Appeal, or before a jury if the Court of Appeal should direct a new trial, and there is no doubt that, if the plaintiff secured a re-trial and was able to launch a fresh case before a jury supported by evidence that two of the police officers who were defendants had subsequently been convicted of offences against the police disciplinary code (offences involving the receiving of money from bookmakers), the plaintiff would be in a different position from that in which he was on the original trial. It is that end which is sought on behalf of the plaintiff. Counsel for the plaintiff has impressed on the court that, so far as anyone could tell on the original hearing, there was no motive for the four police officers giving false evidence to bring about the conviction of the plaintiff, and he submitted that it was much more likely that they would enter into such a conspiracy if they were people, or if some of them were people, who were ready and willing to commit offences against the disciplinary code such as taking money from bookmakers. I am not sure that that follows. It may depend to some extent on the date or dates. The conspiracy in regard to the plaintiff is said to have been in September, 1950. On the other hand, it is not until March or May, 1953, that a word of criticism is made against the police officers by their superiors, and the complaints are not in relation to a conspiracy to pervert the ends of justice. They are complaints, so far as one gathers from this affidavit and from what has been said in court, in regard to the acceptance of money from bookmakers. Moreover, those complaints or criticisms affect two of the defendants only, and the other two, Mann and Harriman, are not affected.

In *Braddock v. Tillotson's Newspapers, Ltd.* (1) this court had to consider whether an unsuccessful plaintiff in an action ought to be allowed to recall for cross-examination a witness as to whom it had been found, subsequently to the trial, that he had not a very good character in that he had been convicted of some criminal offences at some earlier dates. The court declined to allow that evidence and held that ([1949] 2 All E.R. 307):

"It had been the invariable practice of the Court of Appeal to confine the admission of further evidence on questions of fact under R.S.C., Ord. 58,

r. 4, to evidence on questions of fact material to an issue in the action; assuming that the court had power to order the recall of a witness for the purpose of his being cross-examined as to credit, that power should be exercised sparingly and only where the evidence was of such a nature, and the circumstances of the case were such, that no reasonable jury could be expected to act on the evidence of the witness whose character had been called in question."

- A In the present case, if it be right to say that the desire of the plaintiff is that fresh evidence should be heard (and that appears from the affidavit), that evidence might be highly prejudicial to all the defendants, and it might be hardly fair to two of them. In any event, it does not go directly to an issue in the case. It is really something which goes to the credit of the two defendants
- B who were witnesses in the case. I agree in part with the submission of counsel for the plaintiff that the present appeal is not on all fours with the appeal in *Braddock's* case (1). There is a further suggestion as to motive. On the other hand, there is no distinction in law between the position of a police officer and any other witness. In *Braddock's* case (1) no question of time arose, in the present case it does. I do not say that there has been any undue delay since
- C the discovery made apparent by the police inquiry between March and May, 1953, but I cannot bring myself to think that this is a case in which the court ought to grant leave to appeal which, if it was granted, would only result in a further application, either for fresh evidence to be heard by the Court of Appeal or for a new trial, the result of which, it is said, would, or might be, affected by fresh evidence. There must be, or there ought to be, finality in these matters
- D both in regard to a plaintiff and in regard to defendants who in this case are not all in the same position.

- I think it right to add that this matter has been pretty well thrashed out. There have been two trials. Though in one sense it might appear that the result is not wholly satisfactory, I do not think that an appeal would serve any public good, nor do I think it would succeed if the ordinary rules as to
- E evidence were followed. Everyone is desirous that a plaintiff placed as this plaintiff was should have his rights, and that nothing should be hushed up. I do not think that anything has been. The plaintiff failed in his litigation, and, so far as I can see, there is no reason why this court should grant his application. In my judgment, the motion should be dismissed.

- BIRKETT, L.J.:** I agree with the judgment which my Lord has just
- F delivered. I have been very much impressed by the serious nature and of the immenso importance of the issues which have been raised by counsel for the plaintiff, and it would be idle to say that I have not certain grave suspicion. But, as my Lord has reminded us, this is an application merely for leave to appeal out of time, and the ordinary considerations which govern such an
- G application must, therefore, apply to it. From the summing-up of *DONOVAN, J.*, in this case, of which selected passages only were read in court, it is plain that the gravity of the issue raised was appreciated and stated with great lucidity to the jury. I will quote one passage:

- "But the facts on which the claim is based make it of the highest importance, because the integrity of the defendants as police officers is called into question by means of a charge as serious as can possibly be imagined. It is that they invented a wholly false charge against the plaintiff, on which he was deprived of his liberty for some three weeks . . .";
- H

and there are other passages throughout the summing-up which indicate that the learned judge appreciated the gravity of the issue and made it plain to the jury. This precise matter of the conspiracy to give false evidence was one of the specific questions left to the jury, and the issue was debated in the evidence given before the jury. The solicitor to the plaintiff gave evidence on three

distinct matters in respect of which the first defendant was guilty of inaccuracy at least, and telling lies at the most, and, therefore, the real issue was heard and was determined. But counsel for the plaintiff says with great force: "But we were labouring under a terrible handicap. The case was conducted on the footing that the defendants were all men of high character, and that they were police officers of standing in the service", and it was suggested that, in those circumstances, the case made by the plaintiff that they conspired together to give false evidence was inconceivable, they being men of honour and men of integrity, whereas in 1953 two of the four lost their high character and were convicted of accepting bribes from bookmakers. A

The conspiracy alleged was in 1950, but the trial was in 1952, and judgment was delivered in December of that year. In March or thereabouts in the following year the chief constable instituted the proceedings which resulted in the conviction of two of the four. Counsel for the plaintiff says, therefore, with great force: "I first want leave to appeal, and if I get it I want a new trial which can be conducted, not on the footing that the four men are men of high character, but that two of them have already been convicted." B

Whilst having every sympathy with that argument, I must agree with what my Lord has said on that matter. It may be (one has to speculate on these matters) that the real truth, if ever it could be discovered, was that there had been a conspiracy and that the design of it was to screen men who were at that time engaged in accepting bribes and to give the outward appearance that they were incapable of so doing, and that they had taken extreme care in bringing the offender to justice. But that must remain a matter of speculation. It may, on the other hand, be that there was no conspiracy, because I think the point raised by my Lord is of very great significance and importance. Assuming that two of the four were so convicted in 1953, two were blameless, and the question then would arise: Would those two lend themselves in 1950 to a terrible conspiracy of this kind? All those kinds of questions must remain in the realm of speculation. I agree with my Lord, because I think it is very important that in litigation there should come a moment when there is an end. I said to counsel for the plaintiff this morning: "Had these facts arisen fifteen years later would you have applied?" He said with great frankness: "No, of course I would not." It was because May, 1953, came so near to December, 1952, that the application was made. But it is important that there should be an end to litigation; and—and this is an important consideration in my own mind—even if we were to grant this application, and even if there were to be a new trial, I cannot conceive that that would result in any great advantage. I, therefore, agree with my Lord. C D E F

HODSON, L.J.: I also agree. This is an application by the plaintiff for leave to appeal, notwithstanding the time for so doing has expired, from a judgment of DONOVAN, J., after a trial with a jury which was concluded on Dec. 2, 1952. The action was for damages for false imprisonment and malicious prosecution, and it was clear that everything depended on the jury's view of the credibility of the witnesses. The plaintiff's case was throughout that there had been a conspiracy on behalf of the four defendants, who were police officers in the city of Leeds, to make a false case against him, and this application is made because, since Dec. 2, 1952, namely, in May, 1953, according to the solicitor for the plaintiff, two of the defendants, including the principal defendant, a superintendent of police, were found guilty after a full investigation by the Leeds Corporation watch committee of breaches of the police disciplinary code in that they had wrongfully received money, and also the defendant Simpson had wrongfully divulged police secrets, the nature of the wrongful receipt of moneys being in plain language taking bribes from bookmakers. G H

Although this is an application for extension of time, the object of it is, as counsel for the plaintiff stated, to get a new trial, not on the ground of any

misdirection on the part of the learned judge, and not, I think, in order that he might be able to call fresh evidence, but in order that a new trial might be had in the light of the now (as he says) known fact that the police officers whose evidence was believed were, as to two of them, men who ought not to have been believed. And he says his client is confident that, if he could go to the court with that situation, he would have a reasonable chance of obtaining a verdict after these officers had been cross-examined.

A I think this matter has to be considered in the light of the decision of this court in *Braddock's case* (1), in which TUCKER, L.J., delivered the leading judgment of the court. He set out the well-known principles on which fresh evidence is admitted, and continued ([1949] 2 All E.R. 310):

B "These varying expressions have, so far as the decisions of the courts in this country are concerned, always been directed to evidence directly relative to the main issue in the action, or to some issue which could, or would, have been raised at the trial if the evidence had been discovered. It is not necessary in this case to express any opinion as to which is the better view with regard to the quality of the evidence in such a case. If, however, this court is to depart from its invariable practice of confining
C such evidence to the relative issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question. It would, in my view, be wrong for this court to admit fresh evidence
D directed solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict."

Whether this is put before the court as an application to call fresh evidence (as the solicitor for the plaintiff put it) or as an application for a new trial in circumstances in which the defendants' characters would appear in a less
E favourable light than before, the position seems to me to be the same. No evidence here is sought to be tendered which is directly relevant to an issue in the case. The only question is as to the credibility of the witnesses, or some of them. Without questioning the power of the court to protect the public against an injustice being done, I am bound to say that, in this case, I see no ground on which the time ought to be extended in order that this question
F of credit should be re-examined in the case of these two men. It is said with force by the solicitor for the plaintiff in his affidavit, and by counsel for the plaintiff, that now it is fairly clear that these men, or two of them, gave evidence against the plaintiff in order to give the idea that they themselves were above the suspicion of bribery, and, if only he could say that to a jury, how different might the result be. But the result seems to me a matter of pure speculation.
G What has happened here makes no difference, to my mind, whether the evidence of the chief constable as to the credibility of these people, which, I think, was wrongly admitted, is considered or not. Counsel for the plaintiff said that he could cross-examine these men as to their character, and take his chance of the answers they gave, after the inquiry which the watch committee has held. Nevertheless, the position is, I think, that the court ought not to extend the
H time in order to enable matters to be investigated which have happened since the hearing. Counsel for the plaintiff says one cannot expect anyone to believe that, if these men went wrong in 1952 or 1951, they were not bad men in 1950, but I do not think that will do. The mere fact that counsel for the plaintiff and his client are anxious to establish that two of the four defendants have fallen from honesty into dishonesty since the trial is not sufficient to allow this matter to be re-opened, and I would add I see no possible validity in the distinction which counsel seeks to draw between a police officer and any other

citizen in this country. Every one in the witness box stands on the same footing, and no one is entitled to take advantage of his cloth, whether it be the uniform of one part of the service in this country or any other uniform. In those circumstances I agree that the application must be dismissed.

Application dismissed.

Solicitors: *Devonshire & Co.*, agents for *Pearlman & Rosen*, Hull (for the plaintiff); *Sidney Torrance & Co.*, agents for *J. Levi & Co.*, Leeds (for the first and second defendants); *Sharpe, Pritchard & Co.*, agents for *R. Crute*, town clerk, Leeds (for the third and fourth defendants).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

ALMY v. THOMAS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, J.J.), October 13, 1953.]

Dentist—Practice of dentistry by unregistered person—"Treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth"—Repair of denture—Impression of mouth taken—Dentists Act, 1921 (c. 21), s. 1 (1), s. 14 (2).

The respondent, who was not a registered dentist, undertook to repair the denture of a customer. This necessitated re-lining the denture, and to effect this he coated the denture with paste and asked the customer to replace it in her mouth, bite hard on it, and retain it for some minutes to allow the paste to set in conformity with the shape of her mouth. The customer did so and returned the plate to the respondent who later re-lined the plate.

HELD: the respondent had given to the customer "treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth" within s. 14 (2) of the Dentists Act, 1921, and, therefore, he had practised dentistry within s. 1 (1) of the Act, and, not being registered in the dentists register, had been guilty of an offence under that sub-section.

Per HAVERS, J.: If the respondent could have re-lined the denture without asking the customer to replace it in her mouth and allow it to remain there to produce an impression, there would have been no offence.

Twyford v. Puntschart ([1947] 1 All E.R. 773), distinguished.

FOR THE DENTISTS ACT, 1921, s. 14 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 172.

Cases referred to:

(1) *Twyford v. Puntschart*, [1947] 1 All E.R. 773; 177 L.T. 30; 111 J.P. 315; 2nd Digest Supp.

(2) *Hennan & Co., Ltd. v. Duckworth*, (1904), 90 L.T. 546; 34 Digest 564, 222.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Torquay on May 4, 1953, the appellant, Percival William Henry Almy, preferred an information against the respondent, Frederick Douglas Thomas, charging that he, on a date between Dec. 18, 1952, and Jan. 18, 1953, not being registered under the Dentists Act, 1878, did unlawfully practise dentistry, contrary to the Dentists Act, 1921, s. 1 (1).

It was proved or admitted that the respondent had never been registered in the dentists register under the Dentists Act, 1878; that at all material times he held himself out to practise as a dental technician and repairer of dentures, and that outside the door of his premises was a notice reading: "F. D. Thomas, Dental Technician. Dental Repairs Received Here"; that in May, 1952, the respondent repaired the upper dental plate of a customer; that on Nov. 17,

1952, the same customer took the upper plate (to which were attached fourteen artificial teeth) to the respondent at his premises, since the plate was split and required repairing; that the respondent told the customer that the plate would have to be re-lined, which entailed the strengthening by thickening of the plate where the split had occurred, and the price of £2 was agreed; that the customer handed the plate to the respondent who took it to his laboratory and coated it with paste; that the respondent returned, handed the plate to the customer and asked her to replace it in her mouth and to bite as hard as she could, which she did; that the respondent left the customer for five minutes with the plate in her mouth to allow the paste to set in conformity with the shape of her mouth; that he then asked her to return the plate, which she did, after which she left the premises; that the respondent later replaced the hardened paste with permanent plaster; that the customer called at the premises, took possession of her plate and paid £2; that at no time did the respondent touch the customer nor touch the plate while it was in the customer's mouth; that the work done to the plate was a chemical binding, by which additional material was fixed to the top of the damaged plate.

On behalf of the appellant it was contended that the respondent had practised dentistry, contrary to the Dentists Act, 1921, s. 1 (1), since his conduct came within the definition of practising dentistry contained in s. 14 (2) of the Act. The respondent denied that he had practised dentistry within the meaning of that sub-section. The justices were of the opinion that (i) on the authority of *Twyford v. Puntschart* (1) and *Hennan & Co., Ltd. v. Duckworth* (2) work on an existing denture or the mere alteration of an existing denture did not amount to the practice of dentistry within the meaning of s. 14 (2); (ii) there had been no operation, treatment, advice, or attendance within the meaning of that sub-section; and (iii), accordingly, the respondent had not practised dentistry and the information would be dismissed.

John Hobson for the appellant.

Sir Shirley Worthington-Evans for the respondent.

LORD GODDARD, C.J.: The Dentists Act, 1921, s. 14 (2), provides:

"For the purposes of this Act, the practice of dentistry shall be deemed to include the performance of any such operation and the giving of any such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of this Act."

It is to be observed, as counsel for the respondent has stressed, that the word "denture" does not appear in that sub-section, but, as everybody knows, except in the operation known as crowning, artificial teeth are fitted to a person's mouth by means of a denture, and I do not think that it has ever been doubted that dealing with a denture can come within s. 14 (2). If it did not, there would be in the Act a very great gap which was never intended. It is conceded by counsel for the appellant that a mere work of repair can be done by a person who is not a registered dentist without contravening the Act. [HIS LORDSHIP stated the facts and continued:] Once you have a finding that the respondent left the customer for five minutes with the plate in her mouth to allow the paste to set in conformity with the shape of her mouth, it seems to me difficult to say that he was not taking an impression of her mouth. Why do dentists take impressions unless it is to fit the mouth with artificial teeth? In view of that finding, I find it impossible to say that the respondent did not give "treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth", and, therefore, I take a different view from that taken by

the justices and hold that the offence was committed. The Case must be returned to the justices with an intimation to that effect.

SELLERS, J.: I agree. The distinction between this case and *Twyford v. Puntchart* (1) is fine, but, I think, definite. The facts show that there was evidence which required the justices to come to a different conclusion from that to which they did.

HAVERS, J.: I agree. If this work could have been done by the respondent simply by his taking the plate out and re-lining it without asking the customer to put it in her mouth and bite on it and allowing it to remain in her mouth for five minutes, and that was all that was done, in my opinion, there would have been no offence against the provisions of the Act, but it is plain from the finding of the justices that the re-lining was required to be performed in a number of stages, and I find it impossible to say that there was not "treatment . . . or attendance" within the meaning of the sub-section.

Appeal allowed.

Solicitors: *Waterhouse & Co.* (for the appellant); *Church, Adams, Tatham & Co.*, agents for *Lee-Barber, Goodrich & Co.*, Torquay (for the respondent).
[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

SPIERS v. WARRINGTON CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.),
October 14, 1953.]

Education—School attendance—Duty of parent to secure regular attendance of pupil—Relevance of reasonableness of parent's conduct—Attendance of female pupil in trousers—Refusal of head mistress to admit pupil without medical certificate—Failure of parent to provide certificate—Education Act, 1944 (c. 31), s. 39 (1), (2).

A parent was charged on information with an offence under the Education Act, 1944, s. 39 (1), in that his daughter, who was of compulsory school age, failed to attend school. The child had suffered two attacks of rheumatic fever and, on being advised medically to keep the child warmly clothed, the parent sent her to school wearing long trousers. The head mistress informed the girl that she would not be admitted to school in trousers unless she could produce a medical certificate that they were necessary for her good health. The parent was informed that alternatively he could send the girl for examination to the school medical officer. The parent refused to take either of these courses, with the result that on each occasion when she attended school wearing trousers the girl was sent home, and she thus failed to attend school for considerable periods.

HELD: the head mistress, in refusing the girl admission, was enforcing a measure of discipline which was within her competence, and, in those circumstances, the sending of the girl to school in trousers, knowing that she would not be admitted, constituted failure by the child to attend school: *Saunders v. Richardson* (1881) (7 Q.B.D. 388), applied; the reasonableness or otherwise of the parent's conduct was irrelevant, for the defences open to the parent were exhaustively defined by s. 39 (2) of the Act of 1944; and, since no one of those defences was applicable, he was guilty of an offence under s. 39 (1).

London County Council v. Maher ([1929] 2 K.B. 97), no longer law.

FOR THE EDUCATION ACT, 1944, s. 39, see HALSBURY'S STATUTES, Second Edn., Vol. 8, p. 183.

Cases referred to:

- (1) *Saunders v. Richardson*, (1881), 7 Q.B.D. 388; 50 L.J.M.C. 137; 45 L.T. 319; 45 J.P. 782; 19 Digest 566, 80.
- (2) *Fox v. Burgess*, [1922] 1 K.B. 623; 91 L.J.K.B. 465; 126 L.T. 525; 86 J.P. 66; 19 Digest 570, 104.
- (3) *London County Council v. Maher*, [1929] 2 K.B. 97; 98 L.J.K.B. 492; 142 L.T. 69; 93 J.P. 178; Digest Supp.
- (4) *Jenkins v. Howells*, [1949] 1 All E.R. 942; [1949] 2 K.B. 218; [1949] L.J.R. 1468; 113 J.P. 292; 2nd Digest Supp.

CASE STATED by West Derby Quarter Sessions.

At a court of summary jurisdiction sitting at Warrington on Dec. 18, 1952, the respondent, Ernest Spiers, being the parent of Eva Spiers, a child of compulsory school age, was convicted and fined 10s. for an offence under the Education Act, 1944, s. 39, in that between Oct. 13, 1952, and Dec. 3, 1952, the said child, who was a registered pupil at the Richard Fairclough Girls' Secondary Modern School, failed to attend regularly thereat. On appeal by the respondent, the appeal committee allowed the appeal, and quashed the conviction. From that decision the appellants, Warrington Corporation, appealed.

At the hearing before quarter sessions the following facts were proved or admitted. Eva Spiers was born on July 13, 1939. In 1948 she contracted rheumatic fever. In August, 1950, she was registered as a pupil at the Richard Fairclough Girls' Secondary Modern School and attended there normally attired till October, 1950, when she again contracted rheumatic fever and was away from school under medical certificates till Oct. 1, 1951. After Oct. 19, 1951, the child's parents took her away for the rest of the term as they were anxious about her health. When they took medical advice, the doctor said she ought to be kept warm. Accordingly, on Jan. 7, 1952, the girl was sent to school by her parents wearing trousers. On that day the girl was seen by the head mistress, given certain advice about her dress, and sent home. She did not return to school till Feb. 12, 1952.

On Jan. 22 the respondent and his wife were informed that their daughter could not be admitted to school dressed in trousers unless a medical note was produced stating that they were necessary. Alternatively, the girl could be sent for examination by the school medical officer. No medical note was forthcoming, and the girl was not sent to the school clinic.

Article 9 (b) of the articles of government of the school stated:

"The head mistress shall control the internal organisation, management and discipline of the school . . ."

A rule made by the head mistress regulated the dress to be worn by all pupils, and it was proved that the head mistress considered trousers to be both unseemly and unhygienic dress for schoolgirls, but was ready to waive her objections if a medical note was produced.

On Jan. 31, 1952, the respondent's wife appeared before the school attendance committee. She refused to obtain a medical note as to the necessity of her daughter's wearing trousers or to send her to the school clinic for examination and maintained that she was the best judge of what her daughter should wear.

It was contended for the respondent that the school authorities had no power to exclude his daughter because of her dress; that, even if they had such power, no offence had been committed by the respondent under s. 39 because the procedure (regarding the reporting of a suspension to the school governors) under the articles of government of the school had not been followed; that the respondent was at all times willing to send his daughter to school when her health allowed; and that, in view of the child's attacks of rheumatic fever, the action of the respondent was reasonable.

On behalf of the appellants it was contended that the rule made by the school authorities that girls could only attend school in trousers if such dress was recommended by a doctor was a reasonable rule and that the respondent's failure to obtain a medical certificate and his refusal to allow his daughter to be examined by the school medical officer resulted in his daughter being sent to school in a condition in which the respondent knew she would not be admitted.

As stated above, quarter sessions allowed the respondent's appeal, and the appellants now appealed.

G. J. Bean for the appellants, Warrington Corporation.

A. A. Edmondson for the respondent, the parent, Ernest Spiers.

LORD GODDARD, C.J. (having stated the facts): In the first place, if I may refer to the old authorities, which are firmly established, *Saunders v. Richardson* (1) and *Fox v. Burgess* (2) decide that, if a parent sends a child to school in circumstances in which he knows that the child will not be admitted, he is then committing an offence because he is not causing the child to attend school regularly. *Saunders v. Richardson* (1) was decided before education was entirely free. In that case a parent who objected to paying for education insisted on sending the child to school without paying the necessary pence for the week's education. He knew quite well that the child would not be admitted unless he or she brought the money. It was held that that conduct amounted to a failure to cause the child to attend regularly, and LORD COLERIDGE, C.J., in giving the leading judgment, said (7 Q.B.D. 393):

"It is idle to shut our eyes to the fact that the more limited construction would enable many unwilling parents to keep their children uneducated, by doing nothing but sending them to the door of the school under conditions which it is well known would prevent their being taken in."

In this case, there is no question but that the head mistress had told the parents that she would not admit this child to the school dressed in this manner unless the child brought with her a note from a doctor to say that it was necessary that she should be dressed in that manner. The parents have never supplied such a certificate, and it is hardly to be supposed that any doctor could be found to say that it was essential to the child's health that she should wear trousers. The parents, therefore, continued to send the child to school in circumstances in which they knew she would not be admitted.

The school in question is a county secondary school, and the Education Act, 1944, s. 17, is relevant. It provides:

"(1) For every county school and for every voluntary school there shall be an instrument providing for the constitution of the body of managers or governors of the school in accordance with the provisions of this Act, and the instrument providing for the constitution of the body of managers of a primary school is in this Act referred to as an instrument of management, and the instrument providing for the constitution of the body of governors of a secondary school is in this Act referred to as an instrument of government . . . (3) Subject to the provisions of this Act and of any trust deed relating to the school:—(a) every county primary school and every voluntary primary school shall be conducted in accordance with rules of management made by an order of the local education authority; and (b) every county secondary school and every voluntary secondary school shall be conducted in accordance with articles of government made in the case of a county school by an order of the local education authority, and approved by the Minister, and in the case of a voluntary school by an order of the Minister; and such articles shall in particular determine the functions to be exercised in relation to the school by the local education authority, the body of governors, and the head teacher respectively."

Obviously a head teacher must be responsible for the discipline of the school, and, indeed, in this particular case the articles provide (by art. 9 (b)) that the head mistress

A "shall control the internal organisation, management and discipline of the school . . . shall exercise supervision over the teaching and non-teaching staff, and shall have the power of suspending pupils from attendance for any cause which she considers adequate, but on suspending any pupil she shall forthwith report the case to the governors, who shall consult the local education authority."

I quote the last part about the time of suspension simply because quarter sessions seem to have thought that the head mistress in this case was suspending the girl and ought to have reported it to the governors, who should then consult the local education authority. In point of fact, I think that is a false point. The head mistress did not suspend this child. She was always willing to accept her, but she required that she should be properly dressed.

The Education Act, 1944, s. 39, which is now the governing provision, provides:

C " (1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or—(a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause; (b) on any day exclusively set apart for religious observance by the religious body to which his parent belongs; (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home."

In 1929 there was heard *London County Council v. Maher* (3), a case under the Education Act, 1921. Section 49 of that Act provided:

F "Any of the following reasons shall be a reasonable excuse for the purposes of this Act and the bye-laws made thereunder, namely:—(a) That the child has been prevented from attending school by sickness or any unavoidable cause; (b) That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of the child, as the bye-laws may prescribe. (c) In the case of non-compliance with a bye-law requiring a parent to cause his child to attend school, that the child is under efficient instruction in some other manner."

In *London County Council v. Maher* (3) the parents set up as an excuse for not sending their child to school a matter which was not covered by either para. (a), or para. (b) or para. (c), and the justices who heard the summons found that the excuse which the father had set up was a reasonable excuse.

H When the case came up on Case Stated, the court pointed out that s. 49 did not appear to be, if I may put it compendiously, exhaustive; it gave three excuses which the court must accept as defences, but it left it open to a parent to show other causes which the court might consider reasonable or not, and this court said that if the justices below had found that the excuse was reasonable, they could not go behind that finding. That is in accordance with the well-known rule of law on which this court always proceeds, that the facts are not for us. We are bound by the facts found by the justices, and

they held that under the then law it was open to the justices to find any matter as a reasonable excuse if they liked.

I think quarter sessions approached this case bearing in mind *Mahe*r's case (3), but the law has been altered, and the Education Act, 1944, be it noted, is not a consolidating Act. The title to the Act is:

"An Act to reform the law relating to education in England and Wales", and one of the changes that has been made is that s. 39 of the Act of 1944 has been substituted for s. 49 of the Act of 1921. It appears to the court highly probable that the reason for that was that it was considered desirable to get rid of the decision in *Mahe*r's case (3) and to substitute a new section for it, which would not leave it open to justices to find reasonable any excuse parents might set up, but would confine the excuses for not sending a child to school to the reasons set out in sub-s. (2) (a), (b) and (c). That is the only construction which this court feels able to put on s. 39 (2).

We were reminded of *Jenkins v. Howells* (4), which was heard in 1949 and is a case in which I was sitting with OLIVER and CASSELS, JJ. I do not hesitate to say that, in that case, if it had been open to us to find that there was a reasonable excuse for not sending the child to school, we would so have found. It was a very hard case, but we felt that the statute was too strong, and that we could not go into the question of reasonableness. In the present case quarter sessions came to the conclusion

"That the appellant and his wife were acting reasonably in that they were acting in the interest of their child whose health and life they were seeking to safeguard, and that the Case was not made out."

They have attached to the Case a note of their judgment, from which it is obvious that they think that the head mistress was acting reasonably in insisting on uniformity of dress among the girl pupils of the school, but we are not here to balance which is the more reasonable or which is the more desirable. The head mistress obviously has the right and the power to prescribe the discipline for the school, and in saying that a girl must come to school not wearing a particular costume unless there is a compelling reason of health, surely she is only acting in a matter of discipline and a matter which must be within the competence of the head master or head mistress of any school, whether it is one of the great public schools or a county secondary or county primary school. If the question were whether parents reasonably believed that it was in the interests of the child to wear some particular dress, as I pointed out in the course of the argument, not in the least wanting to treat this matter as anything but serious, there are people in this country who believe, and honestly believe, that in the summer it is desirable in the interests of their children that they should wear no clothes at all except what the barest necessities of decency require. One sees in London squares, and certainly in the country, little children running about with no clothes except bathing slips, and one cannot suppose that a head mistress or head master would be obliged to admit children to school wearing no clothes at all. Yet, if the view put forward to quarter sessions were right, provided the parents honestly held that belief, and one could not say that it was unreasonable for the health of the child to be exposed to sunlight or wear no clothes in the summer, the head master or head mistress would be obliged to take any little boy or girl who came to school with no clothes. It would be an absurd position.

In my opinion, we must reverse the decision of quarter sessions and restore the decision of the justices in the court of summary jurisdiction because quarter sessions approached this matter from the wrong angle. They thought, perhaps following, as they thought they were entitled to follow, *Mahe*r's case (3), that the question was whether the parents had a reasonable ground to do what they did. That is not the question. The question is: Was the head mistress, in communicating her refusal to allow the girl to attend school in this way,

acting within her rights? If we hold that she was not only within her rights, but that it was her duty, the respondent, knowing that the child would not be admitted, and insisting on the girl being dressed in this way, brought himself within the reasoning in *Saunders v. Richardson* (1) and, accordingly, committed an offence. For these reasons we allow the appeal.

- SELLERS, J.:** I agree. It would appear that the appeal committee of West Derby Quarter Sessions approached their consideration of this matter on the authority of *London County Council v. Maher* (3), and that they considered the whole of the circumstances and came to the conclusion that the parent before them, Mr. Spiers, was acting reasonably. That case, as my Lord has pointed out, is an authority under a different Act, the Education Act, 1921, whereas this matter falls to be considered under s. 39 of the Education Act, 1944, which is quite different and which does not, as I see it, leave it open to the tribunal to consider matters other than those that are there set down. This daughter of Mr. Spiers did, on the facts, fail to attend regularly at the school, and s. 39 (1) provides that in those circumstances the parent of the child shall be guilty of an offence against the section. But there is a further provision, as my Lord has pointed out, by s. 39 (2), that in proceedings for an offence under that section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave, or in the three particular cases set out. Those three cases cover a wide field of exemption from liability for non-attendance. The only one applicable for consideration by the appeal committee in this case was s. 39 (2) (a), i.e., the question was: Did the facts establish that at any time this daughter of Mr. Spiers was prevented from attending by reason of sickness or any unavoidable cause? On the facts, that excuse could not be established and the appeal committee came on the facts before them to an erroneous conclusion.

HAVERS, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. P. Aspden*, town clerk, Warrington (for the appellants); *Piesse & Sons*, agents for *Browne, Sturges & Wheeler*, Warrington (for the respondent).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

DANSEREAU v. BERGET. COLIN v. BERGET.

[PRIVY COUNCIL (Lord Normand, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), July 8, 9, 13, 14, October 5, 1953.]

Privy Council—Canada—Supreme Court of Canada—Appeal from “final judgment”—Judgment granting probate of will—Supreme Court Act (Revised Statutes of Canada, 1927, c. 35), s. 2 (b), s. 36.

By s. 2 of the Supreme Court [of Canada] Act: “In this Act, unless the context otherwise requires . . . (b) ‘final judgment’ means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding . . .”, and by s. 36: “. . . an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction . . . where such judgment is, (a) a final judgment . . .”

In September, 1946, probate of a will dated Mar. 14, 1935, of a testator who died on Aug. 31, 1946, was granted to the appellant, D., by the Superior Court of Quebec. In March, 1948, that court dismissed a petition by the first respondent that a letter dated Aug. 21, 1946, be admitted to probate as the last will and testament of the testator, and that the judgment of September, 1946, admitting to probate the will of Mar. 14, 1935, be set aside. In April, 1950, the Court of King’s Bench of Quebec reversed this decision and granted probate of the will dated Aug. 21, 1946. In October, 1951, the Supreme Court of Canada dismissed an appeal from the judgment of the Court of King’s Bench.

HELD: (i) according to the law of the province of Quebec, a grant of probate of a will was not, as in England, conclusive and did not create res judicata, even between parties who had contested its validity, and, therefore, probate could be cancelled on proof of a later will.

Migneault v. Malo (1872) (L.R. 4 P.C. 123), applied.

(ii) since the grant of probate was not conclusive, it could not be said to have determined a substantive right in a judicial proceeding; accordingly, the judgment of the Court of King’s Bench of Quebec of April, 1950, was not a final judgment within the meaning of s. 2 (b) of the Supreme Court Act; and, therefore, the Supreme Court of Canada had no jurisdiction to entertain the appeal from that judgment.

Case referred to:

(1) *Migneault v. Malo*, (1872), L.R. 4 P.C. 123; 41 L.J.P.C. 11; 26 L.T. 329; 44 Digest 620, 4499.

CONSOLIDATED APPEALS by special leave from a judgment of the Supreme Court of Canada, dated Oct. 2, 1951.

Edouard Masson, Q.C. (of the Canadian Bar), for the appellant, a trustee under the will of 1935.

J. P. Charbonneau, Q.C. (of the Canadian Bar), for the appellant, Colin, interested under a will of 1937 and on an intestacy.

Andre Forget, Q.C. (of the Canadian Bar), and *R. O. Wilberforce* for the respondent, Berget, interested under the will of 1946.

Oct. 5. LORD OAKSEY: This is an appeal by special leave from a judgment of the Supreme Court of Canada dismissing an appeal from a judgment of the Court of King’s Bench of Quebec which had set aside a judgment, dated Mar. 5, 1948, of the Superior Court of Quebec. No petition for special leave to appeal from the Court of King’s Bench of Quebec was presented. The primary question, therefore, which arises for their Lordships’ consideration is whether the judgment of the Court of King’s Bench was a final judgment

within the meaning of the Supreme Court Act (Revised Statutes of Canada, 1927, c. 35), s. 2 and s. 36, and, therefore, appealable to the Supreme Court. The material sections of the Supreme Court Act are as follows:

"2. In this Act, unless the context otherwise requires . . . (b) 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding . . . (e) 'judicial proceeding' means and includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative, or executive jurisdiction . . . 36. Subject to s. 38 and s. 39 hereof, an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction . . . where such judgment is, (a) a final judgment . . ."

On this question the Supreme Court does not appear to have come to a definite conclusion though RAND and ESTEY, JJ., were of opinion that the court had not jurisdiction.

The judgments of the Court of King's Bench and of the Superior Court of Quebec were delivered on a petition by the respondent Berget praying that a document dated Aug. 21, 1946, be admitted to probate as the last will and testament of the late Eugene Berthiaume, who died on Aug. 31, 1946, and that the probate of a will of the same testator dated Mar. 14, 1935, granted by a judgment of the Superior Court of Quebec on Sept. 4, 1946, in favour of the appellant Dansereau be annulled and set aside. COUSINEAU, J., in the Superior Court dismissed this petition and upheld the probate of the will of Mar. 14, 1935. The Court of King's Bench reversed this decision and granted probate of the will of Aug. 21, 1946.

It has been contended on behalf of the appellants, Dansereau and Colin, that the petition was incompetent in that it combined in one petition a prayer for the probate of the will of Aug. 21, 1946, with a prayer for the cancellation of the probate of the will of Mar. 14, 1935, already granted on Sept. 4, 1946, and that probate of a will once granted can only be contested by an action and not by petition. It was admitted in the present case that the will of Mar. 14, 1935, could have been contested in an action, but it was argued that it could not be contested in a petition. It is, however, to be observed that on the granting of probate of a later will, namely, the will of Aug. 21, 1946, as the last will and testament of the deceased, it necessarily followed that the earlier will was not the last will of the deceased.

Their Lordships do not find it necessary to decide the complicated questions of procedure which have been argued before them as to whether an action or a petition is the more appropriate form of procedure. They think it clear on the authority of *Migneault v. Malo* (1), that, according to the law of the province of Quebec, the grant of probate is not, as in England, conclusive even between parties who have contested the grant, and they think, therefore, that probate can be cancelled on proof of a later will. It is true that in *Migneault v. Malo* (1) their Lordships were not dealing with a case in which two wills had been produced, but their Lordships said (L.R. 4 P.C. 136):

"At first sight it certainly appeared to their Lordships that this language [viz. the language of a Quebec statute, 41 Geo. 3, c. 4, s. 2] availed to introduce the law of England with respect to the conclusiveness of a probate duly granted into the law of Canada; and that where, as in the present case, a suit as to the validity of the will had been contested in open court, both parties appearing, pleading, and one examining, the other cross-examining, witnesses, and probate had then been granted, the same question could not be raised again, at all events between the

same parties, before another tribunal; but that the production of the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, 'such proof shall have the same force and effect as if made and taken before a Court of Probate.' Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian courts with respect to it for the last seventy years, and they have, therefore, made as careful an investigation into this practice as the circumstances permit. It appears, in the first place, that no appeal has ever been instituted from a decree or grant of probate made by the court—that it is very doubtful, whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence, could be propounded, or would be admitted on an application for probate . . . Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in England, and that according to that interpretation it was competent to the respondent to impugn the validity of this will by way of defence to the action brought by the appellant for the payment of the annuity."

It appears, therefore, that in that case, although the validity of the will in question had been contested in open court, both parties appearing and probate having then been granted, the validity of the probated will was allowed to be contested again by the same party who had appeared and contested its validity before. In their Lordships' opinion this was a decision that probate of a will is not conclusive and does not create *res judicata* even between parties who have contested its validity, and it is a decision which has been followed ever since.

In these circumstances their Lordships are of opinion that the judgment of the Court of King's Bench was not a final judgment within the meaning of the Supreme Court Act since the grant of probate is not conclusive and can be contested in appropriate proceedings, and, if that is so, it cannot, in their Lordships' view, be said that a grant of probate determines a substantive right in a judicial proceeding within the meaning of the Supreme Court Act. Their Lordships, therefore, agree with RAND and ESTEY, JJ., that the Supreme Court of Canada had no jurisdiction to entertain the appeal. Their Lordships will humbly advise Her Majesty that, the judgment of the Supreme Court of Canada having been made without jurisdiction, the order of that court should be varied so as to confine it to an order dismissing the appeal for want of jurisdiction and omitting that part of the order which affirms the probate of the will of Aug. 21, 1946. In view of the course the proceedings have taken in the courts below their Lordships think that each party should bear his or her own costs, both in the Supreme Court of Canada and before their Lordships' Board.

Order varied accordingly.

Solicitors: *Blake & Redden* (for the appellant, Dansereau); *Laurence Jones & Co.* (for the appellant, Colin); *Charles Russell & Co.* (for the respondents).
[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

BILLING v. PILL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.),
October 15, 1953.]

Criminal Law—Larceny—Property capable of being stolen—Property attached to or forming part of realty—Wooden hut bolted to concrete base—Larceny Act, 1916 (c. 50), s. 1 (3) (a).

A The appellant was convicted of stealing a wooden army hut from a war-time gun emplacement. It was comprised of seven sections and rested on a concrete foundation, the floor being secured to the base by bolts let into the concrete. The appellant did not abandon possession of the hut after he had demolished it in order to remove it.

B HELD: the hut had been built for a temporary purpose, and while there was no question that the concrete base had become part of the realty, the hut itself was not, merely by reason of the bolts securing the floor to the concrete, "attached to or forming part of the realty" within the Larceny Act, 1916, s. 1 (3), proviso (a), and, therefore, it was a chattel capable of being stolen, and the appellant was rightly convicted.

C AS TO FIXTURES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 96-107, paras. 106-113; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 201-212, Nos. 3320-3448.

Cases referred to:

(1) *Elwes v. Maw*, (1802), 3 East, 38; 102 E.R. 510; 31 Digest, Replacement, 213, 3454.

D (2) *Holland v. Hodgson*, (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 31 Digest, Replacement, 206, 3376.

CASE STATED by Cornwall justices.

E At a court of summary jurisdiction sitting at Torpoint on Feb. 27, 1953, the respondent, James Arthur Henry Pill, a police officer, preferred an information against the appellant, Cecil Lloyd Billing, under s. 2 of the Larceny Act, 1916, charging that, between Jan. 1, 1951, and Oct. 31, 1952, at the parish of Antony, he stole an army hut, value £50, the property of the War Department. It was proved or admitted that the War Department possessed a site at Tregantle, near Torpoint, which was used during the war as a gun emplacement, when between forty and sixty huts were erected on the site. The hut the subject of the charge was comprised of seven sections without doors or windows. It rested on a concrete foundation and the floor was secured to the concrete base by bolts let into the concrete. In 1946 the huts were vacated, but remained under the control of the War Department. Squatters, who moved into certain huts, were cleared from the site between 1947 and the end of 1952 by the St. Germans Rural District Council, acting on behalf of, and at the request of, the Ministry of Health. The method used was to take away the doors and windows of the unoccupied huts so as to deter further squatters, and to demolish those occupied by the squatters as they became vacant. In May or June, 1951, the appellant, without any lawful authority, by two of his servants demolished one hut which was without doors or windows, and, without abandoning possession thereof, took seven sections away and subsequently re-erected the hut on his own land. It took three days to dismantle the hut and remove the sections.

H It was contended on behalf of the appellant that under s. 3 (1) (a) of the Larceny Act, 1916, the hut was not capable of being stolen as it was attached to or formed part of the realty, and, although he had severed it from the realty, he had not abandoned possession of it prior to removing it from the site. It was contended on behalf of the respondent that the hut was not attached to or forming part of the realty so as to prevent its forming the subject of a charge under s. 2 of the Larceny Act, 1916.

The justices convicted the appellant, and he now appealed.

Huntley for the appellant.

P. M. Wright for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The finding of the justices is:

"We were of opinion that the hutted camp was a temporary camp and that the huts were movable buildings which did not form part of the realty. We were of opinion that the hut in question was a purely temporary structure which was capable of being stolen within the provisions of s. 2 of the Larceny Act, 1916, and it is on this point that the appellant has required this Case to be stated."

The Larceny Act, 1916, it must be remembered, was intended to be a consolidating Act and was not intended to alter the law in any way. There are dicta in some cases in the Court of Criminal Appeal of AVORY, J. (who, it is well-known, was the draftsman of the Act), that it was not intended to alter the law of larceny. Under the old common law of larceny, there were many difficulties in the way of preferring a charge of theft in respect of anything which, if I may use a convenient expression, savoured of the land. A great many additions were made to the law from time to time by statute, and most of them will be found in s. 8 of the Act of 1916. We are concerned with s. 1 (3), defining the offence of larceny:

"Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen . . ."

If one stops there, it is clear that anything adhering to the land that can be severed is capable of being stolen. Then there is a proviso, which has given rise to the difficulty in this case:

"Provided that—(a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof . . ."

The construction I put on that sub-section is that things which adhere to the realty can be stolen after they have been severed, but a person who actually severs them (subject to the provisions of s. 8 and one or two other sections with which we are not concerned) cannot be convicted of larceny unless, after the severance, he has left them on the land and then gone back, on what I may call a separate excursion, and taken them. When he left them, they reverted to the possession of the person on whose land they were. Therefore, I think the whole of this case comes down to the meaning of the words "anything attached to or forming part of the realty". Those words might be read as meaning "attached so as to form part". It seems odd that a thing can be attached to the land and yet not form part of it. If it is attached to the realty and may form part thereof, we have to consider whether it is attached to the realty in the sense in which those words are used in this sub-section.

In my opinion, the proviso is aimed at preserving the old common law position that one cannot be charged with stealing real property. What is real property? Land, we all know, is real property and if objects are so attached to the land that they become part of the land, then those objects become, for instance, as between a landlord and tenant, landlord's fixtures, as they are sometimes called. I do not need to go into the elaborate distinctions that were dealt with by LORD ELLENBOROUGH, C.J., in *Elwes v. Maw* (1), as

to how fixtures pass between mortgagor and mortgagee and landlord and tenant. The point is: Is the object a fixture? What is a fixture? First, the commonest fixture is a house. A house is built into the land, so the house, in law, is regarded as part of the land; the house and the land are one thing. Anything which is an integral part of the house, such as, for instance, lead pipes, will also be a fixture and will be attached to or form part of the land. A thing which, in its nature, is a chattel may or may not be a fixture. If it is affixed in some way, the true test, it seems to me, is: Was it meant to be a temporary fixture, and not part of the house or the land? In a house it may be for decoration. Many questions have arisen as regards such things as tapestries, fireplaces, and ornamental chimney-pieces. I think the matter is summed up admirably in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 20, p. 97, para. 107, by DU PARCQ, J.:

- A "Whether a chattel has been so affixed to the land or buildings as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty."
- B That is a useful exposition of the law, and if one wants authority to support it, a very good instance is *Holland v. Hodgson* (2), where BLACKBURN, J., than whom there was no higher authority on these matters, giving his judgment (L.R. 7 C.P. 335) also emphasised that one has to consider the circumstances.
- C Can anybody doubt that the hut in question was put there for a temporary purpose? It can be removed without doing any damage to the freehold. It is resting on a concrete bed which is let into the land. I should say there is no question that the concrete bed has become part of the land, but this hut which stands on it has not become part of the land merely because some bolts have been put through the floor to stabilise or steady the hut. It was put there merely for a temporary purpose so that soldiers, who were going there for a presumed temporary purpose to man a gun emplacement during the war, would have somewhere to sleep. In my opinion, it would be wrong to hold that this hut was attached to or formed part of the realty. It was not attached to the realty any more than a garden seat which, because it is likely to be blown over, one secures to the ground by driving a spike through it. In one sense that is an attachment, but it is not an attachment making the seat part of the realty. This hut was a chattel, remained a chattel, and is capable of being stolen. Therefore, the justices came to a right decision in law in convicting the appellant.

SELLERS, J.: I agree.

HAVERS, J.: I agree.

- H Solicitors: *Reed & Reed*, agents for *Caunter, Venning & Harward*, Liskeard (for the appellant); *Jacques & Co.*, agents for *Stephens & Scoun*, St. Austell (for the respondent).

Appeal dismissed.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

ROSS T. SMYTH & CO., LTD. (LIVERPOOL) v.
W. N. LINDSAY, LTD. (LEITH).

[QUEEN'S BENCH DIVISION (Devlin, J.), October 8, 1953.]

Contract—Frustration—Provision for cancellation if export prohibited—Export prohibited as from future date—Duty of sellers during intervening period.

By a contract in writing dated Sept. 14, 1951, the buyers agreed to buy from the sellers five hundred tons of Sicilian horsebeans for shipment from Sicily, as per bill or bills of lading to be dated October and/or November, 1951. The contract provided (inter alia): "Should the fulfilment of this contract be rendered impossible by prohibition of export . . . this contract or any unfulfilled part thereof to be cancelled". At the date of the contract the export of horsebeans from Sicily was allowed under open general licence, but as from Nov. 1, 1951, by a regulation dated Oct. 20, 1951, of the Ministry of Foreign Commerce, Rome, they could only be exported under a specific licence. At the date of this regulation none of the goods had been exported. The sellers claimed that the contract had been cancelled in accordance with the terms of the contract.

Held: the regulation of Oct. 20, 1951, did not of itself render the performance of the contract impossible, for the prohibition did not come into operation until Nov. 1, 1951, and, there being no finding of fact that the sellers had during the intervening period done everything possible to ship the beans, they were in default under the contract and the buyers were entitled to damages.

Re Anglo-Russian Merchant Traders & John Batt & Co. (London) ([1917] 2 K.B. 679), distinguished.

AS TO IMPOSSIBILITY OF PERFORMANCE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 208-220, paras. 292-298; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 444-452, Nos. 3370-3402.

Case referred to:

(1) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest, Replacement, 451, 3395.

SPECIAL CASE stated by a committee of appeal constituted in accordance with the rules and regulations of the London Corn Trade Association, Ltd.

By a contract in writing dated Sept. 14, 1951, on the London Corn Trade Association, Ltd.'s form of contract, No. 62, the buyers, W. N. Lindsay, Ltd., of Leith, bought five hundred tons of Sicilian horsebeans (Favetta) f.a.q., crop 1951 three per cent. admixture, from the sellers, Ross T. Smyth & Co., Ltd., of Liverpool, for shipment from a Sicilian port or ports as per bill or bills of lading to be dated October and/or November, 1951, at a price of £31 15s. per English ton, including cost of freight and insurance to Glasgow. By cl. 10 of the contract, all disputes arising out of the contract were to be referred to arbitration, and the contract also provided:

"Should the fulfilment of this contract be rendered impossible by prohibition of export . . . this contract or any unfulfilled part thereof to be cancelled."

At the date the contract was entered into the export of horsebeans from Italy was permitted under the terms of open general licence pursuant to a regulation of the Ministry of Foreign Commerce, Rome, dated July 10, 1951. By regulation No. 548827/E/5, dated Oct. 20, 1951, and issued by the Ministry of Foreign Commerce, horsebeans could only be exported under open general licence till Oct. 31, 1951, and from Nov. 1, 1951, their export was to be allowed only under specific licence. There was no evidence that the sellers applied for a licence to export the contract goods. No licence for the export of horsebeans was granted by

the Ministry of Foreign Commerce for the export of horsebeans between Nov. 1, 1951, and Dec. 31, 1951. On Nov. 2, 1951, the sellers wrote to the buyers setting out a telegram they had received from their Italian sellers on Oct. 31, 1951, which read:

“Decreed today embargo horsebeans with immediate effect act accordingly”,

- A and they went on to state that, in the circumstances, they considered the contract cancelled in accordance with its terms. The buyers declared the sellers in default and claimed arbitration. The arbitrators having disagreed, the dispute was referred to an umpire, who, on Apr. 3, 1952, awarded that the sellers were in default under the contract and that they should pay the buyers the difference between the contract price of £31 15s. per ton c.i.f. and £39 per ton, the value on the day of default. The sellers appealed from this decision
- B to the committee of appeal provided for under the contract, and on Nov. 27, 1952, requested this appellate tribunal to state their award in the form of a Special Case under the Arbitration Act, 1950, s. 21. The committee of appeal, on the questions of law whether or not, on the facts found as proved or admitted, (i) the sellers were entitled to rely on the contract clause dealing with prohibition
- C of export and thereby to treat the contract as cancelled or be relieved of their obligations thereunder, or (ii) the contract was discharged by operation of law by reason of the shipment of the horsebeans in Italy having become impossible or unlawful owing to a change of Italian law during the currency of the contract, awarded that the performance of the contract by the sellers had become impossible of performance by reason of a change in Italian law during the
- D currency of the contract, and that the sellers were not liable in damages to the buyers. Alternatively, if, in the opinion of the court, the sellers were in default under the contract, the buyers were entitled to damages.

Eustace Roskill, Q.C., for the buyers.

Mocatta, Q.C., and *N. Lawson* for the sellers.

- E **DEVLIN, J.**, stated the facts and continued: In my judgment, this case turns on a very short point indeed. Were it not for that short point it would doubtless be necessary to investigate the effects of orders on this sort of clause which covers prohibition of export in relation to unascertained goods, and so on, but, for the purpose of this judgment, I can assume that from Nov. 1, 1951, onwards the sellers were excused from performance of their contract, and that
- F either there was a prohibition of export to excuse them, or, alternatively, the contract was frustrated. The effect of that, if that assumption be correct, is that the period of time during which the sellers had the right to ship was curtailed. Instead of being October/November it became only October. The facts appear to be—subject to an argument by counsel for the sellers which I shall have to consider later—that the regulation which prohibited export
- G was made on Oct. 20, 1951, and came into force on Nov. 1, 1951. Accordingly, the sellers had some eleven days during which they could have exported the goods and they neglected to do so. It appears to me that if a party is going to rely on a prohibition of export, or frustration, whichever it is, he has to show that it covers the whole contract period, and if it covers only a part of the period which the contract gives for shipment, then performance of the contract
- H is not rendered impossible. It is merely rendered more difficult for him. Instead of having the full rights which the contract apparently gives them of selecting any date within the two months, the sellers have to select a date within a more limited period, but that is not rendering performance impossible. The position is exactly the same under a contract of this sort, where there is liberty to ship on any date during a given period, as it would be in a contract which offers to one party an option of doing a thing in two or more ways, for example, to pay in gold in New York or in sterling in London. If, after the contract,

it becomes illegal for him to pay in gold in New York he is not thereby relieved altogether from his obligation; he is merely deprived of his option. He has to pay in sterling in London. He cannot elect to tender gold in New York and then say: "That is the way I choose to perform the contract, and as I cannot perform it in that way I am excused from performance altogether". I see no difference in principle between a case of that sort and a case where a party is, in effect, given sixty-one options—to ship on any one of the sixty-one days in September and October. If he is prevented by law from shipping for thirty of those days his rights are so far reduced, but it does not excuse him from shipping in the remaining period. A

There is, of course, a qualification to be made which is illustrated by *Re Anglo-Russian Merchant Traders & John Batt & Co. (London)* (1), from which I will isolate the facts that are relevant to the passage which counsel for the sellers cited. The period of shipment was December, 1915, or January, 1916, and the prohibition on shipment came into operation on Dec. 7, 1915. VISCOUNT B
READING, C.J., said ([1917] 2 K.B. 688):

"The result is that it would have been illegal for the sellers to have shipped the aluminium from America on or after Dec. 7, 1915. Their obligation under the contract was to ship during December, 1915, or January, 1916. They were entitled to the whole of that time to perform the contract. They were not in default on Dec. 7. By reason of the operation of reg. 30A [of the Defence of the Realm (Consolidation) Regulations, 1914,] they were unable to ship after Dec. 7, 1915. There was therefore no breach by them of their obligation to ship to Vladivostok during December, 1915, or January, 1916, and upon that defence, which is now open to them, they succeed." C D

One can well understand the principle on which that reasoning proceeds. Up to Dec. 7 in that case, and up to October in the present case, the sellers were entitled to suppose that they had a period of two months in front of them from which they could select the appropriate date for making their shipment. Up till Oct. 20 in this case they were not in default, and the result of the prohibition of export, had it been instantaneous—as it was in the *Anglo-Russian Merchant Traders* case (1)—would have been effectively the cause of their inability to ship. Up to Oct. 20 they would have been acting as they were entitled to do, but after Oct. 20 the prohibition would have come down on them. If the sellers here had been unable to sell notwithstanding that they had eleven days' grace within which to affect the shipment, they would have been able to say that by using the utmost diligence they were unable to effect a shipment within those eleven days and, therefore, the prohibition of export (and I am treating it for the purposes of this case as being an absolute ban) caused those eleven days' grace to be unavailable to them and the ban was, therefore, the real and effective cause of their being unable to fulfil the contract after Oct. 20. The sellers could then contend that, up till Oct. 20, they were not in default, but were doing what they were entitled to do within the principle in the passage which I have cited from the judgment of VISCOUNT READING, C.J., and that thereafter they were effectively prevented from fulfilling their contract. But, in my view, the bare fact that a regulation dated Oct. 20 prohibited export from Nov. 1 onwards is not enough for them. They must have a further finding of fact in their favour to show what they were doing in the intervening eleven days, and neither expressly nor by implication can I discover any such finding of fact in this case. I have refused an application that the case should be remitted for a further finding of fact, and, accordingly, I have to deal with it on the facts that are found and ask myself whether, on these facts, the conclusion at which the tribunal arrived is justified. There is nothing in the facts of the case to show that the sellers took any steps whatever between Oct. 20 and Nov. 1. In those circumstances, counsel for the sellers is driven to seek to extract a finding of fact from E F G H

the terms in which the tribunal ultimately phrased its award, which read as follows:

"Subject to the opinion of the court upon the points of law above set out we award and direct as follows:—1. The performance of the contract by the sellers became impossible of performance by reason of a change in the law of Italy during the currency of the contract and the sellers are not liable in damages to the buyers . . ."

- A Counsel contends that I should read into that the implication that the sellers must have done all that they could reasonably be expected to do between Oct. 20 and Nov. 1, otherwise the finding that the contract became impossible of performance by reason of the change in law could not be sustained. If I were to accede to that doctrine it would hardly matter, it seems to me, what facts were found in the Case and what were not, because at the end of it the party who desired to sustain the award would merely point to the terms of the award and say the court was bound to infer that all the facts that were necessary to establish the point had been found in their favour by the tribunal. I do not think that that is a doctrine which can possibly be accepted. I am quite sure that this tribunal (which is very experienced in the statement of Cases) would never have intended as a statement of fact a paragraph, which is phrased as being
- C "subject to the opinion of the court" and is headed: "We award and direct."

Accordingly, on the facts which are set out in the Case, I think that the conclusion of the tribunal was wrong for the reasons I have given, and the result is that the award that they made cannot be sustained and I must pronounce in favour of the alternative award set out in the case.

- D *Award that sellers in default under the contract and buyers entitled to damages.*

Solicitors: *Thomas Cooper & Co.* (for the buyers); *Jaques & Co.*, agents for *Dodds, Ashcroft & Cook*, Liverpool (for the sellers).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

E

R. v. NEWLAND AND OTHERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Sellers and Havers, JJ.), October 5, 19, 1953.]

- F *Criminal Law—Conspiracy—Conspiracy to effect public mischief—Conspiracy to effect unlawful purpose, defeat purpose of statute, or work to prejudice of State—Conspiracy to obtain and sell in England pottery restricted to sale for export—Domestic Pottery (Manufacture and Supply) Order, 1947 (S.R. & O., 1947, No. 373), art. 1, art. 2, art. 5 (as amended by S.I., 1948, No. 1616).*

- G *Criminal Law—Trial—Summing-up—Summing-up case of each defendant separately—Verdict on each defendant taken after individual summing-up and before summing-up of case against next defendant.*

- H The appellants were convicted on counts alleging a "conspiracy to effect a public mischief", the particulars being that they had conspired together by fraudulent means to obtain and sell in the home market decorated domestic pottery, contrary to the Domestic Pottery (Manufacture and Supply) Order, 1947, which forbade manufacturers to supply such pottery except for export. It was proved that the appellant obtained the goods from registered exporters or manufacturers under the false representation that they were to be exported, that the goods went to three firms controlled by one or other of the defendants, and that they were then sold to retailers under false documents and invoices describing them as frustrated or rejected exports. Persons who obtained from registered exporters or manufacturers decorated pottery, representing that it was for export, and then sold

it on the home market were not dealt with specifically in the order of 1947 and no penalty was specified for making a false declaration. In summing-up at the trial the judge first gave a general outline of the case and then proceeded to deal with the case of each defendant separately. After the summing-up of the case against each defendant the jury were sent out to consider their verdict regarding him, and when that verdict had been returned the judge proceeded to deal with the case of the next defendant. At no time were the jury separated when considering an individual verdict.

HELD: (i) the particulars sufficiently alleged the common law misdemeanour of conspiracy either to effect an unlawful purpose, or by dishonest devices to defeat the intention and purpose of an Act of Parliament, or to work to the prejudice of the State, offences long known to the common law.

Per curiam: the right approach to "public mischief" cases is to regard them as part of the law of conspiracy and to hold the actions of an individual not committed in combination with others to be indictable only if they constitute what has been held in the past to be a common law or statutory offence.

Dictum of SOULDON LAWRENCE, J., in *R. v. Higgins* (1801) (2 East, 21) and *R. v. Manley* ([1933] 1 K.B. 529), criticised.

(ii) the trial judge acted properly in the method he adopted of summing-up to the jury, especially having regard to the length and complexity of the case, and, therefore, the appellants were rightly convicted.

R. v. Neat ([1949] 2 All E.R. 438), distinguished.

EDITORIAL NOTE. The Domestic Pottery (Manufacture and Supply) Order, 1947 (S.R. & O., 1947, No. 373), as amended by S.I., 1948, No. 1616, is revoked and replaced by the Domestic and Ornamental Pottery (Manufacture, Marking and Supply) Order, 1950 (S.I., 1950, No. 1130).

Cases referred to:

- (1) *R. v. Brailsford*, [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 14 Digest 117, 861.
- (2) *R. v. Porter*, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; 14 Digest 116, 860.
- (3) *R. v. Bassey*, (1931), 47 T.L.R. 222; 22 Cr. App. Rep. 160; Digest Supp.
- (4) *R. v. Manley*, [1933] 1 K.B. 529; 102 L.J.K.B. 323; 148 L.T. 335; 97 J.P. 6; Digest Supp.
- (5) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 14 Digest 112, 814.
- (6) *Vertue v. Clive* (Lord), (1769), 4 Burr. 2472; 98 E.R. 296; 14 Digest 117, 863.
- (7) *Clifford v. Brandon*, (1809), 2 Camp. 358; 170 E.R. 1183; 14 Digest 116, 852.
- (8) *R. v. Leigh*, (1775), 1 Car. & Kir. 28, n.; 174 E.R. 697; 14 Digest 116, 851.
- (9) *Mogul S.S. Co. v. McGregor, Gow & Co.*, (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 14 Digest 112, 812.
- (10) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 34 Digest 169, 1322.
- (11) *R. v. Sterling*, (1663), 1 Lev. 125 (83 E.R. 331); 1 Sid. 174 (82 E.R. 1039); 14 Digest 114, 824.
- (12) *R. v. Daniell*, (1704), 6 Mod. Rep. 99, 182 (87 E.R. 856, 937); 1 Salk. 380 (91 E.R. 331); 3 Salk. 191 (91 E.R. 770); 2 Ld. Raym. 1116 (92 E.R. 238); 14 Digest 208, 1898.
- (13) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; Digest Supp.
- (14) *R. v. Higgins*, (1801), 2 East, 5; 102 E.R. 269; 14 Digest 107, 782.

(15) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 2nd Digest Supp.

(16) *Crane v. Public Prosecutor*, [1921] 2 A.C. 299; 90 L.J.K.B. 1160; 125 L.T. 642; 85 J.P. 245; 14 Digest 538, 6090.

APPEALS by the appellants, Alfred Ernest Newland, Robert Norman Hawes, Ralph Stanislaw Andrew Dean, Vernon Egerton Roland Blunt, Clifford Malcolm Waight, Gerald Edgar Waight, Disposals, Ltd., and Dean, Devitt, Gilbert & Co., Ltd., against convictions of conspiracy to effect a public mischief before GLYN-JONES, J., at the Central Criminal Court.

Ashe Lincoln, Q.C., and *K. A. Richardson* for the appellants, Dean and Hawes.

K. A. Richardson for the appellant, Blunt.

Sachs, Q.C., *Faulks* and *Hirst* for the Crown.

B The other appellants were not represented by counsel.

Cur. adv. vult.

Oct. 19. LORD GODDARD, C.J., read the following judgment of the court. The court has already dismissed these appeals and now proceeds to give its reasons. The appellants were all convicted before GLYN-JONES, J., at the Central Criminal Court in April on an indictment containing thirteen counts, but a verdict was taken on only two of them. On the first count the statement of offence was

"Conspiracy to effect a public mischief"

and the particulars were that all the appellants between May 1, 1947, and July 15, 1948, conspired together and with certain persons not before the court by fraudulent means to obtain, and by dishonest devices to distribute to the home market, that is, for eventual retail sale within the United Kingdom, decorated domestic pottery which was not, by reason of the Domestic Pottery (Manufacture and Supply) Order, 1947, whereby the said pottery was only available for sale for currency other than that of the United Kingdom, or under any licence granted by the Board of Trade, available for such supply. The second count charged them with a similar conspiracy, the particulars referring to a later date and not only to the order of 1947, but also to an amending order of 1948, the amendments not being material to this appeal. Some of the appellants were convicted on both counts, others who were alleged to have entered the conspiracy at a later date only on count 2. Again, for the purposes of this appeal this is immaterial and the cases of all the appellants stand on the same footing.

It would be convenient at the outset to refer to the order mentioned in the indictment. The Domestic Pottery (Manufacture and Supply) Order, 1947, which is dated Mar. 1, 1947, was made by the Board of Trade in pursuance of powers conferred by reg. 55 of the Defence (General) Regulations, 1939, which was kept in force by virtue of the Supplies and Services (Transitional Powers) Act, 1945. Article 1 (1) provides:

"No manufacturer shall manufacture any domestic pottery except under the authority of a licence issued by the Board of Trade under this paragraph and in accordance with any condition attached to that licence."

By art. 2 it is provided:

"Except under the authority of a licence issued by the Board of Trade under this article and in accordance with any condition attached thereto, no manufacturer shall supply any domestic pottery manufactured by him other than undecorated domestic pottery of a description specified in sched. II hereto."

Article 5 provides:

"(1) The provisions of this order except para. (1) of art. 1 shall not apply

to the manufacture or marking of domestic pottery of any description intended for supply, or to the supply of any such goods . . . (b) to the holder of an exporter's certificate issued for the purposes of this article by the Board of Trade, being a person who when placing his order for the goods indorsed it with the words 'for export'. (2) A person referred to in heading (b) of the preceding paragraph shall not supply any domestic pottery in respect of which his order was indorsed 'for export' otherwise than by such exportation."

The order of 1948, made on July 13, 1948, amends the previous order by providing in an explanatory note that any domestic pottery may be supplied without a licence to the holder of an exporter's certificate who surrenders a document, signed and dated by him, clearly indicating that he requires that pottery for export, and by providing that a person so supplied may not supply that pottery except by export.

The object of these orders is clear enough and is designed to assist what was and is commonly known as the export drive. Decorated domestic pottery was a desirable and valuable export which could be sold in overseas markets and thus assist this country to obtain foreign exchange, and, therefore, it was desired to restrict or even prohibit the sale of this commodity on the home market so as to increase the amount available for export. No doubt, this was a policy of the government, but it was a policy authorised by Parliament as the Board of Trade were able to issue the regulations by virtue of the statute referred to therein. Parliament must also be taken to have approved the orders as no prayer was presented against them and it has been recognised over and over again that statutory rules and orders, if intra vires the Act under which they are made, have exactly the same effect as though they were contained in the enactment itself. There has never been any suggestion that these orders were ultra vires. It is to be observed, and this is a matter of importance, that the orders in terms deal only with manufacturers or persons holding export certificates from the Board of Trade and who were referred to in the trade as registered exporters. They may only supply decorated pottery for export. The orders do not in terms deal with a person who obtains from a manufacturer or registered exporter these goods, representing that they are for export, and then, having obtained them, sells them on the domestic market. But it is obvious that, if persons who falsely represent that they intend to export the goods and thereby obtain supplies of them could then with impunity sell the goods in this country, the whole scheme would break down and the object of the legislature would be defeated. Moreover, such conduct on the part of traders who set to work dishonestly by false and deceptive documents and device to obtain and deal with goods contrary to the clear intention of the orders must work serious prejudice to the reputable members of the trade who are carrying on their business in accordance with the law. We may also say at once that it is no answer to the allegation that the appellants were acting fraudulently in this matter to say that the persons who supplied the goods in the circumstances which I shall mention in a moment were not defrauded merely because they were paid the full invoice price. It is enough to show that they would not have acted as they did but for the false representations and dishonesty of the persons who obtained the goods for them. This is so clear that we do not propose to enlarge on it.

The facts which were proved in this case are that the goods came either from registered exporters or from manufacturers, though mainly from the former. A registered exporter who had obtained decorated pottery was not obliged himself to export, but might sell to anyone who gave him an appropriate declaration that he intended to export the goods. No penalty is prescribed for the giving of a false declaration. The appellants were proved either to have given or to have been party to false declarations that the goods were wanted

for export and in addition to that to have given or to have been party to giving their suppliers false shipping marks and in some cases false names of vessels in which the goods were purported to be shipped, or to have taken part in the disposal on the home market of the goods so dishonestly obtained from the manufacturers. In fact, these goods went to three firms or companies who were registered, but were proved to have been parties to the fraud. These companies were Dean, Devitt, Gilbert & Co., Ltd., who were charged on both counts as conspirators, Disposals, Ltd., who were charged in the second count only, and Wilfred Hawes & Co., Ltd., a company with which the appellant, Robert Norman Hawes, was connected or controlled. The goods were, in fact, taken to, or were already at, a wharf and then were distributed to firms controlled by the appellant, Clifford Malcolm Waight, and sales to retailers were effected by means of bogus documents and invoices falsely describing the goods as rejected or frustrated exports. It was the case for the prosecution that by these means the appellants were enabled to dispose of decorated pottery to the value of no less than £70,000, the result of which, of course, was that the total of this commodity available for export was decreased by that amount.

Two main grounds of appeal were taken on behalf of the appellants before us: (i) that the charge of conspiracy to effect a public mischief was a crime not known to the law, and, as an alternative, that at least the particulars of the offence did not support a charge known to the law. We will deal with this point before considering the second ground which related to a matter of procedure only. It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld. We refer to *R. v. Brailsford* (1), *R. v. Porter* (2), and *R. v. Bassey* (3). There is also *R. v. Manley* (4), in which there was a charge of effecting a public mischief, but no charge of conspiracy, and we propose to consider that case entirely separately. The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by SIR FITZJAMES STEPHEN, the most prominent institutional writer on the criminal law in the last century, in his *HISTORY OF THE CRIMINAL LAW*, vol. 3, p. 359.

We think we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy. Indeed, nowadays we know that matters which are to be regarded as contrary to public policy, so, for instance, as to invalidate a contract, must be found in cases decided in the past and no additions are now to be made. No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanours, but there are two points which, in our opinion, do not make it necessary for us to consider whether there is here any attempt to create a new offence. In the first place, it is well known that there may be many acts which, if done by an individual, would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of persons as the result of a conspiracy, and for this really elementary proposition we need only refer to *Quinn v. Leatham* (5). Many other illustrations are to be found both in the old and in the more modern reports, for instance, *Vertue v. Lord Clive* (6), *Clifford v. Brandon* (7), the note to *R. v. Leigh* (8), *Mogul S.S. Co. v. McGregor, Gow & Co.* (9) and *South Wales Miners' Federation v. Glamorgan Coal Co.* (10). A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means. Can anyone doubt that, if persons conspire to obtain a

commodity for sale in this country by false representations and fraudulent documents when legislative enactments provide that except under licence it is only to be sold for export, they are not using unlawful means to effect the end in view ?

Secondly, in *HAWKINS' PLEAS OF THE CROWN*, vol. 1, p. 446, a work of great authority, it is stated:

"There can be no doubt, but that all confederacies whatsoever, wrongfully, to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person."

This passage was quoted in the judgment of *FRY*, L.J. (23 Q.B.D. 630), in *Mogul S.S. Co. v. McGregor, Gow & Co.* (9) and that judgment is very much in point in this case. He was dealing with indictable conspiracies and refers to *R. v. Sterling* (11). He quotes (*ibid.*, 631) the explanation of that case given by *HOLT*, C.J., in *R. v. Daniell* (12) that:

"The real ground of the decision was . . . that the offence of the defendants [i.e. the conspiracy] was of a public nature and levelled at the government . . ."

and that is exactly the case here. The third person injured and impoverished here is the State or, as *HOLT*, C.J., called it, the government. The statement of offence in both these counts might have consisted simply of conspiracy to commit a common law misdemeanour and the particulars thereunder plainly show the constituents.

In upholding these convictions, therefore, we are in no way creating a new offence. The particulars sufficiently allege a common law misdemeanour, namely, conspiracy, and whether the matter is looked at simply as a conspiracy to effect an unlawful purpose or a conspiracy by dishonest devices to defeat the clear intention and purpose of an Act of Parliament or to work to the prejudice of the State, in our opinion, they disclose offences which have long been known to the common law of this country. Counsel for the appellants tried to compare this case with one in which persons devised plans for avoiding surtax or death duties, and quoted *LORD TOMLIN*'s well-known dictum in *Inland Revenue Comrs. v. Duke of Westminster* (13) ([1936] A.C. 19, 20). But the cases are in no sense analogous. What the noble and learned Lord laid down was that, if a man can order his affairs so that the tax attaching under the particular Acts was less than it otherwise would be, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers might be of his ingenuity, he cannot be compelled to pay the increased tax. But in that case the taxpayer had done nothing dishonest, nothing false, nothing deceptive. The only question in the case was as to the legal effect of certain admittedly genuine deeds. They were held to create an obligation to pay annuities, not salary or wages and consequently the taxpayer was entitled to deduct the payments in arriving at the total income for surtax purposes. Openly and without fraud of any kind he had become entitled to certain deductions from his income.

We cannot leave this part of the case without referring to *R. v. Manley* (4), a case binding on this court though it has been subject to considerable criticism. The facts were that the defendant, a woman, had given false information to the police that she had been assaulted and robbed, thereby causing officers of the police to waste their time investigating a bogus crime and exposing individuals answering to the description of the pretended robber to suspicion. In upholding the conviction this court held that such conduct amounted to a misdemeanour, namely, effecting a public mischief. They were relying on a dictum of *SOULDON LAWRENCE*, J., in *R. v. Higgins* (14) as well as on *R. v. Brailsford* (1) and *R. v. Porter* (2). The dictum in *R. v. Higgins* (14) was that all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of

the public are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticised by SIR FITZJAMES STEPHEN in the passage in his HISTORY OF THE CRIMINAL LAW to which we have already referred and also by DR. STALYBRASS in 34 L.Q.R. 183. In effect, it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom, or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences. The Council, or as it was more generally termed, the Court of Star Chamber, in its time rendered considerable service to the criminal law by declaring some matters, notably perjury, to be misdemeanours though they never attempted to create new felonies. But conditions now are wholly different.

A The actual decision in *R. v. Higgins* (14) was that an incitement to commit a felony was a misdemeanour. The court showed that it was firmly established by decisions that an attempt to commit a misdemeanour was in itself a misdemeanour and applied that doctrine to attempts to commit felony and held that the solicitation was in itself an act sufficient to prevent the application of the doctrine that mere intention unaccompanied by some act would not support an indictment for an attempt. No one would criticise the actual

C decision, but the very wide dictum to which we have referred is unnecessary to support it. The short judgment in *R. v. Manley* (4), while referring to *R. v. Brailsford* (1) and *R. v. Porter* (2), apparently overlooked, or, at any rate, makes no mention of what, in our opinion, was an all-important factor in those cases, namely, that in both there was a charge of conspiracy. With all respect to a case which, as we have said, is binding on us, we believe that the right

D approach to what may be compendiously called public mischief cases is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offences. It may be that *Manley's* case (4) will some day be considered by the House

E of Lords and in any case we venture to think that it would be a useful reform if such conduct as was there disclosed were made a summary offence by the legislature. We need not further enlarge on it as the charge we are now considering was one of conspiracy except to say that, in our considered opinion, the safe course is no longer to follow it.

We now pass to the second ground of appeal. What is challenged is the action

F which the learned judge took in summing-up the case. He started his summing-up, with all the appellants in the dock, by giving the jury a general outline of the case and a charge on the law, and no fault is found with his direction. He then proceeded to deal with the case of each defendant separately and took separate verdicts thereon. For instance, he first dealt with the case of

G Clifford Waight and having summed up the evidence with regard to that defendant he sent the jury out to consider their verdict against him. When the jury returned with a verdict of Guilty that defendant was sent down and the judge started to sum up the evidence against the second defendant, again taking a separate verdict, and so on against all of them. His summing-up occupied altogether three days, and at the conclusion of each day the jury

H were allowed to separate and to come back the following morning. They in no case separated while they were considering a verdict.

We can see no objection in law to the course which the learned judge took. It was, no doubt, unusual, but so also was the case. It had taken the better part of six weeks to try, a mass of documents had to be considered and the case was one of great complexity. To have thrown, so to speak, the whole of the case at the jury, leaving them to sort out afterwards the evidence against

each defendant, would have been neither in the interests of the defendants themselves nor in the interests of justice. It was part of the learned judge's duty to remind the jury that they would have to consider the case of each man separately. It would have been impossible for the jury to have done so with a case of this description except by the course which the learned judge took. It was objected that this offended against the decision in *R. v. Neal* (15), but, in our opinion, that case has no application to what happened here. In *Neal's* case (15) the recorder, having concluded his summing-up and enclosed the jury in charge of the bailiff, allowed them to separate and go out into the town for refreshment. The court felt obliged to hold that that was so contrary to established practice that the conviction could not be allowed to stand, applying the words of LORD SUMNER in *Crane v. Public Prosecutor* (16) ([1921] 2 A.C. 331) that

" . . . to deprive an accused person of the protection given by essential steps in criminal procedure "

leaves the court no option but to quash the conviction. But what was done here amounted to no more than this: when the judge had summed up against the first defendant and taken the verdict the case was still part heard against all the other defendants and so it remained against each defendant until a verdict had been taken against him. It is well known nowadays that judges very often break off their summing-up to enable the jury to obtain refreshment, or, if it has become late, to let them go home and consider the verdict fresh next morning though it may be that very little remains to finish the summing-up. Once the summing-up is finished and the jury enclosed they must not be allowed to separate, but we can see no reason why the jury should not be allowed to depart at night, though the summing-up is concluded and a verdict taken against one, while the case still remains part heard against the others. In our opinion, there is nothing in this objection. We cannot forbear from expressing our appreciation of the way in which GLYN-JONES, J., dealt with a case of extraordinary length and complexity.

Appeals dismissed.

Solicitors: *Randolph & Dean* (for the appellants, Dean and Hawes); *Freeborough & Co.* (for the appellant, Blunt); *Solicitor, Board of Trade* (for the Crown).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

CUTTRESS AND OTHERS v. SCAFFOLDING (GREAT BRITAIN), LTD. AND OTHERS.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), October 5, 6, 1953.]

Negligence—Child—Allurement—Scaffold—Erection for repair of house—Children injured by scaffold being pulled over by boys—Foreseeable danger of young persons interfering with scaffolding.

A To enable their plasterers to work safely at a height on the re-plastering of an exposed interior wall of a bomb-damaged house, the second defendants, who were builders, employed the first defendants, a scaffolding firm, to construct an independent tubular scaffold on an open site immediately adjoining the house. The scaffold was thirty-five feet high, fifty-four feet long, and four feet, four inches wide, and it weighted between four and four and a half tons. A pulley at the top to take up men and materials weighing up to one hundredweight from ground floor level projected outside the scaffold. The scaffold was not tied to the house, and could not safely be tied owing to the state of the building, and it was not strutted or buttressed to prevent its falling over, because no pull was to be exerted calling for such precautions. It was erected according to the best practice known, and many hundreds of such scaffolds had been erected and used previously without mishap. The scaffold was approved by the local authority's surveyor and was found satisfactory in use, as constructed, by the second defendants' workmen before and after the accident. Three days after erection the scaffold was left for the week-end by the second defendants' workmen. The pulley rope, which was 150 feet long, was rolled up round the pulley and tied at the top, planks were taken to the higher stages, and the only ladder was removed. On the Sunday, children, including boys of from twelve to sixteen years of age, gathered on the site, which was commonly used by the public, and by children to play on. One boy climbed up the scaffold, unfastened the rope and threw the end not fastened to the pulley down to the others. About a dozen boys pulled horizontally at the rope and three others hung on it simultaneously. The scaffold fell over and injured three children, the plaintiffs.

F HELD: though it was not tied or strutted or buttressed, there was no evidence on which it could be found that the scaffold was insecure or likely to fall, since it was sufficient for the purpose for which it was erected and on the evidence was not likely to fall through any use for which it was intended; the defendants could not reasonably have foreseen the probability of the events which caused it to fall; and, therefore, they were not liable for negligence to the injured plaintiffs.

Decision of JONES, J. ([1953] 1 All E.R. 165), reversed.

G AS TO DEGREE OF CARE NECESSARY IN RELATION TO ACTS BY CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-71, Nos. 433-462.

Cases referred to:

- (1) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.
- H (2) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- (3) *Glasgow Corp'n. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.
- (4) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

APPEALS by the defendants against an order of JONES, J., at Liverpool Assizes, dated Nov. 3, 1952, and reported [1953] 1 All E.R. 165.

The three plaintiffs were children who had been injured by the fall of a scaffold erected by the first defendants for use by the workmen of the second defendants. At a week-end the workmen of the second defendants left the scaffold with a pulley rope wrapped round the pulley at the top of the scaffold, planks moved to the top stages, and the only ladder removed. Boys playing on the bomb-damaged site on which the scaffold stood hauled horizontally on the rope (unfastened by one of them) and caused the scaffold to fall. JONES, J., held that each of the defendants owed a duty to the infant plaintiffs to take all reasonable steps to prevent the scaffold falling on them, that each of the defendants ought to have foreseen the probability of the scaffold being pulled over by the children, and that they were both liable to the plaintiffs for negligence in not so doing. He held also that the second defendants ought to have realised that the scaffold was unstable and a danger to passers-by and that they were negligent in not providing a watchman when the scaffold was left unattended. Both the defendants appealed.

S. Scholefield Allen, Q.C., and *Clover* for the first defendants.

Crichton, Q.C., and *Forrest, Q.C.*, for the second defendants.

Wooll, Q.C., and *Youds* for the plaintiffs.

SINGLETON, L.J.: This is an appeal against an order of JONES, J., given at Liverpool Assizes in November, 1952. His judgment was followed by argument in London as to the position between the two defendants in the action, and his judgment on that was given at a later date. The plaintiffs were three very young boys who had suffered injuries in January, 1949. They successfully sued (each by his next friend) the two defendants, JONES, J., awarding as damages out-of-pocket loss to the next friends of the boys, small sums to two of the boys who were not much hurt, and the sum of £2,500 as general damages to the third boy, whose name was Cuttress, and who had suffered very severe injuries. Both defendants appeal against that judgment, and, in my opinion, the appeal of each must succeed.

In December, 1948, the second defendants, Huntingdon Building & Development Co., Ltd., were to repair a house, No. 102, Great Homer Street, in the city of Liverpool. The house had been damaged by enemy action, and houses in the neighbourhood had been destroyed, so that there was an open space close to the house on which children played and across which people could move. The repair to the house consisted of plastering or cementing the end of it as it stood, i.e., rendering in good condition an inside wall which, by reason of the damage, had become an outside wall. Realising that a scaffolding would be necessary, the second defendants consulted the first defendants, Scaffolding (Great Britain), Ltd., a company experienced in the erection of scaffolding, and said to have been one of the pioneers in tubular scaffolding. They undertook to erect the necessary scaffolding so that the second defendants could do their work, and they erected a scaffold, which was thirty-five feet high and fifty-four feet long, and the depth, or width, of the base of which was four feet, four inches. The weight of the structure was between four and four and a half tons. At the foot of each of the tubes there was a metal base, six inches square, and in the lower part of the structure there was a design which one witness said was rather like an "H", to give it additional stability. It was so designed that, if the ground was not quite level, or not everywhere the same height, the tubes could be adjusted to ensure stability of the structure. At the top of the scaffolding was a pulley for the purpose of taking materials up from ground level to the place on the scaffolding at which they were required, and for that to be done the pulley had to project out some distance beyond the tubular scaffolding itself. The pulley was about thirty-five feet above ground.

The scaffolding was handed over by the first defendants to the second defendants on Jan. 6, 1949. At that time there was a rope at the top of the scaffolding which was intended for use on the pulley, but it had not been thrust through

the pulley. The second defendants' men put it in the proper position, and thereafter for two and a half or three days they used the scaffolding without complaint or without any apprehension of any danger. It was a scaffolding to which reg. 12 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145) would apply. Sub-paragraph (1) of that regulation provides:

- A "Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced to ensure stability and, unless it is properly designed and constructed as an independent scaffold, shall be rigidly connected with the building."

This was designed as an independent scaffold. It is said for the defendants that it was securely supported and that there was no necessity for it to be sufficiently and properly strutted or braced, because stability was ensured from its construction. The regulation does not apply to the facts in this case, because the boys who were injured were not people for whose benefit or protection the regulations were made, but I have referred to it as it does mention an independent scaffold.

- C When the foreman of the second defendants took over the scaffold he was satisfied with it. He was a man of experience, and he had no reason to doubt its stability. His men worked on it for a few days and the pulley was used, and nothing wrong was observed by anyone. At noon on Saturday, Jan. 8, the second defendants' workmen left work, and the description given by Mr. Williams, the foreman, of what was done was this:

- D "At a quarter past twelve the last bucket of mortar was taken up, the bucket was lowered down again, and the rope was rolled up to the top and tied above the cat-head. Then we removed any planks that were on the lower tiers to a higher position, cleared up the surplus building material, and then removed the ladder. Q.—There was only one ladder? A.—Yes."

- E Thus, the scaffolding was left with no ladder and with no planks on the lower stages, though there were a few planks at the top, and the rope, a long one, was wound round the part where the pulley is. It was thought that everything was safe. Before that time there had been a little trouble from children. Some bricks had been put in with mortar, and a child, or children, had interfered with bricks on ground level. The foreman said that, after renewing that piece of work, he remained until after dark one night to make sure that the setting of the bricks was right. There had been no other trouble with children, though quite a number of them used the piece of waste ground around the house.

- G On the afternoon of Sunday, Jan. 9, some children were on the vacant piece of ground, including boys from twelve to sixteen years of age. The judge accepted the evidence of three girls, who said that a number of boys approached the scaffolding, and one climbed up it. The first stage was six feet up and there were no planks there. The second stage was a little less and, again, there were no planks, planks being only at the top two stages. The boy unfastened the rope wound in the way I have described, and threw down one end to the boys below. It was not an easy journey for anyone, and I find it a little difficult to see that it was something which anyone ought to anticipate being done.
- H Then eleven or twelve boys pulled on the rope away from the building and away from the scaffolding, and three other boys hung or dangled on the rope between those eleven or twelve boys and the staging, so that they were being jerked up and down by the pulling of the eleven or twelve boys. While that was being done someone dressed in workman's clothes came along and drove the boys away. He put the rope behind some corrugated iron alongside the building and departed. The boys returned. They got hold of the rope again and the same thing happened. Some pulled and others hung on the rope.

That was bound to place a strain on the scaffolding. A police officer came along, and the boys ran away. The police officer climbed some little distance up the scaffolding himself, fastened the rope some height above the ground, and departed. As soon as he had gone the boys came back again. A boy got the rope from where it was fastened and the same number of boys pulled on the rope and others dangled on it, and after a short space of time the scaffolding quivered and came down in one piece. Most unfortunately it fell on the three little boys who are plaintiffs, and they sustained injuries.

The writ in the action was issued on Apr. 7, 1949, and the statement of claim was delivered on July 9, 1949. Damages were claimed by reason of the negligence of one or other, or both, of the defendants, their servants or agents, in erecting and/or maintaining the scaffolding in a dangerous manner and condition, whereby the same suddenly collapsed and fell and each of the plaintiffs was struck and severely injured by the falling parts thereof. I do not suppose that, at the commencement of this action, the plaintiffs' advisers would have complete evidence or complete information as to the cause of the accident, but at the trial evidence given by the three girls showed, as the judge found, what had happened and how the collapse of the scaffolding was brought about. Before that time there had been no complaint by anyone against the scaffolding or against the manner of its erection. It had been inspected by those for whom it was erected, and their workmen had worked on it in perfect security. It was the action of a number of boys that brought the scaffolding down, and that was set up by each of the defendants in their defence, and they have said throughout: "Neither of us was negligent in any sense whatever."

A Mr. Martin, a chartered mechanical engineer, and an employee of a firm of consulting engineers in Manchester, gave evidence for the plaintiffs. He said he had not been in court the whole of the time occupied by the plaintiffs' evidence, and he had no details of the erection, and had not seen the plan or the photographs. Asked to look at the plan and to consider whether it showed a suitable erection for this class of thing, he said:

"No, I do not think it was suitable . . . Because by reason of the height in proportion to the width of the base and bearing in mind that a [pulley] wheel was employed . . . In my opinion, the scaffold should have been tied to the building or alternatively braced to withstand the overturning force created by the use of the pulley."

In other words, he was saying that the pulley extending out beyond the line of the scaffolding would involve some pull outwards on the scaffolding, and the scaffolding should be either tied to the building or braced or buttressed. Under cross-examination he was inclined to think that, if the building itself was weak, the scaffolding should not be tied to it, but, still, there ought to have been buttresses, because the pulley was overhanging and there was thus an outward pull. Notwithstanding the view of that witness, it is the fact that the scaffolding had been used for two or three days without any complaint whatever. It had been inspected by those for whom it was made, and there was on the other side a body of evidence to show that it was erected in the ordinary way in which an independent scaffold is erected. It stood on the six-inch square steel parts or footings, and it was sufficient for its purpose. There was strong evidence from the defendants to that effect. Asked if there was a necessity for some sort of board or solid base on which the footings should rest, Mr. Martin thought the six-inch square steel bases were sufficient in the ordinary way for the ground on which they were placed.

The defendants called a number of witnesses of experience, and it is noteworthy that, after this accident, the scaffolding was re-erected in just the same way and work continued for a fortnight or so until what had to be done was finished, without any complaint from anyone. A representative of the Liverpool city surveyor's office had found no fault with it and

thought it satisfactory, and after the accident he saw it again and saw what was done. No one, apparently, suggested that this erection, an independent scaffold, was in any way contrary to reg. 12. If anyone had so thought, something would have been done about it. It was an independent scaffold not tied to the building. It could not be very well. It was not buttressed, because buttressing was considered unnecessary by those of experience, as it had a depth of four feet, four inches, and each of the tubes was resting on a six-inch square steel bottom. Practical experience, as shown by the evidence of the defendants, showed that that was sufficient of itself without the necessity for any buttressing, and Mr. Martin's evidence suggested that he did not think it would be any safer or any better if the foot of each tube had been upon a piece of wood or board.

A The learned judge's findings were in favour of the plaintiffs. Objection is taken that there is no evidence on which some of the findings can be supported, and it is submitted by both defendants that, on the evidence, judgment ought to have been entered for the defendants; in other words, that there was no evidence on which the plaintiffs could succeed. The first defendants' witnesses, including the witness from the corporation, and the second defendants' witnesses, showed that this scaffolding was erected according to the ordinary practice and to the best practice as known, and that it was sufficient for the purpose for which it was required. The scaffolding was necessary to enable workmen to work at a height in comparative safety. When men are working at a height of thirty feet or so above ground level, they ought to have something to protect them from falling. That was the purpose of the scaffolding, and unless it were stable and securely placed it would be no use to them. They found it sufficient both before and after this accident. Moreover, it was demonstrated by one witness, perhaps by two witnesses, that in order to cause the scaffold to fall away from the building there would have to be a horizontal pull of five and a half to six and a half hundredweights and that, said one witness, would mean a pull by about eleven men or grown-up boys—a horizontal pull from the top.

E One question to be considered is whether those who erect a scaffolding of this sort are reasonably to expect something of the kind which happened, for the scaffolding was sufficient for the purpose for which it was erected. The judge made certain findings of fact on which the plaintiffs submit that they are entitled to hold the judgment in their favour. One finding is ([1953] 1 All E.R. 166):

F "I find that the scaffold fell in one piece and that it fell because it was not properly constructed and was not sufficiently strutted. I find that the immediate cause of it falling was the interference with it and pressure put on it by some twelve to fifteen boys, aged about fifteen or sixteen. I find that these boys could not have pulled the scaffold over if it had been properly constructed and secured by struts in the nature of buttresses to prevent it from falling in the direction in which it fell. I think that the servants of the first defendants were probably wise in not attaching the scaffold to the wall and I am not convinced that it could have been safely tied to the building in any way, but I am satisfied that there should have been struts placed on the side of the scaffold away from the building to prevent it falling in that direction and that it was negligent of the first defendants not to provide such struts . . . I find that the scaffold was liable to fall and was a danger to passers-by using this open space. I accept the proposition that an independent scaffold is recognised as a safe scaffold in certain conditions, though I believe that such a scaffold may be unsafe to passers-by if not tied or strutted."

H The learned judge in that passage accepts the view that it was not desirable to tie this scaffold to the building, but he says there ought to have been struts,

though in the same passage he finds that the immediate cause of the scaffold falling was interference and pressure put upon it by twelve to fifteen boys. He added (*ibid.*):

"I find that their negligence was a contributing cause of the fall of the scaffold."

I would point out it is, perhaps, more accurate to say that the scaffold was pulled down rather than to say that it fell. The judge said, again (*ibid.*):

"I find that the scaffold was liable to fall and was a danger to passers-by using this open space."

There is no evidence whatever to show that the scaffold was liable to fall through any ordinary use for which it was intended.

The passage which I have read suggests that the judge is adopting the view that an independent scaffold must be strutted or buttressed. I do not think that the evidence, taken as a whole, warrants any such conclusion. The finding of the judge seems to me to be equivalent to saying that the practice, which has been followed for a long period, of having scaffolding of this kind built as an independent scaffold is not sufficient unless it is also strutted. That would be a departure from the practice of those who have been responsible for these erections for a considerable time, and, though I am far from saying that an independent scaffolding should never be strutted, I feel that those who have had to deal with this kind of work over the years are generally able to form an impression as to what is necessary for what has to be done. If there be anything in the lie of the land or in the nature of the subsoil, which may give apprehension of danger, then clearly additional steps should be taken for the protection of the workmen in the first place, but here there was no such apprehension, and the scaffolding which was erected was sufficient for all the purposes for which it was intended. I do not think that finding of the judge is warranted on the evidence.

[HIS LORDSHIP held that there was no evidence to support a finding that sole plates should have been provided as the foundation for the base plates on which the uprights rested, since on the facts the ground was not such as to require them, and continued:]

I come now to the third finding ([1953] 1 All E.R. 166):

"I find that the servants of the second defendants should have realised that the scaffold was insufficiently secured and that children would probably interfere with it, that they were negligent in leaving a rope attached to the top of the scaffold when they left it unattended, and that their negligence was a contributing cause to the fall of the scaffold."

That seems to me to be going a long way. People engaged on a building or repair operation have a scaffolding erected at the end of a building, and when they cease work at mid-day on Saturday they take away all the planks on the lower part of the staging. They take away the ladder. And it is said that they are negligent because they leave a rope at the top on a pulley thirty-five feet above ground, the rope being wrapped round the pulley, not hanging down, or in any sense a temptation to anyone, though, I suppose, it could be seen. For myself I should hesitate a long time before I found that there was negligence on the part of responsible employees of the builders. They had taken the precaution to put away the ladder and to take away from the lower parts of the structure the planks so that anyone who had to get up to the pulley had to swarm up these tubes to a height of thirty-five feet. I do not think that they ought to have anticipated that someone would climb up there and get hold of the rope and throw it down. I should not describe it as negligence. Even if that could be regarded as negligence, and even if the most careful

thought would have caused them to take the rope away at the week-end, it is only one stage in this matter.

The next finding of the judge is (*ibid.*):

A "I find that it was obvious to the servants of both defendants that this open space was used by the public as a thoroughfare and by children as a playground and that the scaffold would be attractive and alluring to children, particularly to boys aged about fifteen and sixteen, as a place on which to climb and play, especially if so attractive and alluring a piece of equipment as a rope was left on it. In my opinion, the servants of both defendants should have realised that any reasonably active boy would be able to climb to the top of the scaffold and should have foreseen that, if the rope was left on the top, even though coiled up, it was probable that some boy or boys would climb up and detach the loose end and that others would pull on it and pull the scaffold over and cause injury to passers-by."

B Quite a few witnesses were asked questions on that. I think I am right in saying that every one of them said: "I should never have contemplated that for a moment." The foreman said: "If I had contemplated that, I would have taken the rope away." But the judge finds that the scaffolding is attractive and alluring to fifteen- and sixteen-year-olds, and he said it was probable that some boy or boys would climb up and detach the loose end of the rope and that others would pull on it and drag the scaffold over and cause injury to passers-by.

C I hope I am not unduly critical, but every witness asked about this said he had never heard of anything like it before. He had never heard of an accident of this kind, and there was no cross-examination as to that. It cannot, then, I think, be right for the judge to say that the defendants ought to have realised it was probable that some boy or boys would climb up and detach the loose end, and that others would pull on it and drag the scaffold over and cause injury to passers-by. Why should they have realised that, or thought of it, if such a thing had never been heard of before so far as one can find from the evidence? Of course, afterwards when one hears what went on that afternoon one may think of it as something boys might resort to, but I cannot accept that the defendants ought to have realised beforehand that a boy might climb up and that other boys would probably pull the whole thing down. I cannot agree with that finding.

D The next finding is (*ibid.*, 167):

E "I find that the servants of the first defendants should have foreseen this probability as they knew that the scaffolding could be pulled over . . . I find that it should have been obvious to the workmen that, if they left this independent unattached scaffold unattended with a rope attached, even if coiled up at the top of the scaffold, it was probable that some boy would climb up and throw down the end of the rope and other boys pull on it, and that, if they did so, the scaffold would fall over in the absence of ties or struts to prevent that happening."

F The learned judge said that, there being no struts, there was liability on the defendants. I realise that the plaintiffs were in difficulty in the way of witnesses of expert character, but a case of this kind must be determined on the evidence given, and liability ought not to be put upon defendants unless it is shown that, in doing what they did, they failed to exercise the care which a reasonable person charged with their duties would exercise. This is not, as counsel for the plaintiffs said, the ordinary case of allurement of a young child, i.e., of a young child being tempted or enticed into a trap. It is not that case. The case depends on whether either of the defendants, or both, as they left the structure in the condition in which it was left at mid-day on Saturday, Jan. 8, ought to have

foreseen a probability of some interference with their structure which might result in injury to passers-by. The judge found that they ought to have foreseen what happened. It is one stage to say that they ought to have foreseen that someone might go and drop the rope down, and that having done that someone might swing on the end of the rope. But far removed from that stage, I think, is the position which arose here, that eleven or twelve boys should be pulling on the rope in a direction which would tend to bring the whole structure away from the building, and that, while that was being done, others should swing on the rope between those boys and the structure itself so that, as a result of renewed pull, the dangling boys, a jerk, too, or it may be many jerks, there came a quiver and the whole thing went. If the defendants ought reasonably to have anticipated anything like that happening, then they are responsible in law, but on this evidence I do not see that they can be.

We were referred to *Bolton v. Stone* (1) the cricket ball case. LORD PORTER said ([1951] 1 All E.R. 1080):

"In the words of LORD THANKERTON ([1942] 2 All E.R. 399) in *Hay (or Bourhill) v. Young* (2) the duty is to exercise '... such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care'. LORD MACMILLAN used words to the like effect (*ibid.*, 403). So, also, LORD WRIGHT in *Glasgow Corp'n. v. Muir* (3) ([1943] 2 All E.R. 50) quoted the well-known words of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (4) ([1932] A.C. 580): 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour' ",

and LORD PORTER added ([1951] 1 All E.R. 1081):

"It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

LORD NORMAND said (*ibid.*, 1082):

"It is, therefore, not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road. She must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence."

Applying those tests, it seems to me impossible, on the evidence given in this case, to say that the defendants ought to have foreseen the probability of anything such as that which happened on Sunday, Jan. 9, 1949. For these reasons I feel that these appeals must be allowed.

BIRKETT, L.J.: I am of the same opinion. I think this order ought to be reversed primarily on the ground that, with all respect, the learned judge failed to assess properly the true quality of the evidence given. He ignored for the most part the evidence given for the defence by men of great experience, expert in the particular matter of scaffolding, and he relied on certain evidence which, I think, if truly appreciated, has not very much relevance to the issue to be determined. The learned judge found that the first defendants were liable in that the scaffolding was not properly constructed and was liable to fall. As an adjunct to that he said it was not properly strutted and that sole plates were not provided as they ought to have been. The second defendants, he said, should have realised that the scaffolding was unstable and

insecure and liable to fall, though why they should have realised that after working for two and a half days without the slightest trouble I do not know. He said also they should have realised that, that being a place where children came and played, they would probably come and interfere with the scaffolding; that they negligently left a rope coiled some tremendous height from the ground; and (though it played no important part in this case) that they were negligent in not providing a watchman. As against both defendants he said they ought

A reasonably to have anticipated the events which in fact occurred when this scaffolding fell, i.e., three boys dangling in pendulum fashion on a single rope, after one had climbed to a perilous height and uncoiled it and thrown it down, and about twelve all tugging down the rope in a horizontal way.

- I say the evidence was not properly appreciated because the most singular fact in this case is that the expert called for the plaintiffs, Mr. Martin, when
- B he went into the witness-box laboured under the most serious disabilities. Counsel for the plaintiffs said that Mr. Martin had never seen the scaffolding and had no idea as to how this accident had been brought about, or as to how the scaffolding had been brought down by twelve boys tugging in a horizontal tug-of-war on the rope. All he knew had been gleaned from the police constable, who said only: "There was a time when I was on this site, and I saw
- C children playing with the rope, swinging on the rope pendulum fashion. I chased them away, and after I had gone, some little time afterwards, there was a fall. I came back, and there was the scaffolding which had fallen down." He had no idea that twelve boys of fifteen years of age had been doing this. I think Mr. Martin had in his mind the idea that this scaffolding had fallen because these children were swinging pendulum fashion on the rope. The expert for
- D the plaintiffs had to find some cause for a scaffolding of this kind falling, and he actually said the reason was the pulley at the top, which extended beyond the line of the scaffolding, and the rope which came through it. He said that in spite of the fact that expert scaffolding erectors had provided hundreds of these scaffoldings—indeed, hundreds of them in Liverpool—and there had never before been an accident of this kind in any place at any time. Counsel for
- E the plaintiffs asked him in what respects was it not suitable, and he said:

"By reason of the height in proportion to the width of the base and bearing in mind that a [pulley] wheel was employed . . . In my opinion, the scaffold should have been tied to the building or alternatively braced to withstand the overturning force created by the use of the pulley."

- That was Mr. Martin's case, viz., that the normal user of this scaffolding
- F was such that it was liable to overturn. All the evidence to the contrary was utterly ignored—the fact that hundreds had been erected in the city of Liverpool, and never before had there been an accident, never before had a scaffold been overturned. As I have said, all that evidence was quite ignored; and to speak plainly, the constable and the expert, Mr. Martin, had no idea of what had happened when they gave evidence.

- [HIS LORDSHIP referred to the evidence of Mr. Suckling, branch manager of the first defendants, who had said that a complete independent scaffold had been installed and that sole plates were unnecessary, and continued:] My Lord pointed out that this scaffolding had been worked on during the whole of Thursday, the whole of Friday and the whole of the Saturday morning. The pulley was working. The men were working, and there was no accident
- H of any kind. And my Lord also pointed out, what, I think, is highly significant, that this scaffolding was re-erected in precisely the same way without struts, without tying, and without buttresses.

Those matters seem to me to be of immense importance. Recalling the evidence that nothing like this had ever happened before, that the scaffolding was absolutely safe and stable, and that hundreds of similar scaffolds had been erected with no complaint of any kind, and the evidence of the city surveyor

with thirty years' experience that: "Even in this city of Liverpool hundreds of them have I seen like this scaffolding of which no complaint could possibly be made", I think, with respect, that the learned judge was mistaken in assessing the evidence and that there was no real ground on which the findings recited by my Lord could be sustained.

The other point is this: Was it a reasonable thing to say to the defendants: "You should have anticipated this happening"? This is what the defendants were to anticipate—that a gang of boys would come on the waste land, that one of them would climb to the top without a ladder (which no workman, I gather from the evidence, would have done), uncoil the rope and throw it down to his ten or eleven companions, and then descend and join them whilst three of them hung on the rope in pendulum fashion, and then for the ten or whatever number it might be to pull in that horizontal way. All that was to be reasonably anticipated! For my own part, I think it is asking far too much of scaffold erectors or anyone else to anticipate that that extraordinary and unusual thing would take place. I could very well understand that children coming on to the site might play about with the uprights, but that one should foresee that they would indulge in this kind of thing seems to me to be asking of people far too much in the way of reasonable anticipation. I think, therefore, that the learned judge was wrong on the two main points in this case, the evidence on which the findings are based, and the reasonable foreseeability, or reasonable apprehension of events, and I agree with my Lord that these appeals ought to be allowed.

HODSON, L.J.: I also agree. This accident happened because some mischievous boys between the ages of twelve and sixteen pulled over a scaffold, and three smaller children who were on the spot were injured. The action is brought, not against the boys, but against the scaffolding company which built the scaffold, and against the builders who were using it. The learned judge has found as against the constructors of the scaffolding that it was not properly constructed and not sufficiently strutted, and against the builders who were using the scaffolding that they should have realised it was insufficiently secured, and against both defendants on the ground that it was reasonably foreseeable by either of them that such interference as took place here would probably occur.

Dealing with the last point first, it seems to me quite fantastic to say that the two defendants, the scaffolders or constructors, or the builders, should reasonably have foreseen that boys would not only climb up the scaffolding (a task which, I suppose, is not particularly difficult for an active young man), but should untie a rope which was coiled at the top thirty-five feet from the ground, let the rope down, and it being a long rope 150 feet long as against the thirty-five feet height of the scaffolding, should be able to get far enough away from the scaffolding to give a lateral pull on the rope strong enough to pull the scaffolding over. I am bound to say I find it quite impossible to hold that that is reasonably foreseeable within the language of *Bolton v. Stone* (1), and, in particular, of the passage in LORD NORMAND'S speech ([1951] 1 All E.R. 1082):

"It is, therefore, not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road. She must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence."

On the first question, whether there was evidence on which a judge could find that the scaffolding was insecure, I agree with my Lord. The matter was put by the plaintiffs in a variety of ways. Their counsel pointed out that one does not expect scaffolding to fall down, and the fact that it fell down forms an impressive part of the plaintiffs' case. But that part of his case really

disappears when one learns that it fell down because it was pulled down by a lateral pull, and, as one of the witnesses put it, anything built by man will fall down if a sufficient lateral pull is exerted. As to the construction of the scaffolding itself, the first head of complaint was that it should have been tied to the wall. That head disappeared in the course of the trial. The learned judge found, and I agree with him, that he was unable to find himself satisfied that tying was requisite. Indeed, the city surveyor went round to the place to see that the scaffolding was not tied to the wall, because the wall was the gable end of an old building, and it would have been unsafe to tie the scaffold to it. It would have been useless for the purpose of supporting the scaffolding, because the middle parts would be pulled out or the wall itself might have come away. So that it was really conceded on all hands, and certainly accepted by the judge, that tying was not required.

- A [HIS LORDSHIP held that there was no evidence on which it could be found that sole plates should be provided and continued:] The third point made against the structure was that it should have been strutted, and, to my mind, that is the only point on which any evidence at all worthy of consideration was called on behalf of the plaintiffs, because Mr. Martin, the plaintiffs' expert, did claim that struts or, alternatively, buttresses, should have been used in the normal practice, at any rate, where tying was not feasible. But when one looks into the matter one sees, I think, the circumstances in which strutting is necessary. I have in mind reg. 12 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, which reads:

"Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced . . ."

- D Bracing does not come into the case, because it refers to transverse pieces which are in the structure, but it is clear from that regulation that there are circumstances in contemplation when strutting or buttressing (as the witness called it) is necessary. I think that matter is explained in the evidence of a Mr. Dranse, who was called on behalf of the defendants as a technical man:

- E "It has also been suggested that it might be strutted or buttressed; what have you to say with regard to strutting? A.—In this case it was not necessary. The work to which the scaffold was to be subjected did not call for strutting or anything of that nature. There are scaffolds which have to be buttressed where we have definite horizontal pulls to arrest. If we know that pull, we can design the buttress to withstand it.
- F This is an independent scaffold for plasterers, and as such it is not subjected to anything like that load."

- This scaffolding was used for workmen employed to plaster the wall, and it had only to carry the weight of the men and material, and to sustain the hauling up from the ground of loads of up to round about one hundredweight at a time, and no question of horizontal pull was involved at all. So this point really merges in the point of foreseeability, which I have already mentioned. There was no question of constructing a scaffolding to resist horizontal pressure at all. The scaffolding was required for vertical work and not for horizontal stress. No abnormal horizontal stresses were to be expected and, to my mind, when one considers the evidence there is nothing in the point that this scaffolding ought to have been buttressed. I agree, therefore, that the appeal of both defendants should be allowed.

Appeals allowed.

Solicitors: *Jaques & Co.*, agents for *Dodds, Ashcroft & Cook*, Liverpool (for the first defendants); *Berrymans*, agents for *Barrell & Co.*, Liverpool (for the second defendants); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiffs).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

ATLANTIC MARITIME CO., INC. v. GIBBON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), October 2, 5, 6, 7, 8, 1953.]

Insurance—Marine insurance—Freight—Cover for loss caused through restraint, warlike operations, and civil war, etc.—Frustration clause if voyage or adventure lost through restraint of princes—Proximate cause of loss—Delay—Institute Time Clauses (Freight), cl. 8.

The assured, the owners of a Panamanian vessel, were insured under a Lloyd's marine policy from July 15 to Oct. 15, 1949, in respect of (inter alia) "freight and/or anticipated freight and/or chartered freight in the sum of \$93,600". The policy contained, among others, the following clauses. " (1) This policy covers:—(a) the risks excluded from the standard form of English marine policy by the clause:—'Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be declaration of war or not . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . ' (b) loss (total or partial) of the subject-matter hereby insured caused by:—(i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . Nevertheless this policy is warranted free of any claim based upon loss of, or frustration of, any voyage or adventure caused by arrests . . . or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power. (2) Warranted free of loss proximately caused by delay". The policy incorporated the Institute Time Clauses (Freight), cl. 8 of which stated: "Warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise".

By a charterparty dated July 16, 1949, it was agreed between the agents of the assured and charterers that the vessel should proceed to Taku Bar in North China to load a cargo of salt and thence to a port in Japan to deliver the cargo. At all material times Taku Bar was in territory under the control of Chinese communist forces who were engaged in civil war against the Nationalist Government of China. The vessel arrived at Taku Bar on Aug. 1, and at 10.30 a.m. on Aug. 8, while she was still awaiting instructions to load, a Chinese Nationalist destroyer arrived and an armed party boarded the vessel and forbade the master to communicate with the shore. At 4.30 p.m. a second destroyer arrived, and at 5.30 the master of the vessel was instructed by a message from that destroyer to leave the anchorage. A Chinese ship in the harbour was shelled and sunk, and at 7 p.m. the Atlantic Trader, with all the other vessels at Taku Bar, put to sea. When clear of Taku Bar the master sent a wireless report to agents of the assured and asked for orders. On the evening of Aug. 9 he was instructed by the assured to proceed to British Columbia to load a cargo of lumber. He complied with these instructions, and between Aug. 29 and Sept. 30, the vessel loaded a full cargo of lumber which she carried to ports on the Atlantic coast of the United States. On and after Aug. 10, other ships, chiefly liners, arrived at Taku Bar and loaded small quantities of cargo. In an action against the insurer for an indemnity under the policy it was contended on his behalf, first, that the proximate cause of the loss of the freight was the loss of the adventure within the frustration clause in the policy, and/or, secondly, the loss of freight was due to delay, which excluded the insurer's liability under the policy. It was contended on behalf of the assured that their claim was not based on the loss or frustration of, or delay in, the voyage or adventure, but on the perils insured.

HELD: to establish their claim the assured must, first, satisfy the court that the circumstances, as known at the time of abandoning the voyage, were, on reasonable assessment, such as to warrant the inference that performance of the voyage had become, for practical purposes, impossible by reason of a peril insured against: dicta of LORD DUNEDIN in *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* ([1917] A.C. 238), and of LORD SUMNER in *Bank Line, Ltd. v. Capel (Arthur) & Co.* ([1919] A.C. 454), applied; (per SIR RAYMOND EVERSLED, M.R.) on the facts, the act of the master in leaving Taku Bar on the evening of Aug. 8, 1949, was under compulsion, and was an act which could be classified as being due to restraint of princes; but there was some doubt whether the peril was of such a nature as justified immediate abandonment of the adventure; assuming that the adventure was lost by reason of the interference of the Chinese Nationalist destroyers on Aug. 8, the real, efficient cause of the loss was the restraint of princes, which was covered by the frustration clause in the policy, and it was immaterial that the restraint was, also, an incident of a civil war (to which the warranty did not apply), as the civil war, per se, was not responsible for the loss, and, therefore, the insurer was relieved from liability: *Cory v. Burr* (1883) (8 App. Cas. 393), applied.

Per JENKINS, L.J.: On the facts, the assured had failed to show that the circumstances, as known on Aug. 8, were such as to warrant the inference that performance of the voyage had been rendered, for practical purposes, impossible by reason of the intervention of the Chinese Nationalist destroyers, and, therefore, their claim failed; assuming that the loss of the adventure was due to the intervention of the Nationalist destroyers, the peril giving rise to the loss was a restraint of princes, within the meaning of the frustration clause, which operated as a bar to the claim, and it made no difference that the restraint was imposed in the course of, or in consequence of, civil war: *Cory v. Burr* (supra), applied.

Per MORRIS, L.J.: The act of the master in leaving Taku Bar was under compulsion, and, on the facts, it was not wrong for the assured to decide that they would not be justified at that time, and for a reasonable time ahead, in attempting to defy the orders of the Chinese Nationalist officers, but, although the assured claimed that the loss was caused by civil war, the real cause was restraint of princes, and, therefore, the insurer was relieved from liability by the frustration clause, the purpose of which was to exclude liability otherwise arising under the policy: dicta of LORD SUMNER in *Samuel (P.) & Co. v. Dumas* ([1924] A.C. 467), applied.

Per curiam: it was doubtful whether, in the circumstances of the case, the insurer would be free from liability by reason of the time exceptions in the policy.

Per SIR RAYMOND EVERSLED, M.R.: "... in this case, it seems to me that the time element is relevant, not as a consequence of the mishap, but to ascertain correctly the nature and quality of the accident. If, because of the length of time which is likely to subsist during which the peril lasts, it is justifiable to say: 'This finally disposes of the bargain', then the freight is lost immediately on the happening of the insured peril and is attributable solely to that peril. The time element has only been essential in order to estimate correctly the extent of the peril, and, if, in point of fact, the peril ceased a week or two weeks afterwards, that fact would be quite immaterial, provided that the original decision was held, in the circumstances, to have been reasonably justified."

Bensaude v. Thames & Mersey Marine Insurance Co. ([1897] A.C. 609), and *Russian Bank for Foreign Trade v. Excess Insurance Co.* ([1918] 2 K.B. 123), discussed.

Observations by SIR RAYMOND EVERSLED, M.R., and MORRIS, L.J., on the amount recoverable under the policy, if recovery had been possible.

Decision of SELLERS, J. ([1953] 1 All E.R. 893), affirmed on other grounds.

AS TO "WAR RISKS" CLAUSE IN LLOYD'S POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-319, paras. 439-443.

Cases referred to:

- (1) *Rickards v. Forestal Land, Timber & Rys. Co., Robertson v. Middows, Ltd., Kahn v. Howard Bros. & Co., Ltd.*, [1940] 4 All E.R. 395; [1941] 1 K.B. 225; 110 L.J.K.B. 25; 164 L.T. 84; *affd.* H.L., [1941] 3 All E.R. 62; [1942] A.C. 50; 110 L.J.K.B. 593; 165 L.T. 257; 2nd Digest Supp. A
- (2) *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.*, [1917] A.C. 227; 86 L.J.K.B. 873; 116 L.T. 353; 12 Digest, Replacement, 340, 2628. B
- (3) *Atkinson v. Ritchie*, (1809), 10 East 530; 103 E.R. 877; 41 Digest 464, 2955.
- (4) *Geipel v. Smith*, (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 41 Digest 411, 2558.
- (5) *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 41 Digest 521, 3501. C
- (6) *Bank Line, Ltd. v. Capel (Arthur) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 41 Digest 366, 2136.
- (7) *Millar (Andrew) & Co., Ltd. v. Taylor & Co., Ltd.*, [1916] 1 K.B. 402; 85 L.J.K.B. 346; 114 L.T. 216; 12 Digest, Replacement, 445, 3371.
- (8) *Cory v. Burr*, (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 29 Digest 217, 1736. D
- (9) *Carras v. London & Scottish Assurance Corp'n., Ltd.*, [1936] 1 K.B. 291; 105 L.J.K.B. 689; 154 L.T. 69; *revsg.* (1935) 52 Lloyd, L.R. 34; Digest Supp.
- (10) *Russian Bank for Foreign Trade v. Excess Insurance Co.*, [1918] 2 K.B. 123; 87 L.J.K.B. 872; 118 L.T. 645; 29 Digest 219, 1750.
- (11) *Bensaude v. Thames & Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 29 Digest 47, 93. E
- (12) *Turnbull, Martin & Co. v. Hull Underwriters' Assocn.*, [1900] 2 Q.B. 402; 69 L.J.Q.B. 588; 82 L.T. 818; 29 Digest 211, 1690.
- (13) *Roura & Forgas v. Townend*, [1919] 1 K.B. 189; 88 L.J.K.B. 393; 120 L.T. 116; 29 Digest 273, 2214.
- (14) *Robertson v. Petros M. Nomikos, Ltd.*, [1938] 3 All E.R. 249; [1938] 2 K.B. 603; 107 L.J.K.B. 504; 159 L.T. 130; *affd.* H.L., [1939] 2 All E.R. 723; [1939] A.C. 371; 108 L.J.K.B. 433; 160 L.T. 542; Digest Supp. F
- (15) *Mercantile S.S. Co., Ltd. v. Tyser*, (1881), 7 Q.B.D. 73; 29 Digest 209, 1683.
- (16) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp'n., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest, Replacement, 436, 3333. G
- (17) *Samuel (P.) & Co. v. Dumas*, [1924] A.C. 431; 93 L.J.K.B. 415; 130 L.T. 771; 29 Digest 112, 666.

APPEAL by the plaintiffs from an order of SELLERS, J., dated Mar. 16, 1953, and reported [1953] 1 All E.R. 893, in an action for indemnity under a policy of marine insurance. H

The plaintiffs were a shipowning company, incorporated under the laws of Panama, and the owner of a Panamanian ship called the Atlantic Trader. By a Lloyd's policy of marine insurance, dated Aug. 29, 1949, they were insured by the defendant and other underwriters for three months from July 15, 1949, in respect of (inter alia) freight in the ship against risks as contained in the

"Institute War and Strikes Clauses. Freight—Time" (i.e., the risks excluded from the standard form of English marine policy by the "free of capture and seizure" clause). Among the risks covered by the policy were the consequences of civil war and loss of the subject-matter thereby insured caused by civil war. The policy was warranted free (a) of any claims based on loss or frustration of the adventure caused by restraints of princes, and (b) of loss approximately caused by delay, and, by the Institute Time Clauses (Freight), cl. 8, which was incorporated in the policy, it was warranted free from any claim consequent on loss of time.

By a charterparty, dated July 16, 1949, between agents of the plaintiffs and charterers, it was agreed that the Atlantic Trader should proceed to Taku Bar, a port in North China, to load a cargo of salt for delivery in Japan. At all material times Taku Bar was in territory under the control of Chinese communist forces who were engaged in civil war against the Nationalist Government of China. On Aug. 1, 1949, the ship arrived at the port of Taku Bar, and on Aug. 8, while she was at anchor outside the bar awaiting instructions to load, two Chinese Nationalist destroyers arrived. Their officer forbade the master of the Atlantic Trader to communicate with the shore and, later, ordered him to leave the north Chinese ports as soon as possible. On the same day, the master received a wireless message from the charterers' agents to start loading on Aug. 13. In the evening, while the destroyers were firing at various targets, the Atlantic Trader sailed to sea, and, when clear of Taku Bar, the master sent a wireless report to the plaintiffs' agents and asked for orders. On the following evening he was instructed by the plaintiffs to proceed to British Columbia to load a cargo of lumber, and he complied with these instructions. Neither the master nor the plaintiffs made any inquiry as to the possibility of returning to Taku Bar to load under the charterparty. Between Aug. 29 and Sept. 30 the ship loaded a full cargo of lumber which she carried to ports on the Atlantic coast of the United States.

In a claim under the policy, the plaintiffs contended that there had been a total loss of freight by reason of one or more of the perils insured against. The defendant contended (i) that the loss, if any, was due, not to any of the perils covered by the policy, but to the voluntary acts of the master and the plaintiffs in abandoning the voyage contemplated by the charterparty of July 16, 1949; (ii) that, if the loss were otherwise covered by the policy, the underwriters were absolved (a) by the frustration clause, and (b) by the time clauses; and (iii) that, in any event, by reason of the second charter (viz., to load lumber in British Columbia) the plaintiffs had suffered no loss, or very little loss, and, therefore, if the underwriters were under any liability to them the sum claimed should be substantially reduced. *SELLERS, J.*, held that the voyage was lost by reason of civil war and the restraint of princes, that the frustration clause did not apply in so far as the loss of freight was caused by civil war, but that the liability of the insurers was excluded by reason of the warranty "free of loss proximately caused by delay" and by cl. 8 of the Institute Times Clauses (Freight).

Mocatta, Q.C., and *C. T. Bailhache* for the plaintiffs.

Sir Robert Aske, Q.C., *Eustace Roskill, Q.C.*, and *Bateson* for the defendant.

SIR RAYMOND EVERSHED, M.R.: This was an action by shipowners to recover for loss of freight on a Lloyd's policy of marine insurance. The freight alleged to have been lost was an amount of freight, approximately £12,000, payable in respect of a contract of affreightment whereby the plaintiffs' ship, the Atlantic Trader, was to load, at the port of Taku Bar in northern China, a cargo of salt and carry it to Moji in Japan. The defendant is one of the underwriters of the policy and has been selected in accordance with common practice for the purposes of the suit, the actual sum claimed to be due from him being £10 8s. 5d. There is no dispute, so far, as to the figures.

The defences to the action may be taken to be four in number. It is, first, denied that the plaintiffs have proved that their alleged loss of freight was due to any of the perils covered by the policy, apart from any of the exceptions contained in it. The second and third defences are to the effect that, if the loss were otherwise covered by the policy, the underwriters are absolved by one or other of the exceptions in the policy, particularly by what has been referred to as the frustration clause and certain time clauses. Lastly, it is said that on the facts of the case there was, in any event, no loss at all, or, at least, that the sum claimed should be substantially reduced, having regard to the fact that another freight was earned after the date of the alleged loss. The learned judge found for the defendant and dismissed the action with costs. He found in the plaintiffs' favour on the first of the defences which I have indicated, but held that the case fell within one of the exceptions to which I have alluded. He did not deal with the fourth defence, which has been referred to before us as the quantum point. I agree with the learned judge that this claim fails, though, as will appear, I prefer to base myself on a different exception, namely, the frustration clause, from that which appealed to the learned judge. For reasons which will also appear, I prefer to express no concluded view on the other exception clauses or on the quantum point, and it is right to say that we have not heard full argument on these matters.

The questions involved are all, except the last, questions solely of the construction of the particular policy with which we are concerned. The policy is in a form which is common in cases of this kind, i.e., it is based on what is called the standard form of Lloyd's policy, to which numerous slips, ten in all, have been added, so that little is left of the original foundation. I do not repeat the observations of *MACKINNON, L.J.* ([1940] 4 All E.R. 403) in the Court of Appeal in *Rickards v. Forestal Land, Timber & Rys. Co.* (1) in regard to this form of policy. I have no doubt that those engaged in this class of business find it convenient that their policies should take this form. But it cannot, I think, be denied that the effect produced is, in some degree, one of taking away with one hand what has been given with the other, and the task of the courts in construing the resultant documents is certainly rendered more difficult. The numerous cases to which we have been referred make it not easy to contend that those entering into this class of business well understand the meaning of the conventional accumulation of clauses which constitute the policy. It is, however, as I have said, in this case a question of the interpretation of this particular congeries of documents, and that interpretation must be made in the light of such cases as have established or illustrated the principles which have to be applied.

There was no oral evidence taken before the judge. An agreed statement of facts was produced, on the basis of which, together with one or two relatively unsubstantial additions, the whole matter was tried out. The relevant terms of the policy are set out in the agreed statement of facts, but it will be convenient that I should state them in this judgment. The contract of insurance is dated Aug. 29, 1949, and covers a period of ninety-two days from 8 a.m. of July 15 to 8 a.m. of Oct. 15, 1949. It was a policy for covering loss of the hull, machinery, etc., as well as of freight. We are, in this case, concerned only with freight and it is not, therefore, necessary to read the whole of the standard policy or the ten addenda thereto. The standard form of policy indicates its general nature by the following paragraph:

"Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of the seas, men-of-war, fire, enemies, pirates, rovers . . . arrests, restraints and detainments of all kings, princes and people of what nation, condition, or quality soever."

There then follows in italics, in the standard form, what is called the "free

of capture and seizure " warranty, but over that there has been impressed the word " Deleted ". The first of the addenda, which is lettered " A ", indicates (i) the period covered by the policy, and (ii) the " interest insured ", which consists of four items, the first being: " Hull, materials, machinery, boilers and everything connected therewith. Valued \$624,000 ". The second, third, and fourth items have figures stated against them, but do not have against them the word " valued ". I, therefore, take it that the policy is what is called a valued policy only in respect of the first item, namely, " hull, materials, machinery ", etc., with which we are not in this case directly concerned. The third item of interest insured is: " Freight and/or anticipated freight and/or chartered freight, \$93,600 ". The conditions are stated thus:

A This insurance is only to cover the risks as per Institute War and Strikes Clauses as attached. Including war protection and indemnity, etc., liabilities clauses as attached."

Then, after two paragraphs which I can pass over, is found this observation, " Subject to war cancellation clause as attached ", and, finally:

C " World wide trading, but warranted not in Black Sea, Baltic Sea (east of fifteen degrees east) or China ports (other than Hong Kong) . . . "

The last words which I have read are, however, modified by two other of the addenda, lettered " B " and " D ", which indicate that, in consideration of a small additional premium, the policy was to cover the case of the vessel making an in-and-out passage to Taku Bar, near Tientsin.

D I can now pass to the addendum lettered " G ", which is headed: " Institute War and Strikes Clauses. Freight—Time ". This addendum, which is printed, consists altogether of five numbered clauses of which cl. 1 contains at its end the frustration exception to which I have already referred. Clause 1 is as follows:

" This policy covers: (a) the risks excluded from the standard form of English marine policy by the clause . . . "

E and then there are set out the " free of capture and seizure " paragraphs, which appear in italics in the standard form underneath the word " Deleted ", and which are:

F " Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be declaration of war or not . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom . . . "

Clause 1 continues:

G " (b) loss (total or partial) of the subject-matter hereby insured caused by: (i) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom (ii) mines, torpedoes, bombs, or other engines of war, but excluding loss or damage covered by the standard form of English marine policy with the free of capture etc., clause (as quoted in 2 (a)) inserted therein. (c) loss (total or partial) of the subject-matter hereby insured caused by: (i) strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions (ii) persons acting maliciously."

H I have read all those paragraphs for reasons which will later appear. There then follows what has been referred to as the frustration clause:

" Nevertheless this policy is warranted free of any claim based upon loss of, or frustration of, any voyage or adventure caused by arrests, restraints or detentions of kings, princes, peoples, usurpers or persons attempting to usurp power."

Clause 2 contains one of the time exceptions to which I have referred: "Warranted free of loss proximately caused by delay . . ." Clause 4 is:

"The Institute Time Clauses (Freight) (except cl. 9, cl. 12 and cl. 14) are deemed to be incorporated in this policy, in so far as they do not conflict with the provisions of these clauses."

The "Institute Time Clauses (Freight)", anticipated by cl. 4 of addendum "G", appear in the next addendum. Only three of the clauses need be mentioned. Clause 6 relates to the obligations of the underwriters in the event of total loss, and reads:

"In the event of the total loss (actual or constructive) of the vessel named herein, the amount insured shall be paid in full, whether the vessel be fully or partly loaded or in ballast, chartered or unchartered . . ."

From that it seems to follow that, had the Atlantic Trader been wholly lost, then the obligation under the policy would have been to pay the full sum of \$93,600, which is the sum stated as the amount of the cover in respect of the freight. Clause 7, which is relevant to the defence as to quantum, reads:

"Except in respect of a claim arising under cl. 6 [i.e., where there has been a total loss of the ship] the amount recoverable hereunder for any claim for loss of freight shall not exceed the gross freight actually lost."

Then comes the important clause, the second of the two time exceptions, which is, in common and well-recognised form, one which has appeared in some of the cases to which I must allude.

"8. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

The remaining addenda need not be mentioned for the purposes of my judgment. It may be convenient that I should now draw attention to one or two matters in the policy. I have referred to the circumstance that, by virtue of addenda made to it, the policy covered risks incurred during the voyage to and from the port of Taku Bar. It is also to be noted that, so far as the freight is covered, it appears not to be a valued policy. The policy, however, covers a period of time of ninety-two days and during that time covers the assured against loss of freight, whether chartered, unchartered, or anticipated: i.e., this is not a policy covering loss of some freight under a particular contract of affreightment. It covers any loss of freight from an insured peril (subject, of course, to the exceptions) incurred during the period of ninety-two days which the policy covers.

The remaining relevant facts are likewise stated in the agreed statement of facts, but, again, it will, I think, be convenient that I should incorporate my references in my judgment. On the day following the start of the period of cover, namely, on July 16, 1949, the shipowners entered into a contract of affreightment, or charterparty, in regard to the voyage to and from Taku Bar. It is unnecessary to read any of the terms of the charterparty save one clause, but it was a contract whereby the Atlantic Trader was to go to the port of Taku Bar, load with a cargo of salt, and take it to a safe port in Japan, which, for the purposes of this case, has been taken to be Moji. One of the addenda added to this document consists of a printed piece of paper, in the margin of which appear the words "War Risks Clause". Paragraph 2 is:

"The ship shall have liberty to comply with any orders or directions as to departure . . . given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof or any person acting or purporting to act with the authority of such government or of any department thereof."

In this case the ship sailed under the Panamanian flag. The reason why I have

read that particular paragraph will appear later. The Atlantic Trader arrived at or off the port of Taku Bar on Aug. 1, and she anchored outside the bar. Taku Bar is the port of Tientsin, an important city in northern China, which was at that time under the control of the communists and their forces. There was at that time, and had been for a considerable period, a civil war in progress in that part of the world between the communists and the so-called Nationalist Government of China, which was then the de jure government of China. The master of the ship, on his arrival, reported his presence and his readiness to load. He received his instructions to start loading after the first of the episodes to which I shall presently come, the instructions being that he should start on Aug. 13, some twelve days after his arrival. He remained, therefore, at anchor off the bar until the morning of Aug. 8, when the episodes referred to occurred. By that time there were near him in the anchorage three other Panamanian vessels and also a fourth vessel, understood to be a Chinese vessel and bearing the letter and number "K.264".

It is now convenient, in stating what occurred during the first episode, to read from the agreed statement of facts.

"Between 8 and 8.30 a.m. on Aug. 8, 1949, a destroyer arrived at the anchorage flying a Chinese flag, though at that time the master did not know whether it was the flag of the communist forces or of the Nationalist. At about 10.30 a.m. on the same day a Chinese officer and twelve men carrying revolvers and tommy guns approached the vessel in a small tug. The officer in charge asked for the master and on seeing him asked what he was doing at Taku Bar. The master replied that he was waiting to load cargo. The officer then asked if there were any communists on board and was told there were not. The officer went to the master's cabin with the master and chief officer and left two or three of his men outside the cabin door armed with tommy guns. He there asked the master a number of questions as to the vessel and her crew and told him that he was forbidden to communicate in any way with the shore whilst the vessel was at Taku Bar. The officer then said to the master: 'Leave the northern Chinese ports as soon as possible. If any damage happens the Nationalists won't take any responsibility'. He then left the vessel and went towards the other ships in the anchorage. . . . After the above conversation with the Chinese officer the master gave directions for [the Atlantic Trader] to be made ready to sail. Between 3.30 and 4 o'clock that afternoon the destroyer . . . shelled and sank the Chinese ship number K.264. As none of the other vessels moved away, the master continued to wait at the anchorage. Just after 4.30 p.m. another destroyer came in from the sea and at about 5.30 p.m. the master received the following message from that destroyer, which was transmitted in Morse to the ships in the anchorage: 'Messages to all Panama ships from Chinese navy. Good advice to you. Better leave here before 8 p.m. New activity will take place here even if you are close to port. Otherwise you are responsible'. Before 7 p.m. all the lighters and tugboats in or about the anchorage were collected into one spot by Chinese naval craft and there anchored. At 7 p.m. that evening the vessel together with the three other Panamanian ships already mentioned left the anchorage and sailed out to sea. At 8 p.m. when the vessel was about five miles off the Taku Bar lightship those on board saw flashes and heard explosions from gunfire coming from the direction of Taku Bar and some days later the wireless operator intercepted a message stating that another vessel had been sunk within the harbour at Taku Bar on the night of August 8/9. The only signs those on board the vessel saw at Taku Bar of cargo being available was the loading of salt from lighters on the San Fernando and the loading of other cargo on the Nowrooz [the San Fernando and the Nowrooz being two of the three other Panamanian ships]. The plaintiffs

have no knowledge of the conditions on land which may or may not have prevented the shippers from bringing up the cargo for loading the vessel."

At this stage, I interpolate the further piece of evidence which was received by the learned judge but which is not part of the agreed statement of facts. It consists of a signal sent by the master of the Atlantic Trader, via San Francisco, to the owners or their agents, at 12 noon, Greenwich mean time, on Aug. 8. It says:

"Today at 11.30 an officer with twelve armed men from Nationalist warships boarded my ship. They asked for some information and they ordered me to abandon immediately the port and the north China coast. I remained to follow the developments of the situation for four other vessels at anchor near my ship. Between 15.30 and 16.00 one of the ships was fired on and sunk by the warship. At 17.30 we are ordered again to leave immediately otherwise they are not responsible for the consequences. All the ships weighed anchor whilst the warships are firing at various targets. I left at 19 o'clock and am proceeding slow waiting for your orders."

The nature of the answer to that telegram appears from the agreed statement, which goes on to say:

"During the night of Aug. 8/9 the master received an inquiry from the charterer's agents at Tientsin in the following terms: 'Please advise immediately whether you are expecting trouble regarding safety'. On Aug. 9 the master replied: 'Left Taku Bar 19.00 eighth'. At 8.30 p.m. on Aug. 9 the master received instructions from the plaintiffs' London agents to proceed to British Columbia to load a cargo of lumber after bunkering at Sasebo (Japan)."

This is the reply to the signal which I have read. The agreed statement goes on to state that the ship complied with these instructions, arriving, accordingly, at Pacific ports, so that between Aug. 29 and Sept. 30 she loaded a full and complete cargo of lumber which she carried to ports on the Atlantic coast.

The reason why those instructions were given is that on Aug. 9, 1949, the plaintiffs had entered into a second contract of affreightment, relating to the lumber to be carried from British Columbia to the Atlantic ports. I need not read the terms of that contract and only pause to state that it required the Atlantic Trader to proceed with all convenient speed to the Pacific ports. By para. 23 it was stated,

"Lay days not to commence before 9 a.m. Sept. 6, 1949, and if steamer is not in every respect ready to load by noon Sept. 14, 1949, charterers to have option of cancelling this charterparty."

The Atlantic Trader was able to arrive at the loading port before the cancelling date. The only other facts which may be mentioned are that the court was supplied with a table, extracted from the records of Lloyd's, of the movements of other vessels which were able to go to Taku Bar after the date of these episodes on Aug. 8, both in August and later, and there load cargo of various kinds. It is, however, right to state that none of these other vessels was a Panamanian vessel. All but four of them were vessels flying the flag of the United States, and all, or most of them, were not cargo vessels or tramp steamers, but liners calling to take up, among other things, relatively small amounts of cargo, the loading of which took only a short time.

On that statement of facts the first question which arises is, putting it as the learned judge put it: Did the master of the Atlantic Trader act voluntarily in leaving, as he did, the port of Taku Bar and sailing away eastwards or did he act under compulsion, i.e., as a result of restraint of princes, which was one of the insured perils? The learned judge answered that question in

favour of the plaintiffs. He was of opinion that there was, on Aug. 8, as a consequence of, and illustrated by, the episodes related in the agreed statement of facts, a peril actually present which amounted to a restraint of princes or an episode in the civil war, such as justified the master or the plaintiffs in abandoning the first contract of affreightment. Those events caused the master, as the learned judge said, to treat the adventure comprehended in the charter-party as lost, and the learned judge thought that he was justified in abandoning that contract and that freight then and there. That the learned judge so stated his conclusion is apparent from a passage in his judgment where he said ([1953] 1 All E.R. 901):

“It was because the cargo could not be loaded and the contractual voyage could not be performed within any foreseeable or assessable period of time that the master abandoned the contract and sailed away and the owners entered into a new engagement for the services of the ship.”

With all respect, I think that statement is not quite accurate, and counsel for the plaintiffs so conceded. In light of the signal sent by the master on Aug. 8 and the reply instructing him to proceed to the British Columbian ports, it is, I think, not accurate to say that he had abandoned the contract for good and all when he sailed away from Taku Bar that evening. He sailed away and proceeded at slow speed awaiting orders, and the actual abandonment was determined on by the plaintiffs on the following day, Aug. 9.

So far as the law applicable to this aspect of the case is concerned, there has, I think, been no question in this court that it was rightly stated by the learned judge in the course of his judgment. Without taking undue time on it, I will refer to a passage from LORD DUNEDIN's speech in *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* (2), which SELLERS, J., cited. In that case the restraint of princes was an exception to the policy, and the quotation must, of course, be read accordingly, but that is not material to the present matter. LORD DUNEDIN said ([1917] A.C. 238):

“Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by LORD ELLENBOROUGH in *Atkinson v. Ritchie* (3). The more recent cases cited by the appellants, such as *Geipel v. Smith* (4) and *Nobel's Explosives Co. v. Jenkins & Co.* (5), do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint may consider that the restraint, though it does not affect him at the moment, will do so if he continue the adventure. It would be useless to try to fix by definition the precise imminence of peril which would make the restraint a present fact as contrasted with a future fear. The circumstances in each particular case must be considered.”

As regards subsequent events SELLERS, J., referred to what was said by LORD SUMNER ([1919] A.C. 454) in *Bank Line, Ltd. v. Arthur Capel & Co.* (6):

“What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted . . .”

We were also referred to a passage in SIR ARNOLD MCNAIR's *LEGAL EFFECTS OF WAR*, 3rd ed., p. 165, which, in my judgment, correctly states the problem which is posed in these cases, and I respectfully adopt it as part of my judgment.

“It is submitted that the test can be stated as follows: Would a reasonable man in the position of the party alleging frustration, after taking all reasonable steps to ascertain the facts then available, and without snapping at the opportunity of extricating himself from the contract, come to the conclusion that the interruption was of such a character and was likely

to last so long that the subsequent performance or further performance of the contract would really amount to the performance of a new contract ? ”

I would like to make one further citation from the judgment of SELLERS, J. After stating that, no doubt, the Atlantic Trader was not infringing any rule of law but was a neutral vessel, he said ([1953] 1 All E.R. 898):

“ It was in the interest of both the owners and the insurers that the vessel should not be unduly hazarded to a loss by gunfire or arrest, and the master would have been blamed for reckless disregard of the safety of his ship if he had become a casualty in either of these ways after the two warnings which had been given and in the conditions which he had himself observed during the day.”

Before leaving the cases on this aspect of the matter, I should make reference to *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (7), decided in this court. The plaintiffs in that case were manufacturers of confectionery. At the outbreak of the first world war, the English government imposed an embargo on the export of confectionery, and the plaintiffs, treating the embargo as likely to be of indefinite duration, claimed that they were justified in repudiating a contract to supply the defendants with confectionery for export. The court, however, held that the owner had acted with undue precipitation, and that the nature of the embargo was such that it was not, in the circumstances, likely to last indefinitely or for a long time. The court was, no doubt, assisted to that conclusion by the circumstance that it was, in fact, lifted shortly after it had been imposed. It was contended by counsel for the plaintiffs in the present case that the *Millar* case (7) should be regarded as special, and he indicated reasons for saying that it had not been generally regarded with favour. It is, of course, an authority binding on this court, but I think that the only conclusion that one can draw from that and other cases is that stated in the last sentence which I read from LORD DUNEDIN’s speech ([1917] A.C. 238) in *Watts, Watts & Co., Ltd. v. Mitsui & Co., Ltd.* (2), namely, that one must pay regard in each case to the particular circumstances. There may be circumstances in which the nature of the embargo is such that a reasonable man ought not to regard it as likely to be of long or indefinite duration. But, plainly, it is equally true that a case such as *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (7) cannot be regarded as an authority which would compel the master of a ship to wait at sea for a long period of time (highly inconvenient in ordinary business relations), when the nature of the restraint or arrest was such that a reasonable man, according to common-sense standards, would and should take it as concluding any possibility then and there of further performance of the contract of affreightment. Again, I gratefully refer to a passage in SIR ARNOLD MCNAIR’S *LEGAL EFFECTS OF WAR*, 3rd ed., p. 163, where, after mentioning the *Andrew Millar* case (7) and what he calls the “ rule ” that emerges from it, the learned author says:

“ This rule does not touch the case where the operative cause is so conclusive as to discharge the contract at once, for in such a case it would be unreasonable to demand delay.”

In the present case, I for my part have no doubt at all that the action of the master of the Atlantic Trader in moving out of the harbourage at Taku Bar at 7 p.m. on Aug. 8, 1949, was an act of his, not voluntary, but under compulsion: i.e., it was an act which could be classified as being due to restraint of princes.

That, however, is not necessarily the conclusion of this part of the case, for the question is: Have the plaintiffs in the action proved that the peril was such—that the circumstances were such—on Aug. 8 or 9, 1949 (or on both of those days) as justified the master, as a reasonable man, or the plaintiffs, as reasonable men, in concluding that the adventure, viz., the Taku Bar salt contract of affreightment, was lost then and there ? In other words, was the

master, or were the plaintiffs, justified in making no further attempt (as they did not) and no further inquiry after the evening of Aug. 8 with a view to seeing if that contract of affreightment could still be achieved? In answering or attempting to answer that question, it is necessary to bear in mind certain obvious facts: (i) that the date, Aug. 13, when loading was to begin was still some way ahead; (ii) that the civil war in that part of China had been going on for some considerable time and during that period of time ships like the

- A Atlantic Trader had been trading regularly in this part of the world. What was novel in the situation, so far as the evidence shows, was the arrival in the harbourage of the two Chinese Nationalist destroyers. The later facts, viz., the circumstance that other ships were thereafter able to go in and load cargo (though relatively small quantities), is relevant, as LORD SUMNER said ([1919] A.C. 454) in the *Bank Line* case (6), only as showing what the real possibilities, correctly forecasted, were on Aug. 8 and 9. How should a man in the master's position then have judged the situation? I have already said (and it has been for me somewhat of a difficulty on this part of the case) that the learned judge seems to have thought that the master, on the evening of Aug. 8, regarded the situation as so tense and threatening and the peril as so actual that he then and there abandoned the contract. The fact is, as I have said, somewhat different.

- Perhaps, unfortunately in a case of this kind, no evidence was taken or heard from the master which would throw further light on his appreciation of the situation and would enable the court to judge whether that appreciation was the appreciation of a reasonable man. The question is one of inference from the facts as I have stated them, comprehended in the agreed statement together
- D with the cable. Do they favour the view that there was here a peril of such a nature as justified immediate abandonment? Counsel for the plaintiffs tabulated certain matters for our consideration: (i) the fact that the master, at the least, was justified on the evening of Aug. 8, in moving out of the immediate neighbourhood; (ii) the fact that the Panamanian ships (and the second message was addressed to them, for by that time they were, apart from the destroyers, the only ships remaining there) were told, not merely to go from Taku Bar, but to leave all the northern Chinese ports; and (iii) the fact that the other three Panamanian ships went with the Atlantic Trader and that, so far as the evidence shows, none of them ever returned. Further, there is the point that (so far as the evidence goes) no complaint was ever made by the charterers of the conduct of the Atlantic Trader in declining to attempt any
- F further performance of the charterparty. As regards that matter, however, it is noteworthy that the charterparty contained the clause giving to the ship (on the face of it) liberty to comply with any orders as to departure given by any department of any government, and it may be that for that reason the charterers could not have complained because the master of the Atlantic Trader obeyed what purported to be an order given by an officer on behalf
- G of the Nationalist Government of China. Counsel for the plaintiffs then asked: What would have happened to the Atlantic Trader if she had been observed by the Chinese warships hanging about outside the harbour of Taku Bar, either disregarding or attempting to disregard their orders against communication with the shore? Those are, and would provide for anyone in the position of the master, somewhat formidable considerations favouring an immediate and final
- H departure from the scene of turbulence. There are, however, other considerations which seem to me to weigh somewhat in the other direction. The civil war had been going on for some time, and trading in those ports had not, apparently, been much interfered with by reason of it. Five days still remained before loading was to begin. There is also the circumstance that anyone well acquainted with the sea would wonder how long two destroyers could remain at sea in the absence of any tanker or other vessel capable of supplying them. Last, and, perhaps, most important of all, it is necessary, I think, clearly to

have in mind the nature of the threat or minatory advice given by the Chinese officer and men. There was no suggestion, so far as I can see, that the Nationalist ships were forbidding the Panamanian ships to load cargo which was not material of war or were threatening any harm directly to those ships. Put quite broadly, what I understand the Chinese warships were saying was this: "There is going to be trouble in this water and if you are still present you may get hurt. If you do, we cannot help it." It is not, after all, an uncommon state of affairs. One can well imagine on land a situation in which a party of men about to make some sort of raid on a rival party might say to innocent third persons: "You had better get out of the way. There is going to be trouble," and if you remain here we cannot be responsible if something happens to hit you."

Bearing, then, all these considerations in mind, I confess that I feel some doubt whether, on this major premise of the whole case, the plaintiffs have proved their claim. The matter is, obviously, difficult and I acknowledge the experience in these matters of the learned judge who tried the case and expressed the contrary view. In those circumstances, I do not propose to express, and do not think it necessary that I should express, any final view on this matter. If the adventure was lost, whether strictly the contract of affreightment was frustrated, by which I mean "frustrated" according to our law of contract—if the view taken by the master and the plaintiffs was justified, then the circumstances were such as had the equivalent effect and the adventure was lost—then the freight it would earn would have been lost also. But, in my judgment, as I have earlier indicated, if the adventure was so lost, and was lost by reason of this interference by the warships, then I have come to the conclusion that the underwriters are absolved from liability by the frustration clause in the policy:

"Nevertheless this policy is warranted free of any claim based upon loss . . . any voyage or adventure caused by . . . restraints . . . of . . . princes . . ."

I think that, according to the plain sense of the language and the plain sense of the facts, it was on this hypothesis so lost, and that the case falls within, and exactly within, the ordinary meaning of that paragraph. On this matter, however, the learned judge took a different view. He says that the adventure was lost (and he put it alternatively) either as a result of civil war or as a result of restraint of princes or as a result of hostile operations. He said ([1953] 1 All E.R. 898):

"I find that the Atlantic Trader left Taku Bar on the evening of Aug. 8, 1949, because of the civil war which was taking place there, because of the restraint placed on her by the Chinese government forces who restrained her master from communicating with the shore and from remaining in the harbour and because of warlike operations."

The learned judge having stated the matter thus and invoked all three of those reasons, counsel for the plaintiffs, accordingly, says: "I can now base my claim against the underwriters exclusively on the civil war as the reason for the loss, and so bring myself outside the terms of the frustration clause which, though mentioning 'restraints of princes', etc., does not in terms refer to civil war." Alternatively, as I understand him, counsel for the plaintiffs contended that, reading it with the rest of the policy or of the particular addendum of which it forms part, the frustration clause must be taken to liberate the underwriters from liability for loss caused by restraint of princes, provided that the restraint of princes is not itself an incident of civil war—an argument, of course, which must carry counsel for the plaintiffs this further distance, that the restraint of princes must be a restraint unconnected with any of the other matters specifically set out in addendum "G", viz., hostilities, warlike operations, mines, torpedoes, etc. I am bound to say that, if the latter contention

is right, it seems to me to give to the frustration clause a wholly artificial and unnatural restriction in meaning. My own view is that, on the facts and on the assumption which I have made in the plaintiffs' favour, the real, efficient or (if you will) "proximate" cause of the loss was the restraint of princes. It is true that the restraint arose out of, was an incident of, a civil war, but the civil war per se (which had, as I have said many times, gone on a long time) was not responsible for the loss. To establish the claim and to state its nature with sufficient particularity, it seems to me that the plaintiffs were bound to allege and to rely on the particular circumstances narrated in the agreed statement of facts, which, though an incident of the civil war, constituted a restraint of princes. In the course of the argument, I put an example to counsel for the plaintiffs of this character. Let it be supposed that an owner is insured against loss from warlike operations generally, and that there is then an exception "warranted free from any loss caused by torpedoes". Counsel for the plaintiffs conceded (and I think he had to concede on his argument) that, if his ship was sunk by a torpedo fired in the course of the warlike operation, he could still base his claim on warlike operations and ignore the torpedo exception, or, alternatively, could contend that the exception as to torpedoes related only to torpedoes fired otherwise than in the course of warlike operations, i.e., during the course of peace-time practice or by accident.

If, then, I am right in saying that the real, efficient cause of this loss was the restraint of princes, I have already said that it seems to me clearly, as a matter of language, covered by the frustration exception. It is to be noted, as counsel for the defendant pointed out, that the exception is limited in this way. It is applicable, on the face of it, only to cases where the claim is based on loss or frustration of a voyage or adventure, which I take to be in distinction from those cases where the vessel or the cargo is itself lost. However that may be, if I am right so far, it seems to me inevitable that this case is covered by the reasoning of the House of Lords in *Cory v. Burr* (8). The facts of that case, shortly, were these. The master of a ship having committed an act of barratry, the ship was, in consequence, arrested by the Spanish revenue authorities. The policy covered acts of barratry by the master, but contained an exception, a frustration clause substantially the same as that with which we are concerned. The House of Lords, affirming the decision of the Court of Appeal, held (and held quite clearly because they did not find it necessary to call on the respondent) that, though in a sense everything flowed from the act of barratry, and, as LORD BLACKBURN pointed out (8 App. Cas. 399), a case might have been made based in origin on the barratry, on a proper analysis of the matter the true cause of the loss, the efficient cause, or, to use the expression which is found in the Marine Insurance Act, 1906, s. 55, the proximate cause, was the seizure, and it was impossible for the plaintiffs to make good their claim unless they pleaded and alleged the seizure. Put another way, the barratry itself, though it started the train of events which ended in the loss, did not necessarily involve the loss, because non constat that any action of restraint would be taken by those entitled to take it. Counsel for the plaintiffs, who analysed the speeches of the noble Lords in that case, said that it established only that in that case seizure was the proximate cause, so that it did not stand in his way if he could, apart from the restraint of princes, base his claim—as, he said, the judge by his judgment found that he was entitled to do—on civil war without reference to the restraint. But it seems to me that on the facts of this case it is inescapable that the real, efficient cause of this loss was the restraint of princes, and not the civil war.

I do not propose to take time in going through the speeches in *Cory v. Burr* (8) again, but I cannot accept the view that their reasoning involved the proposition that the barratry could be disregarded altogether. It seems

to me that, to take one instance, the EARL OF SELBORNE, L.C., clearly in his opinion negatives such a conclusion. He said (8 App. Cas. 397):

"But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty. Suppose the case of a belligerent capture: that belligerent capture is as much attributable to 'men-of-war', or to 'enemies', to 'taking at sea', as any seizure by reason of barratry can be attributed to barratry—indeed more directly and immediately. Men-of-war and enemies might or might not have taken the ship, but their coming into contact with the ship, their firing at her, their placing her in a position of jeopardy, is the first step towards 'capture or seizure' which is its consequence. Then the argument, if it is sound as to barratry, would seem to be sound as to 'men-of-war' and 'enemies' also, that because there is an express insurance against those things, therefore a 'capture or seizure', and consequently an attack by 'men-of-war' or by 'enemies', is to be taken out of the warranty."

I do not propose to read the rest of the speech, though counsel for the plaintiffs relied particularly on the last sentence (*ibid.*):

"That appears to me to be equally the case whether remotely it was occasioned by barratry or not . . ."

LORD SELBORNE, L.C., is, as I understand it, stating that to say that seizure was the real cause of the loss is not to deny responsibility in the barratry. So here, putting it the other way round, though it is true that all that followed arose from the civil war, the civil war alone, or the mere allegation of the civil war, could not suffice to make good the claim. The plaintiffs must allege those further acts which, being restraints of princes, are, to my mind, clearly within the plain language of the frustration warranty. Counsel for the plaintiffs further contended, however, that the view for which he argued, viz., that he could base his case exclusively on the civil war risk and disregard the restraint of princes, was supported by the way in which *Carras v. London & Scottish Assurance Corpn., Ltd.* (9) went in this court. In my judgment, the *Carras* case (9) is essentially different from the present. In that case the ship, owing to a peril of the sea, stranded in the Straits of Magellan, the damage done to her being such that it was impossible to save her save by an expenditure of money which would exceed in amount the actual value of the ship when repaired. In the circumstances the ship was abandoned to the hull underwriters and eventually passed to the salvors. The freight to be earned by the voyage on which she was then engaged was lost. It was said that, in so far as that loss of the venture was attributable to the delay, i.e., the loss of time which followed the disaster before the ship was finally repaired (as it eventually was), the shipowners' claim against the underwriters would be barred by the time clause in the policy, but, through their counsel, Sir Robert Aske, they said, in effect: "We are not claiming that we lost this voyage through any delay. The time had nothing to do with it. What (we say) lost us the freight was the circumstance that commercially it was uneconomic to repair the vessel. That is how we base our claim. There was here only one peril, the sea peril, which caused the disaster, and we can and do base our case on that peril without any reference to loss of time." That, the court held, they were entitled to do. The case is, therefore, I think, wholly distinct from the present, where the question may be put in one of two ways: first, are there here two perils, and,

if so, can the plaintiffs choose between one and the other ?, to which the answer, as I have already indicated, is: "No, both must be proved, or, at least, the peril of the restraint". Alternatively (though this is, perhaps, putting the same point in another way), it is not possible for the plaintiffs to put their case save by alleging and proving the particular restraint, which is covered, as I think, by the frustration clause.

- A That being the conclusion at which I have arrived, it is, of course, the end of this appeal, but, as I have already indicated, SELLERS, J., preferred to base his rejection of the plaintiffs' claim on the time clauses and to say that the underwriters were absolved by their operation. So saying, he dealt somewhat briefly with the point which I have thought the most significant and on which I have preferred to base my own judgment, though he clearly indicated that
- B on that point he was, contrary to my opinion, in the plaintiffs' favour. I have already said that the problem to which the time exceptions give rise has not been fully argued before us, but the clauses seem to me, I confess, to raise points of great difficulty, and, having regard to the view which SELLERS, J., expressed and to the argument which we have heard, I think it right that I should make some observations on them. There are here two clauses, but
- C for present purposes (though I am not to be taken as denying possible distinctions between them) I will confine myself to para. 8 of the "Institute Time Clauses (Freight)", which reads:

"Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

- D If the matter were wholly free from authority, I confess at once that I should think this time clause had, in the present circumstances, nothing to do with the case, and that, I apprehend, was the view of BAILHACHE, J., when he came to consider a similar situation in *Russian Bank for Foreign Trade v. Excess Insurance Co.* (10). But the question now is whether, particularly having regard to the decision which BAILHACHE, J., eventually reached in that case, the authorities, as they now stand, do not inevitably produce the result that
- E on this ground also the plaintiffs fail, and, since it was obviously not possible for SELLERS, J., to attempt to overrule the view expressed by BAILHACHE, J., it is, perhaps, natural that he should have based his conclusion on the time clauses. It is open to this court, if it thought right, to express disapproval of the decision in the *Russian Bank* case (10).

- The cases are not numerous and begin with the decision of the House of Lords in
- F *Bensaude v. Thames & Mersey Marine Insurance Co.* (11). In that case, the ship was engaged to convey Portuguese troops and arms to a destination. Through a peril of the sea, she broke her shaft. The damage took so long a time to repair that the Portuguese charterers cancelled the charter, as they were entitled to do by Portuguese law, and, therefore, the freight was lost. It was contended that, since the breaking of the shaft was due to an insured
- G peril, the plaintiffs were entitled to recover. The answer was: No, the loss was due essentially, not to the breaking of the shaft, but to the delay which followed the breaking, as a result of which, by Portuguese law, the charterers were entitled to be released from their contract. I think it useful to refer to the first two sentences of the argument on behalf of the appellants, the ship-owners, which, to my mind, make clear the real point of the decision.

- H "The appellants lost their claim for freight owing to the breaking of the shaft, that is owing to the perils of the sea."

So far, that is right if by it is meant that all that was material followed, or flowed, from the breaking of the shaft. Then the second sentence is:

"The claim is consequent, not upon the loss of time, but upon the disabling of the vessel by perils of the sea, and arose at once before any loss of time had taken place."

It was that part of the argument which the House rejected, observing that the loss did not arise at once on the happening of the accident, but it arose only on and as a consequence of the delay which the break occasioned. As LORD HALSBURY, L.C., put it ([1897] A.C. 611):

"The reason why there was a loss of freight was that the repairs would have taken so long a time as would have defeated the adventure."

Or, as put in the passage most often quoted, from LORD HERSCHELL's speech (ibid., 613):

"The whole basis of the claim of course must be the loss of the subject-matter insured—that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage so that [which I read as meaning "in the sense that"] the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability."

Turnbull, Martin & Co. v. Hull Underwriters' Asscn. (12) was, in essentials, similar. There a fire (which was an insured peril) occurred and damaged the refrigerating plant in a ship, which was engaged to carry meat from an Australian port, and, as a result, the contract was lost. The reason why it was lost was that the repair of the refrigerating machinery took so long a time that, putting it broadly, the meat could not wait, but would have to go in another ship. Then comes the *Russian Bank* case (10) to which I have already alluded. In that case a ship was engaged to sail from Novorossisk in the Black Sea to Falmouth. While she was at Novorossisk the Turkish State entered the first world war against this country and Russia, and the Dardanelles, the exit from the Black Sea, was, accordingly, closed. Having regard to the nature of those circumstances, viz., the consequences of a declaration of war, it followed that the closure was of so long a time or of so indefinite a duration that the restraint which the declaration of war involved was treated as being conclusive, finally making impossible then and there the sailing of the ship to Falmouth. That being the case, BAILHACHE, J., said ([1918] 2 K.B. 127):

"The defendants [the underwriters] have two answers to this. First, they refer to the written clause in the policy reading 'Excluding all claims due to delay', and they say the claim based upon the closing of the Dardanelles is a claim due to delay. I must deal with this answer a little closely, because I confess that I thought during the argument there was very little in the point. I have since read the decision of the House of Lords in *Bensaude v. Thames and Mersey Insurance Co.* (11) two or three times, and I am now satisfied that the point is one that deserves very careful consideration."

The learned judge then referred to the exact terms of the policy and to the facts of the *Bensaude* case (11), and he continued (ibid., 128):

"I confess I cannot distinguish the two cases. In the *Bensaude* case (11) there was a peril insured against, namely, of the sea—the propeller shaft broke. Here there was a peril insured against, namely, restraint of princes—the Dardanelles were closed. In the *Bensaude* case (11) the broken propeller shaft necessitated such delay in the prosecution of the voyage that the adventure was frustrated. Here the restraint of princes did the same thing. In both cases it was delay due to a peril insured against, which caused in one case the total loss of the freight, and in the other the constructive total loss of the cargo. The fact that the subject-matter insured was in the one case freight and in the other case barley seems to me immaterial."

BAILHACHE, J., was, therefore, saying that in principle the two cases are indistinguishable: the logic of the *Bensaude* case (11) governed the *Russian Bank* case (10).

Before I make my own observations, it is, perhaps, convenient to mention the other relevant cases. In *Roura & Fourgas v. Townend* (13) the ship, which was carrying a cargo of coal, was seized by the Germans, and its subsequent fate was that it stranded on the coast of Denmark and was abandoned. It was thereafter recovered, but in the circumstances the judge held that the ship must be treated constructively as a total loss, and for that reason he distinguished the case from the *Russian Bank* case (10). I hope I am saying nothing that I should not say if I add that I read the passage at the end of the judgment of ROCHE, J., as indicating some doubt in his mind of his acceptance of the reasoning of BAILHACHE, J. ROCHE, J., said ([1919] 1 K.B. 196):

"There remains the defence based upon the fact that claims arising from delay were excluded by the express terms of the policy. It was said that it was the lapse of the time during which the *Igotz Mendi* was in German hands that caused the loss, and that such lapse of time was delay within the meaning of the exception. The reasoning of BAILHACHE, J., in *Russian Bank for Foreign Trade v. Excess Insurance Co.* (10) was relied upon in support of this part of the defendants' case. The decision of BAILHACHE, J., in that case has, I understand, been affirmed by the Court of Appeal on a ground having no bearing on the present case. I understand that the Court of Appeal did not consider, or at any rate express any opinion, as to whether they adhered to the view of BAILHACHE, J., upon this point of the delay clause. It is certainly, therefore, undesirable and, in my view, also unnecessary that I should express any opinion on that matter."

In the case before ROCHE, J., the ship was treated as totally lost.

Robertson v. Petros M. Nomikos, Ltd. (14), a later decision of the House of Lords, was, again, a case of total loss. In that case two of the noble Lords expressed some doubt as to the scope of the *Bensaude* decision (11) and, as I take it, the validity of the application of that decision by BAILHACHE, J., for LORD ATKIN said ([1939] 2 All E.R. 724):

"I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view. It may prove that the words 'consequent on loss of time' have received too wide a construction in some of the cases, and I only desire to register a caution that it must not be assumed from the decision in this case that the loss of freight in question was in fact in consequence of loss of time."

LORD THANKERTON associated himself (*ibid.*) with LORD ATKIN's caution. On the other hand, no doubt, treating the *Russian Bank* case (10) as a good authority and, in part, relying on that authority, PORTER, J., in the *Carras* case (9), was able to make this formulation (52 Lloyd, L.R. 39):

"What, then, constitutes a total loss or constructive total loss of freight ?

It may, in my view, be due to three causes: (1) loss of ship, total loss or constructive total loss; (2) loss of cargo, total loss or constructive total loss; and (3) loss of the adventure. Loss of the adventure, however, is a claim consequent on loss of time and is, by cl. 7 of the Institute Clauses, irrecoverable . . ."

In terms the *Russian Bank* case (10) is not, in fact, there mentioned.

I do not think that there is any real, sound, or justifiable basis for distinguishing, on the facts, the present case from the *Russian Bank* case (10). It seems to me that to attempt such a distinction would be to introduce into a subject already complex enough fine distinctions which would only add to

confusion and doubt. On the other hand, to my mind, there are formidable arguments advanced by counsel for the plaintiffs for saying that, in principle and logic, the *Russian Bank* case (10) is essentially different from the *Bensaude* case (11), and for this reason. In the *Bensaude* case (11) and cases of that kind, the peril—the accident, if you will—is complete and distinct from the period of time which thereupon ensues. These are cases, observe, in which the ship or the cargo is physically damaged. The shaft is broken. That, of itself, does not give rise to any claim, since it may be capable of being repaired the next morning, but it is then followed by a definite, ascertained loss of time, and it is that loss of time, distinct from, though consequent on, the accident itself, which gives rise to the loss of the bargain. In a case such as the *Russian Bank* case (10), and in this case, it seems to me that the time element is relevant, not as a consequence of the mishap, but to ascertain correctly the nature and quality of the accident. If, because of the length of time which is likely to subsist during which the peril lasts, it is justifiable to say: “This finally disposes of the bargain”, then the freight is lost immediately on the happening of the insured peril and is attributable solely to that peril. The time element has only been essential in order to estimate correctly the extent of the peril, and, if, in point of fact, the peril ceased a week or two weeks afterwards, that fact would be quite immaterial, provided that the original decision was held, in the circumstances, to have been reasonably justified. That seems to me a real and sensible, even if it be thought to be a fine, distinction between the two classes of case. In the *Robertson* case (14), in the Court of Appeal, MACKINNON, L.J., used language which seems to me to be characteristically happy. In reference to the time clause he said ([1938] 3 All E.R. 258):

“It will bar any claim whenever it is necessary for the assured to assert the lapse of time as one of the facts establishing his cause of action.”

That is, the actual lapse of time as it, in fact, occurs. But, in a case such as the present, the lapse of time is not actual, but estimated, and has gone to make up and establish, as I have said, the nature and quality of the risk. If that is so, then it certainly leads to what, to my mind, is the comforting conclusion that a case such as this and the *Russian Bank* case (10) would be treated as outside the contemplation of the time clause, for, as I said earlier, I am comforted by the view of BAILHACHE, J., that, on a reading of the clause as a matter of English, that is, undoubtedly, one's first impression. But I have already stated that in the circumstances of this case it is not necessary for me to express a final view, and, having regard to the length of time for which the decision of BAILHACHE, J., has stood without adverse comment or criticism—except so far as it can be found in the judgment of ROCHE, J., in *Roura & Fourgas v. Townend* (13) and in the cautions of LORD ATKIN and LORD THANKERTON in *Robertson's* case (14)—I am not prepared to say, and I do not think it would be right for me to say that BAILHACHE, J., was wrong. And if he was not wrong, then I have already stated that, in my judgment, his decision covers the present case. But I venture to express the hope that, if this or another similar case should go to the House of Lords, it may then be thought appropriate for the House to review (as, after all, it best can) the scope of its own decision in the *Bensaude* case (11) and the formulation of LORD PORTER, as a judge of first instance, in the *Carras* case (9). The House may also then consider to what extent the principle of *Mercantile S.S. Co., Ltd. v. Tyser* (15), which was cited to us but was not cited in the *Bensaude* case (11), may not also be relevant. In that case, owing to peril and a consequent lapse of time, a charterer became entitled by his contract to cancel, and he did cancel. The Court of Appeal held that the loss was caused, not by the peril or the length of time, but by the exercise by the charterer of his contractual right. It might have been said that what lost the freight contract in the *Bensaude* case (11) was, not the peril, nor the length of time, but the

Portuguese law which justified the charterer in cancelling the contract. These, however, are matters appropriate for the House to consider, should this or another case find its way to the House.

A There remains only what I have called the quantum point. As I have already said, following the judgment of SELLERS, J., I think it unnecessary to express any concluded view, and I propose to say very little on it. I think the question in this case largely depends, as the other questions have done entirely, on the terms of the policy itself, rather than on the Marine Insurance Act, 1906, s. 68 and s. 70. The point, however, may be simply stated, and is this. If the second, or British Columbia, charter was made in substitution for the first, or salt, charter, in the sense that it would not have been made, and could not have been made and carried out, had the first charter not been lost, then, B subject to any question of figures, *prima facie* it would appear to me that the plaintiffs suffered no loss at all. If, on the other hand, the second charter, or some other similar charter, could have been made and reasonably might have been expected to have been made notwithstanding the performance of the first charter, then, having regard to the terms of the policy, it seems to me that the plaintiffs would be entitled, if they were in other respects right, to say: C "We have lost this particular £12,000 and it is *nihil ad rem* that after the time of its performance had gone by we may or could have anticipated some other freight". My difficulty is that there is no evidence before the court of the circumstances in which the second or British Columbia charter was made, nor any evidence on which a decision might be reached on the likelihood or possibility, given performance of the first charter, of making, within such time as D was left, another bargain of affreightment. In the absence of that evidence it is additionally fortunate, to my mind, that I do not find it necessary to express any concluded view. But I am bound to say that, on the facts as they emerge from the agreed statement of facts, there seem, at least, strong grounds for supposing that, in truth, the British Columbia charter, the making of which E caused the decision of the owners that was communicated to the master on Aug. 9, was in substitution for the first charter and would not have been made (so that its freight would not have been earned) had it not been for the loss or abandonment of the first charter. Subject, as I say, to any question of figures, but since the British Columbia charter appears to have produced more for the owners than the first charter, the result would appear, *prima facie*, to be that there was, in any case, no loss. For the reasons which I have stated, and, particularly, F my conclusion on the frustration point, I think that the learned judge correctly dismissed the action, and I would dismiss the appeal.

G JENKINS, L.J.: I agree that this appeal fails. It is common ground that the plaintiffs, on or about Aug. 8, 1949, abandoned the voyage contemplated by the charterparty of July 16, 1949, and, accordingly, lost the freight payable under that charterparty in the sense that they failed to earn it. But in order to succeed the plaintiffs must further show that their abandonment of the voyage, with the consequent loss of freight, was brought about, not by their own election, but by some peril insured against which made the performance of the voyage for practical purposes impossible and, in effect, left H them no option but to abandon it. The intervention of the Chinese Nationalist destroyers on Aug. 8, 1949, was, clearly, a peril insured against, and, accordingly, any loss of freight demonstrably brought about by such intervention would constitute a valid claim under the policy, unless barred by one or other of the exceptions contained in it. But did such intervention make the performance of the voyage for practical purposes impossible? To secure an affirmative answer to this question, the plaintiffs need not go so far as to establish that in the light of subsequent events it would, in fact, have been impossible to perform the voyage by reason of the peril in question. It would suffice for them

to satisfy the court that the circumstances, as known at the time of abandoning the voyage, were, on reasonable assessment, such as to warrant the inference that performance of the voyage had become, for practical purposes, impossible by reason of the peril in question: see the speech of LORD SUMNER in *Bank Line, Ltd. v. Arthur Capel & Co.* (6), where he said ([1919] A.C. 454):

"The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free."

Nevertheless, if those circumstances were not, on reasonable assessment, sufficient to warrant that inference, it does become material to consider whether the peril in question did, in fact, make the voyage for practical purposes impossible and, if it is not shown to have done so, the plaintiffs cannot succeed merely on the strength of an unwarranted inference of impossibility drawn at the time of abandonment. I would add that, as appears from my use of the expression "for practical purposes impossible", absolute impossibility, inferential or actual, need not be made out. Prevention of performance for such a period, or save at such risk, as to make performance in a business or commercial sense impracticable, would suffice.

These considerations lead me to formulate the primary question in the case as follows: Did the intervention of the Chinese nationalist destroyers on Aug. 8, 1949, and the directions then given by their commanders warrant the inference that the *Atlantic Trader* would, for some unpredictable but probably substantial period of time thereafter, e.g., for the duration of the civil war, be unable to load the required cargo of salt at Taku Bar without serious risk of attack, sinking or seizure at the hands of the nationalist naval forces? In answering this question it has to be borne in mind that the date appointed for the commencement of loading the vessel was Aug. 13, 1949, and that there is evidence to the effect that on and after Aug. 10 a number of vessels loaded cargo at Taku Bar apparently without molestation. This, so far as it goes, suggests that the impediment brought about by the intervention of the nationalist destroyers was, in fact, of a purely transient and temporary character. That does not in itself conclude the question against the plaintiffs, as the reasonable inference from the circumstances, as they appeared on Aug. 8, 1949, might, nevertheless, have been that the impediment was of a permanent character (e.g., that the Nationalists had resolved to institute a blockade of Taku Bar for the duration of the civil war) and, as I have already indicated, the matter must, primarily, be judged by reference to the circumstances as then known. But were those circumstances, duly considered and assessed at that date, such as to warrant that inference? Speaking for myself, I cannot see that they were. The civil war had been in progress for a long time before Aug. 8, 1949, and it does not appear that there had been any previous molestation by the Nationalists of neutral ships trading to and from Taku Bar. The directions given by the nationalist naval forces, as recorded in the agreed statement of facts, seem to me, on the whole, to suggest a temporary warning-off of neutral vessels for their own safety pending particular operations against the communists in the

course of which they might be accidentally damaged, rather than an announcement of something in the nature of a permanent blockade. At best, they were of doubtful import, and, while clearly necessitating a temporary withdrawal on the part of the Atlantic Trader, I do not think that they warranted the immediate conclusion that it would be impracticable for the Atlantic Trader to load salt at Taku Bar on Aug. 13, 1949, or within any reasonable period of time thereafter. The matter standing in this state of uncertainty as regards the Nationalists' intentions, I think it behoved the plaintiffs to wait, at all events for a few days, to see how the situation developed. If they had done so, there is nothing in the evidence to suggest that the vessel could not have loaded in safety at Taku Bar, commencing on the date actually appointed, i.e., Aug. 13, 1949. On the contrary, the evidence as to the activities of other merchant vessels at Taku Bar on and after Aug. 10 suggests, so far as it goes, that the vessel could, in fact, have so loaded. Accordingly, in the view I take, the plaintiffs have failed to show that the circumstances as known on Aug. 8, 1949, were such as to warrant the inference that performance of the voyage had been rendered for practical purposes impossible by the peril in question. Still less have they shown that performance of the voyage would, in fact, have been impossible, the evidence as to the subsequent shipping activities at Taku Bar, so far as it goes, being to the opposite effect. I, therefore, conclude, differing in this respect from the learned judge, that the plaintiffs' case fails on the ground that the facts fall far short of establishing that their abandonment of the voyage, with the consequent loss of freight, was brought about by the intervention of the Nationalist destroyers in the sense above indicated, as distinct from being the product of their own election.

My conclusion on this aspect of the case is, I think, supported by the reasoning in *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (7), and by the following passages from SIR ARNOLD MCNAIR'S *LEGAL EFFECTS OF WAR*, 3rd ed., which appear to me to summarise correctly the law deducible from the authorities. At p. 163 the learned author refers to *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (7) and says:

"The Court of Appeal held that the vendors had been too precipitate, that they should have waited for a reasonable time before treating the contracts as impossible of performance, and that the contracts were not in the event frustrated. WARRINGTON, L.J., in a short and illuminating judgment points out the distinction between illegality which 'arises ipso facto from a state of war' and impossibility which may or may not be the result of an act of the executive. The same necessity of waiting a reasonable time appears from *Geipel v. Smith* (4). This rule does not touch the case where the operative cause is so conclusive as to discharge the contract at once, for in such a case it would be unreasonable to demand delay."

Again, at p. 165, after quoting the passage from LORD SUMNER'S speech in the *Bank Line* case (6), to which I have already referred, the learned author continues:

"It is submitted that the test can be stated as follows: Would a reasonable man in the position of the party alleging frustration, after taking all reasonable steps to ascertain the facts then available, and without snapping at the opportunity of extricating himself from the contract, come to the conclusion that the interruption was of such a character and was likely to last so long that the subsequent performance or further performance of the contract would really amount to the performance of a new contract? If so, there is frustration. And in considering the probability of the duration, he is entitled to assume that in so far as the outbreak or the existence of a war is the cause of the interruption that cause is of uncertain duration. Moreover, the court will not let him suffer for a determination thus reached

if subsequent unexpected events show that he was unduly pessimistic in his forecast."

Finally, at p. 301, the learned author again refers to *Andrew Millar & Co., Ltd. v. Taylor & Co., Ltd.* (7), which, he says,

" . . . illustrates the importance of not being too precipitate in coming to the conclusion that State action has made it impossible to carry out a contract. A party to a contract before making this allegation and acting upon it must wait for a reasonable time in order to see whether the State interference is brief in its operation or likely to be for all practical purposes permanent."

The conclusion which I have reached on the facts makes it strictly unnecessary for me to deal with the question whether the plaintiffs' claim, if otherwise well founded, would not have been barred by the warranty concerning loss or frustration of the voyage or adventure, which is in these terms:

" Nevertheless this policy is warranted free of any claim based upon loss of, or frustration of, any voyage or adventure caused by arrests, restraints or detentions of kings, princes, peoples, usurpers or persons attempting to usurp power."

The defendant underwriter's submission in regard to this warranty is to the effect that, on the assumption that the Nationalist destroyers imposed a prohibition against the use of Taku Bar, this was a restraint of princes within the meaning of the warranty, and, accordingly, that the plaintiffs' claim was based on loss or frustration of the voyage or adventure caused by restraint of princes and, therefore, expressly barred by the warranty in question. The plaintiffs succeeded before the learned judge in meeting this seemingly unanswerable submission by an argument to the effect that, although the prohibition was a restraint of princes, the intervention of the destroyers was also an incident or the consequence of civil war and a warlike operation and, as such, sufficed to support a claim based on one or other of those insured perils irrespective of its character as a restraint of princes. I find it impossible to concur in the learned judge's acceptance of this argument. If the peril giving rise to the loss was a restraint of princes, it seems to me that the warranty clearly operated as a bar to the claim, and that it makes no difference that the restraint was imposed in the course of, or in consequence of, civil war. The only action taken by the destroyers relevant to the claim was the prohibition or restraint on loading at Taku Bar which, for the purposes of this part of the case, they must be assumed to have imposed. Apart from such prohibition or restraint, there was nothing in their activity (whether regarded as civil war or as warlike operations) which could be said to have brought about the loss of freight to which the claim relates, and, so far as I can see, the claim could not be effectively formulated otherwise than by alleging the prohibition or restraint. Clearly, the mere fact of civil war or warlike operations did not make performance of the voyage impossible. The Atlantic Trader had herself made at least one voyage to and from Taku Bar while the civil war was in progress. Moreover, considering the matter purely as one of construction, I see no ground for construing the reference to restraints as meaning restraints imposed otherwise than in the course of or in consequence of civil war or warlike operations. That mode of construction, carried to its logical conclusion, would, for practical purposes, nullify the exception, for restraint of princes would seldom, if ever, occur otherwise than in association with another or others of the various perils insured against. Finally, the question seems to me to be, in any case, concluded against the plaintiffs by the decision of the House of Lords in *Cory v. Burr* (8). As to the time clauses, I do not wish to add anything to what my Lord has said. I also refrain from entering into the difficult question which would have arisen concerning the quantification of the loss if it had been held

recoverable, and I express no opinion about it. I conclude that, for the reasons I have stated, the appeal fails and should be dismissed.

MORRIS, L.J.: I am also of the opinion that this appeal fails. The claim made by the plaintiffs is for loss of freight. They have to prove that there was a loss within the terms of the policy. If they show that there was a loss which is recoverable, then the amount of their loss would have to be assessed, and in that connection cl. 7 of the Institute Time Clauses (Freight) becomes relevant, for it provides:

"Except in respect of a claim arising under cl. 6, the amount recoverable hereunder for any claim for loss of freight shall not exceed the gross freight actually lost."

The claim of the plaintiffs was that there was an actual total loss of freight amounting to £12,420, which was said to result from, or to have been caused by, hostilities, or warlike operations, or civil war, or from some peril insured against. The plaintiffs must show that there was a loss, and that there was a loss caused by a peril insured against. If they do, then it has to be considered whether the underwriters are absolved by any provision in the policy and whether the amount claimed exceeds the recoverable amount.

It is undoubted that the particular freight under the charterparty of July 16, 1949, was lost. The question arises: Was it lost by a peril insured against? That was only so if the loss was caused in one of the ways enumerated. The plaintiffs say that the loss was caused by civil war. The learned judge, after consideration of the facts, held ([1953] 1 All E.R. 898):

"The same facts and circumstances seem to me to establish the three separate risks of civil war, restraint and warlike operations."

Was, then, the loss so caused? This, in my judgment, is a question of fact. The loss was clearly not so caused if all that happened was that the master of the Atlantic Trader was advised, or was required, temporarily to withdraw his ship. If the master and the owners decided voluntarily to abandon the adventure, then there would not be a loss owing to an insured risk. But the learned judge came to the following conclusion (*ibid.*):

"In the light of the known circumstances I do not think a prudent master could have ignored the warnings and the happenings which he himself saw. It would seem that it was not only Taku Bar, but also the northern Chinese ports which had to be left, and he had no reason to think the risks were slight or the interference was only temporary. In those circumstances I find against the defendant's submission that the act of the master at any material stage was voluntary."

I do not find myself prepared to differ from the learned judge in the conclusion which he summarised in the passage which I have just read. The Master of the Rolls, in his judgment, has stated the considerations which weigh in the one direction and in the other. Speaking for myself, I take the view that those considerations weigh more in favour of the action taken by the owners than against their action. The agreed facts record that what was said to the master was: "Leave the northern Chinese ports as soon as possible. If any damage happens the nationalists won't take any responsibility." The reference to the northern China ports suggests something more than a mere local operation, something bigger than a raid or something different from mere temporary operations in a locality. What the master did was to withdraw and proceed slowly and await orders, and he reported the situation in a telegram to the plaintiffs or their agents. That telegram records the facts of the situation with substantial accuracy. From evidence which was before the

learned judge, it appeared that two of the other Panamanian ships were compelled by threats from naval vessels to leave the port with a warning that they were not to return. Those ships did not return. I think there is force in the submission made by counsel for the plaintiffs that it would have been a situation of difficulty for the Atlantic Trader if, in defiance of the warnings or orders given, she had been again found by a Nationalist destroyer in the prohibited area. The list of the sailings into Taku Bar and the takings on of cargo by other ships is not, in my judgment, at all conclusive. We are told that all the ships were liners, and that the majority of them were flying the American flag and were making a stay of short duration in contrast to the time of about ten days which would have been occupied by the Atlantic Trader in taking on her cargo. The new charter was entered into by the plaintiffs within a very short time, but it does not seem to me that, in a case where there has been full discovery of documents, any interpretation of the facts adverse to the owners ought to be drawn from that circumstance. There was, I think, at least the risk that, if the ship had later returned and had been destroyed, the plaintiffs might have been under peril of it being said against them that they had thrown their ship away, whether that suggestion would or would not benefit in litigation those who made it. Though the authorities show that the owners are not entitled to act precipitately, they are not to be criticised merely because subsequent events, or later acquired knowledge, suggest that they took a view which, in retrospect, may have been unduly pessimistic.

On a reasonable view of the facts known at the time and of the future prospects as they might reasonably have been assessed, I do not feel prepared to say that the owners were not entitled to conclude that they were and would be prevented from carrying out the charterparty. It was not, in my judgment, wrong for them to decide that they would not be justified at that time and for a reasonable time ahead in attempting to defy the orders and warnings given. In considering, in this connection, the question of time, I have in mind a passage in the speech of LORD WRIGHT ([1941] 2 All E.R. 184) in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp., Ltd.* (16), where he used the words "within any time consistent with the commercial or practical adventure". I also think that some words used by LORD SUMNER in his speech in the *Bank Line* case (6) are relevant in that connection. He said ([1919] A.C. 454):

"Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there."

For the reasons which I have stated, I do not feel prepared to differ from the conclusion reached by the learned judge on this part of the case.

The underwriters are, however, in my view, relieved from liability by the terms of the clause which has been called the frustration clause. Here the claim of the plaintiffs is that they have suffered the loss of the voyage or adventure which was the subject of the charterparty of July 16, and that such loss was caused by the restraint of kings, princes, peoples, usurpers or persons attempting to usurp power. That is in reality the claim made by the plaintiffs, even though they choose merely to say that the loss was caused by civil war. The purpose of the words in the frustration clause is to exclude a liability otherwise arising. The word "nevertheless" by which the clause is introduced demonstrates that. It seems to me that the only question here is whether these words apply. In my view, they do, and the claim made by the plaintiffs is covered by this exception clause which relieves the underwriters from liability. I will only add that a useful citation was made by counsel for the defendant, in his argument dealing with this part of the case, when he referred to what LORD SUMNER said ([1924] A.C. 467) in *P. Samuel & Co. v. Dumas* (17):

"Where a loss is caused by two perils operating simultaneously at the time

of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates."

I, therefore, think that the claim of the plaintiffs is defeated by the language of the clause with which I have been dealing. This view makes it unnecessary for me to express any concluded opinions in regard to the two remaining
A questions.

I would like to express my concurrence with the observations made by SIR RAYMOND EVERSHED, M.R., in his judgment in dealing with the question of loss of time and the questions which arise on a consideration of the clause:

"Warranted free from any claim consequent on loss of time whether
B arising from a peril of the sea or otherwise."

As my Lord has pointed out, the most recent of the cases dealing with this clause is the *Robertson* case (14), which went to the House of Lords. My Lord has already referred to what was said by MACKINNON, L.J. ([1938] 3 All E.R. 258), when that case was before this court, and I do not cite the passage only because my Lord has already cited it. In the House of Lords LORD ATKIN
C said ([1939] 2 All E.R. 724):

"I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view."

D That observation was concurred in by LORD THANKERTON (ibid.). The question which has to be determined when this clause is under consideration is whether the claim made is consequent on loss of time. The words "whether arising from a peril of the sea or otherwise" do not add anything. They are surplusage, as BAILHACHE, J., pointed out ([1918] 2 K.B. 127) in his judgment in the *Russian Bank* case (10). The precise words of a clause of this nature may differ

E slightly, but probably not significantly. The wording in the *Russian Bank* case (10) was slightly different from that in the *Bensaude* case (11), but BAILHACHE, J., expressly said that he did not think there was any difference in meaning between the two sets of words. In *Roura & Fourgas v. Townend* (13), before ROCHE, J., the wording was "excluding all claims arising from delay". In the *Bensaude* case (11) the facts showed that the claim was consequent on

F the fact that the ship was going to be delayed for a period of time. In the *Russian Bank* case (10) the claim was held to be consequent on the fact that the ship was delayed at Novorossisk because the Dardanelles were closed. In the present case the claim is, not that the ship was delayed or that there was a loss of time, but that a contract was lost, and that, in spite of the fact that there was no loss of time, or no appreciable loss of time, a claim can be made

G for the actual loss of freight. Though I find it unnecessary, as my Lord has found it unnecessary, to express any concluded opinion, if I may treat the matter as an open one, as directed by LORD ATKIN ([1939] 2 All E.R. 724) in the *Robertson* case (14), in the sense that the decided cases can merely be regarded as decisions of fact which are not to trammel a fresh determination of the facts of a new case, then I express the doubt whether on the facts of
H this particular case it could be said that the claim made was one consequent on loss of time.

There is, finally, the question what would have been the amount recoverable had recovery been possible. Again, I do not find it necessary to express any concluded opinion. The policy covers loss of freight, or anticipated freight, or chartered freight, during a three-months period, and as it is a policy of insurance I think that the reminder given by ROCHE, J., in *Roura & Fourgas v. Townend* (13), in a passage cited to us by counsel for the defendant in his

argument, is worthy to be borne in mind. ROCHE, J., referred ([1919] 1 K.B. 196) to the principle that

" . . . an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if before action it has already been made good to him."

The insurance in this case covered a loss of money to be earned in the employment of the ship. Though I express no final opinion, it would seem to me to be contrary to good sense if, in a case where the ship remained intact as a freight-carrying vehicle, no account need be taken nor allowance made in respect of earnings resulting from the employment of the ship under a new and substituted contract referable to a period of time covered by the contract which could not be performed.

Appeal dismissed.

Solicitors: *Ince & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

DIXON v. CITY VENEERING MILLS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), October 23, 1953.]

Costs—Appeal to Court of Appeal—Shorthand transcript of evidence at trial—Copy of part of transcript.

SIR RAYMOND EVERSLED, M.R. (after the court had dismissed the appeal): May I again take this opportunity of drawing the attention of parties to the need for care in deciding whether it is necessary to copy the transcript of the whole of the shorthand note of the evidence. As the appeal has failed, no point here arises, but it was obvious that much more of the transcript was copied than was required. I agree that it is not always easy to decide, but I think that sometimes insufficient attempts are made to conclude whether it would not be enough for part only of the transcript to be copied. The copying as a matter of course of everything which was before the court below wastes money, and on some occasions this court has given indications to the taxing master, asking him to consider whether certain of the costs of this copying should be disallowed. The court may have occasion to say something more hereafter of a more general nature, but I hope that what I have said may penetrate a little further than just among those present at the moment.

F.G.

Re WATKINS, WATKINS *v.* WATKINS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), October 9, 13, 1953.]

Family Provision—"Widow"—*Presumption of death of first husband—Absence for twenty-six years.**Death—Presumption—Absence for twenty-six years.*

A In 1913 the plaintiff, who was then aged twenty-two years, married E., a coalminer, then aged twenty-five years. There were two children of the marriage. E. deserted her in 1921. In 1922 E. returned and asked the plaintiff to receive him back, but she refused and she had not seen or heard from or of him since. The plaintiff remained in touch with E.'s father until his (the father's) death in 1927, and with E.'s sister, who died in 1937, but no mention was made between them of E. In 1948 the plaintiff, being

B under the impression that E. had died in 1942, went through a form of marriage with W., and was described on the certificate of marriage as a widow. In 1951 W. died, and the plaintiff applied under the Inheritance (Family Provision) Act, 1938, s. 1 (1), for reasonable provision to be made for her out of W.'s estate. On the question whether, in the absence of

C direct evidence of E.'s death, the plaintiff could properly be described as the widow and a dependant of W.,

HELD: although the plaintiff had made no inquiries to trace E., having regard to the fact that it appeared that his father, his sister, the plaintiff, and her children, who were the persons most likely to hear of him, had had no word of him since 1922, the plaintiff was entitled, in 1948, to assume that E. was dead, and, therefore, she was free to marry W., whose widow she must now be presumed to be.

D

Observation of ROXBURGH, J., in *Re Peete* ([1952] 2 All E.R. 602), applied.

AS TO PRESUMPTION OF DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 630-634, para. 701; and FOR CASES, see DIGEST, Replacement Vol. 22, pp. 159-166, Nos. 1444-1516.

E Cases referred to:

- (1) *Tweney v. Tweney*, [1946] 1 All E.R. 564; [1946] P. 180; 115 L.J.P. 60; 174 L.T. 335; 2nd Digest Supp.
- (2) *Re Peete*, [1952] 2 All E.R. 599; 3rd Digest Supp.
- (3) *Nepean v. Doe d. Knight*, (1837), 2 M. & W. 894; 7 L.J.Ex. 335; 150 E.R. 1021; 22 Digest, Replacement, 159, 1448.
- (4) *Doe d. George v. Jesson*, (1805), 6 East, 80; 102 E.R. 1217; 22 Digest, Replacement, 157, 1430.
- (5) *Doe d. Lloyd v. Deakin*, (1821), 4 B. & Ald. 433; 106 E.R. 995; 22 Digest, Replacement, 164, 1493.
- (6) *Doe d. France v. Andrews*, (1850), 15 Q.B. 756; 117 E.R. 644; 22 Digest, Replacement, 165, 1504.
- (7) *Prudential Assurance Co. v. Edmonds*, (1877), 2 App. Cas. 487; 22 Digest, Replacement, 22, 36.
- (8) *Re Stollery*, [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; Digest Supp.

H ADJOURNED SUMMONS by which the plaintiff applied under the Inheritance (Family Provision) Act, 1938, s. 1 (1), for reasonable provision to be made for her out of the estate of William Elias Watkins, deceased, whose widow she claimed to be.

The preliminary objection was taken by the defendants that as the plaintiff could not prove that her first husband was dead on the date of her marriage with the testator, she had failed to show that she had capacity to marry him, and, in consequence, was not his widow and so not a dependant within s. 1 (1) of the Act.

J. A. Gibson for the plaintiff.

Rubin for the first and second defendants, the executors of the will of William Elias Watkins.

Goff, Q.C., for the third defendant, one of the residuary legatees.

HARMAN, J.: The plaintiff started proceedings under the Inheritance (Family Provision) Act, 1938, s. 1, on the footing that she was the widow of the testator, and, therefore, was a dependant entitled to apply to the court under the Act. The brother and sisters of the deceased, who were beneficiaries under the will, challenge that statement in limine by saying that the plaintiff is not their brother's widow and, therefore, there is no power to make any provision for her under the Act. A

A great deal of evidence has been filed by the defendants. The first statement which the plaintiff made when she, so to speak, opened her case, B was this:

"I am the widow of the above named William Elias Watkins. I was married to the deceased in 1948. At the time of our marriage I was a widow and the deceased was a bachelor. My former husband, who died in 1942, deserted me in or about 1922 and we never resumed cohabitation." C

That is a plain statement, and in an ordinary case it would be quite sufficient, but it was challenged at once on behalf of the defendants by David Thomas Watkins, the brother of the deceased. He obtained through the solicitors of the plaintiff the death certificate of the man whom the plaintiff had mentioned as being her husband who deserted her in 1922 and died in 1942. That certificate is of a death on Oct. 30, 1942, of one Ernest William Edwards, of 21, Kingsmead Terrace, Bath, a Ministry of Works caretaker, aged sixty-seven years, the informant being a son, N. M. Edwards. In addition to producing that certificate, David Thomas Watkins produced the marriage certificate of the plaintiff, which shows that she was married on Nov. 21, 1913, she being then twenty-two years old and a spinster, to one William Edwards, a bachelor, aged twenty-five years, he being a coalminer, both being inhabitants of Pontypool. There are differences between the description of her husband in the marriage certificate and the man who died at Bath in October, 1942, and it is now conceded by the plaintiff that she was wrong in supposing that the man who died at Bath in 1942 was her husband and that she has no grounds on which she can properly rely to show that her husband did die at Bath, or, indeed, anywhere else, in 1942. That being so, it is said on behalf of the defendants that the plaintiff is not qualified as a dependant at all. D

In answer the plaintiff puts forward the certificate of her marriage to the testator, a marriage celebrated on Jan. 30, 1948, in which she is described as a widow and he as a bachelor. There is no doubt that that is evidence of the marriage, and as such I accept it, on the principle mentioned by PILCHER, J., in *Tweney v. Tweney* (1), in these terms ([1946] 1 All E.R. 565): E

"The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity . . . This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact." F

The certificate is, therefore, *prima facie* sufficient evidence that the plaintiff was the widow which she gave herself out to the registrar to be. G

ROXBURGH, J., had this matter before him in *Re Peete* (2), where the circumstances were these. The plaintiff produced a marriage certificate in which she was described as a widow. That was *prima facie* evidence of the fact that she was in a position to contract a valid marriage, but it appeared when the matter was gone into that she had told the registrar that she was H

a widow because she supposed on hearsay evidence that her husband had been killed in 1916 in an explosion at a factory, three years before the second marriage. ROXBURGH, J., came to the conclusion, when he considered the evidence on which she made that statement, that it was quite unreliable, and, therefore, he said that the statement that she was a widow was of no probative value and she failed to prove that she was a widow, and, therefore, he dismissed her application in limine. At the end of his judgment, he said ([1952] 2 All E.R. 602):

A "That being so, it seems to me that the plaintiff has not proved that she was the widow of the deceased because she has not proved that her first husband died before June 23, 1919, and that she had the capacity to marry the deceased when she went through the ceremony of marriage to him. It occurred to me that, if I was not prepared to accept the evidence of what the sister of the first husband had told the plaintiff, the latter might be able to set up a case that the husband had disappeared over a long period in circumstances in which she would be entitled to presume that he was dead at the time of the marriage, but the evidence does not prove any such case."

B
C So that ROXBURGH, J., was prepared to envisage a case in which, although no direct evidence of the death of the first husband was forthcoming, the court could be asked on the circumstance of the lapse of time alone to assume that the first husband was dead and that the wife was in a position to contract a second marriage.

D In the present case, the lapse of time is considerable. The plaintiff last saw her first husband in 1922, she did not marry the testator till 1948, and there can be very little doubt that, if she had at one time or another made inquiries from all the people who might be supposed to have heard of him, or if there was evidence aliunde about the knowledge of such people, it would be quite easy for me sitting as a jury to assume that the man was dead.

E This is a state of things which has been provided for, from time to time, by statute as a matter of convenience. Since the days of James I it has been the law (see 1 Jac. I, c. 11, s. 2) that when a spouse had not been heard of for more than seven years a man or woman, even though he or she was a deserting party to the marriage, could not be convicted of bigamy if he or she contracted a second marriage. A statute of Charles II [18 & 19 Car. 2, c. 11] provided that where there was a lease for lives, if one of the persons on whose lives the lease depended had not been heard of for more than seven years, it might be assumed that he had died, and often that was the prevailing fact in ejectment actions brought under the fiction of an action by John Doe against the tenant. It has been possible since 1937 for a man or a woman to petition the Divorce Court under the Matrimonial Causes Act, 1937, s. 8, for dissolution of a marriage where the spouse has not been heard of for seven years and there is no reason to suppose that the spouse is alive. Those are all, of course, matters where convenience in conducting human affairs has brought about statutory interference. It has led to a view that there is a kind of magic in the period of seven years, and, indeed, one does find indications of statements that for seven years a man will be presumed to be alive, though he is not heard of, but at the end of that time that presumption ceases, and a presumption arises that the man is dead. I am asked by counsel for the third defendant to say that, although it is quite true that, during H the first seven years of absence, one presumes a man to be alive, after that period he is not presumed to be dead, unless there are circumstances justifying that assumption. What is there here? The first husband was a miner. He was in the army and, after the first war, served in 1920 in Ireland. He appears not to have set up any matrimonial home in a regular way with the plaintiff. They had two children, one of whom was born in 1913 and the other in 1919. The husband deserted the plaintiff for another woman in 1921. He appears to have returned one day in 1922 and asked the plaintiff to take

him back, saying, according to her (and I have no reason to doubt this) that, if she would not, she would never see him again. She would not have him back, and she has never seen him since. Counsel for the third defendant says that there is no reason to suppose that he is dead, because he is only sixty-five years old and he had a trade which takes men all over the world, that of a miner. Moreover, counsel argues, there is good reason for the husband's silence, because he has not maintained the plaintiff since he left her. Nor do his children know anything about the matter. They have both given evidence.

On the other side, there is this very long period of time. Also, the plaintiff kept in touch with her husband's father until his death in 1927, and he, apparently, had no communication with his son. She also from time to time had some communication with her husband's sister, who died in 1937, and, says she, no mention was ever made between them of the husband. I am asked to infer from that, and I think I can, that they both assumed that he was dead, or, at any rate, they neither of them ever heard anything of him. She says that he had two brothers, but she never kept in touch with them. The truth of the matter is that so long as the plaintiff saw no prospect of re-marrying she did not trouble herself very much about the matter. She heard from some relation of her former husband in 1942 about his being dead, and, when she wished to persuade the testator that she was in a position to marry him, she bethought herself of that rumour, which was no more than that, and obtained this certificate, which satisfied her and, apparently, him.

What, then, ought I to assume? Supposing I was charging a jury here, should I have to tell them that they were not at liberty to assume from this that the plaintiff's first husband was dead by 1943, or should I have to tell them that the lapse of time was such that they were entitled to suppose him dead?

There is a good deal of authority on both sides on this point. *Nepean v. Doe d. Knight* (3) was an appeal in an ejectment action, and the point decided was that, though there was a presumption after a certain lapse of time that a man was dead, there was no presumption that he died at any particular moment in that period, and, therefore, the actual point decided is not directly material. The case came before the Exchequer Chamber (in Error), and LORD DENMAN, C.J., gave the court's judgment, which was a considered one, and said (2 M. & W. 912):

"The doctrine . . . is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years . . . After fully considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct . . . It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive."

There the presumption, therefore, is stated as arising simply from the lapse of the seven years.

Much to the same effect is *Doe d. George v. Jesson* (4). This was before the Real Property Limitation Act, 1833. The judgment was given by LORD ELLENBOROUGH, C.J., in these terms (6 East, 85):

"As to the period when the brother might be supposed to have died, according to the statute [18 & 19 Car. 2, c. 11] with respect to lease dependent on lives, and also according to the Statute of Bigamy (1 Jac. 1, c. 11), the presumption of the duration of life, with respect to persons of whom no

account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore in the absence of all other evidence to show that he was living at a later period there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him."

- A There, again, it is suggested, though not stated in so many words, that presumption of life is for the first seven years, but drops at that point, and another presumption replaces it, namely, that the man is dead.

In *Doe d. Lloyd v. Deakin* (5) the court cited LORD ELLENBOROUGH'S decision in *Doe d. George v. Jesson* (4), and agreed with it; but there the person not heard of was the tenant of certain lands, and, therefore, there was good

- B reason to suppose that he would come and collect the rents or have something done with them, and, as he had not done so for seven years, it was natural to presume that he was dead.

It is said, on the other hand, that mere lapse of time without anything more is of no effect at all, and for that two cases are relied on. *Doe d. France v. Andrews* (6) was an ejectment action in a case of a lease for three lives, two of

- C the cestui que vies (sic) being dead and the third being someone about whom nothing whatever was known. The headnote states:

"No witness was called who had ever known the third; and, except the mention of him in the lease (which described him as aged ten years), there was no proof that he had ever existed. No evidence of search for him was given. Held that, to raise the presumption of his death, there should have been evidence that he had not been heard of by those persons who would naturally have heard of him had he been alive, or that search had been ineffectually made to find such a person; and that the mere fact that no witness called had heard of him was not sufficient."

D

I think that fairly sums up the result of the case. I find PATESON, J., saying this (*ibid.*, 760):

E

"The mere lapse of time does not raise a presumption of death, unless you go farther and show that the person has been absent, and not heard of by those who would have heard of him if he had returned."

There no inquiries had been made.

F

Lastly, in *Prudential Assurance Co. v. Edmonds* (7), a case of a policy, LORD BLACKBURN refers to *Doe d. France v. Andrews* (6), and says (2 App. Cas. 508):

"... he [the plaintiff] relied upon the rule of law which is generally laid down in something like these terms; if a man has not been heard of for seven years that raises the presumption that he is dead. It is generally so enunciated. I do not say that that is the correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think, having regard both to the reason of the thing and the decisions, we must take 'not being heard of' in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, 'I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years'. But that would not be enough to raise a presumption that he was dead, because, if ever so much alive, those people might not have heard of him. My Lords, it appears from the case of *Doe d. France v. Andrews* (6) that it is necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man amongst those who, if he was alive, would be likely to hear of him. ... In like manner, in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those

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H

who, if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing of him as would raise the presumption that he was dead."

Therefore, the criticism that can be raised against the plaintiff's evidence is that no adequate search has been made. She has not made any inquiries so far as we know. When the brothers of the first husband were alive, who are now said to be dead, she did not ask them. On the other hand, she is the wife, or was the wife, and the nearest relations are her two sons. There was a father and there was a sister, and none of those people had ever heard of this man since 1922, and, in my judgment, a jury would be entitled at this distance of time to presume that the man was dead by 1948. It would be, I think, a sorry state of things if for criminal purposes a jury might assume a man was dead and for the purposes of the Divorce Court a similar presumption might be made, but in a Chancery Court no such presumption could be made. In my judgment, the plaintiff was entitled by 1948 to assume that she was free to marry and describe herself as a widow, and the presumption is that she was right. Consequently, I hold that she is a dependant of the testator and entitled to raise this action.

[HIS LORDSHIP considered the facts. The testator had bequeathed the plaintiff an annuity of £2 per week out of his estate of about £15,000. HIS LORDSHIP ordered that the plaintiff's annuity be doubled.]

Application allowed.

Solicitors: *Gibson & Weldon*, agents for *Everett & Tomlin*, Pontypool (for the plaintiff); *Drury, Hopgood & Co.*, agents for *Gabb, Price & Fisher*, Abergavenny (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

WARREN v. KEEN.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 8, 9, 1953.]

Landlord and Tenant—Repair—Weekly tenancy—Extent of obligation of weekly tenant to repair.

In an action by a landlord to recover from a weekly tenant a sum expended on repairs to the demised premises the landlord alleged that it was an implied term of the tenancy that the tenant would use the premises in a tenantlike manner, would keep them wind and water tight, and would effect fair and tenantlike repairs to them. The landlord, in particulars, alleged defects in the premises which included damp and stained plaster on internal walls, a cracked and broken external wall, window-sills lacking weather-proof joints and with decayed paintwork, and a leak in the hot-water boiler.

HELD: the defects particularised were due to fair wear and tear for which a weekly tenant was not liable, his only obligation being to use the premises in a tenantlike manner, and, therefore, the landlord was not entitled to recover.

Quaere as to the scope and meaning of the obligation stated by SWINFEN EADY, L.J., in *Wedd v. Porter* ([1916] 2 K.B. 100) to keep premises "wind and water tight".

AS TO COVENANTS IMPLIED IN A WEEKLY TENANCY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 145, 146, paras. 156, 157.

Cases referred to:

- (1) *Wedd v. Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243; 31 Digest, Replacement, 59, 2157.

- (2) *Auworth v. Johnson*, (1832), 5 C. & P. 239; 172 E.R. 955; 31 Digest, Replacement, 395, 5227.
- (3) *Horsefall v. Mather*, (1815), Holt, N.P. 7; 171 E.R. 141; 31 Digest, Replacement, 349, 4798.
- (4) *Marsden v. Edward Heyes, Ltd.*, [1927] 2 K.B. 1; 96 L.J.K.B. 410; 136 L.T. 593; 31 Digest, Replacement, 45, 2044.
- (5) *Ferguson v. Anon.*, (1797), 2 Esp. 590; 170 E.R. 465; 31 Digest, Replacement, 395, 5225.
- (6) *Shrewsbury's (Countess) Case*, (1600), 5 Co. Rep. 13b; 77 E.R. 68; 31 Digest, Replacement, 41, 1997.

APPEAL by the defendant from an order of His Honour JUDGE TUDOR REES at Brentford County Court, dated June 12, 1953.

The plaintiff, the landlord, let premises to the defendant on a weekly tenancy. In this action by the landlord to recover from the defendant £23 5s., being the cost of certain repairs to the premises, she alleged in the particulars of claim that

"It was an implied term of the said tenancy that the defendant would use the said premises in a tenantlike manner, would keep the same wind and water tight, and would make fair and tenantable repairs thereto. The defendant in breach of the said implied term has failed to use the said premises in a tenantlike manner, has not kept the same wind and water tight, and has not made fair and tenantlike repairs thereto."

The particulars of disrepair alleged were as follows:

"(a) First floor front room (large). Walls—plaster damp—stained below window opening. (b) First floor front room (small). Walls—plaster damp—stained and perished below window opening. (c) External. Front wall—rendering cracked and broken in parts. Front floor window opening—sills not weatherproof, joints and paintwork decayed. (d) Leak in hot-water boiler."

Then followed an alternative allegation of waste. The tenant denied that he was under any liability in respect of the alleged failure to repair.

It appeared that by reason of the disrepair of the premises the borough of Heston and Isleworth served a notice on the landlord requiring her to remedy the defects. She did so and incurred the expense above stated. In the present action the county court judge held that there was an implied covenant in the tenancy that the tenant would keep the premises in a good and tenantable condition and do such repairs as were necessary to that end. He held further that the tenant was in breach of that implied covenant, that he had allowed the premises to deteriorate, and that he was liable to the landlord in respect of the amount claimed.

Croome for the tenant.
R. B. Willis for the landlord.

SOMERVELL, L.J., stated the facts and continued: Counsel for the landlord did not seek to support the wide form in which the learned judge set out the obligation on the tenant which he found to be implied. That would, in fact, mean that a weekly tenant was under a general covenant to keep, and, perhaps, to put and keep, in repair. No authority was cited for such a proposition, and in principle I am clear that no such implied obligation rests on a weekly tenant. It was suggested that the words in the note were wider than those used at the hearing.

The case for the landlord before us was put in the following way. It was alleged that a tenant from year to year is under an obligation not only to use and cultivate the land or premises in a husbandlike or tenantlike manner, but also to keep the buildings wind and water tight. That will be found stated in the

judgment of SWINFEN EADY, L.J., in *Wedd v. Porter* (1) ([1916] 2 K.B. 100) and in various other cases and in text-books. On the other hand, the researches of counsel have failed to discover any case which throws light on the scope of that obligation, in other words, any case where a tenant has been held liable for failure to keep wind and water tight where the damage would not be covered by the obligation not to commit voluntary waste or the obligation to use the premises and land in a tenantlike manner. So, whether there is an additional obligation of a limited kind as to repairs in the case of a tenant from year to year remains in a state of, at any rate, some doubt.

In *Auworth v. Johnson* (2) LORD TENTERDEN, C.J., in an interlocutory observation, said (5 C. & P. 240):

"A tenant from year to year is to keep the premises in a little order . . .", and then he said that the tenant had done nothing. When he summed up to the jury (*ibid.*, 241) he again used the words the meaning of which is obscure,

". . . to keep the house wind and water tight . . ."

The argument is, first, that that obligation to keep wind and water tight applies to a weekly tenant as well as to a tenant from year to year, and then, assuming that it does, the next submission is that the matters set out in the particulars of claim come within the covenant to keep the buildings wind and water tight. I think that submission fails at both stages. If there be a, so far indefinite, obligation on a tenant from year to year to do certain minor repairs necessary to keep premises wind and water tight—and I will assume without deciding the point that there is some such limited obligation—I see no ground in principle for applying that to a tenancy from week to week. It is quite true that under the Rent Restrictions Acts many tenants from week to week are enabled to remain in premises year after year, and the landlord may find great difficulty in fulfilling the conditions which have to be fulfilled under those Acts if he is to get possession. But that consideration does not, to my mind, affect the question of what are the implications of a weekly tenancy. It seems to me that it would be absurd to suggest that a weekly tenant is under an obligation to repair. It is difficult to think of repairs which would not in themselves cost more than the weekly rent in many cases and yet it is suggested that the tenant is impliedly liable to expend that money although his right to the premises may be terminated in a week's time.

In the second place, I am myself clear that the matters particularised in the particulars of claim would not fall within the words "wind and water tight". It seems to me clear that the damage here was due to decay of the walls, and there is no suggestion that that was due to any other cause than fair wear and tear. There is no suggestion that the tenant started knocking the walls about or anything of that sort, but in the course of time they had become cracked and presumably required re-pointing, because water was seeping in through the cracks which had appeared. The same would appear to have applied to the wood of the window-sills. That may have been due, not only to age, but also to the positive failure to have the external woodwork re-painted every three years, or whatever is the normal period. Those would both be matters which, in my opinion, could not on any construction come under this formula of keeping the building wind and water tight having regard to the principles which are to be found in the cases as to the implied liability of a tenant from year to year. Therefore, for these reasons, I think this appeal succeeds and the claim made by the landlord fails.

DENNING, L.J.: Apart from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the premises in a husbandlike, or what is the same thing, a tenantlike, manner. That is how it was put by SIR VICARY GIBBS, C.J., in *Horsefall v. Mather* (3) (Holt N.P. 9) and by SCRUTTON and ATKIN, L.J.J., in *Marsden v.*

Edward Heyes, Ltd. (4) ([1927] 2 K.B. 7, 8). But what does it mean—"to use the premises in a tenantlike manner"? It can, I think, best be shown by some illustrations. The tenant must take proper care of the premises. He must, if he is going away for the winter, turn off the water and empty the boiler; he must clean the chimneys, when necessary, and also the windows; he must mend the electric light when it fuses; he must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable

A tenant would do. In addition, he must not, of course, damage the house wilfully or negligently; and he must see that his family and guests do not damage it—if they do, he must repair it. But, apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, the tenant is not liable to repair it.

- In the present case the landlord sought to put on the tenant a higher obligation.
- B He said that the duty of the tenant was to keep the premises wind and water tight and to effect fair and tenantable repairs thereto. That seems to be based on HILL AND REDMAN'S LAW OF LANDLORD AND TENANT, 11th ed., p. 186. I do not think that is a correct statement of the obligation. Take the first branch, "to keep the premises wind and water tight". LORD TENTERDEN in one or two cases at nisi prius used that expression, and it was followed by the Court of Appeal
- C in *Wedd v. Porter* (1), but it is very difficult to know what "wind and water tight" means. I asked counsel whether there was any case to be found in the books where a tenant had been found liable for breach of that obligation because I wanted to see what sort of thing it had been held to cover. But no such case was to be found. In its absence, I think that the expression "wind and water tight" is of doubtful value and should be avoided. It is better to keep to the
- D simple obligation "to use the premises in a tenantlike manner". Take the second branch, "to make fair and tenantable repairs". LORD KENYON used the expression in *Ferguson v. Anon.* (5) (2 Esp. 590), which is reported only by Espinasse, whose reports were notoriously defective. If you read the whole sentence used by LORD KENYON, however, it is clear that he was referring only to cases where a tenant does damage himself, such as breaking the windows or the
- E doors. Then, of course, he must repair them. The sentence used by LORD KENYON was explained by BANKES, L.J., in *Marsden v. Edward Heyes, Ltd.* (4) ([1927] 2 K.B. 6), by saying that if a tenant commits waste—that, is if he commits voluntary waste by doing damage himself—he must do such repairs to the premises as will enable them to exclude wind and water. So explained, it does not support the proposition stated in HILL AND REDMAN at p. 186.
- F It was suggested by counsel for the landlord that an action lies against a weekly tenant for permissive waste. I do not think that is so. It has been held not to lie against a tenant at will: see the *Countess of Shrewsbury's Case* (6); and, in my opinion, it does not lie against a weekly tenant. In my judgment, the only obligation on a weekly tenant is to use the premises in a tenantlike manner. That does not cover the dampness and other defects alleged in the particulars
- G of claim. The appeal should be allowed accordingly.

ROMER, L.J.: I also agree, and can express in a very few words why I think the learned judge came to a wrong conclusion in this case. He is reported (although inaccurately as we were told) to have said in his judgment as to the original contract of tenancy, which was a weekly tenancy,

- H "There was an implied covenant that the tenant would keep the premises in a good and tenantable condition and do such repairs as were necessary to this end."

That language (had it been used) would be attributing to a weekly tenant a degree of liability in the matter of repairs which is higher than that imposed by the law on tenants from year to year, as has been shown by SWINFEN EADY, L.J., in *Wedd v. Porter* (1) and BANKES, L.J., in *Marsden v. Edward Heyes, Ltd.* (4), and in

other cases to which my brethren have referred. Accordingly, counsel for the landlord is unable to support the degree of liability which the learned judge was reported to have laid down. From the cases I have mentioned I gather that, whatever may be the precise extent of the liability of a tenant from year to year, he is not liable for deterioration due to fair wear and tear, and, if so, a fortiori, a weekly tenant is not so liable. Counsel then submitted (and he has authority to support him) that a yearly tenant is at all events liable to keep the demised premises wind and water tight, whatever that may mean, and that this obligation is also imposed on a weekly tenant. There is no authority supporting that proposition so far as weekly tenants are concerned, and I, for my part, find difficulty in accepting it. But, at all events, it is only necessary for me to say in the present case that, in my opinion, the deterioration of which the landlord complains and on which she is suing in these proceedings is deterioration due to fair wear and tear or failure to paint, or both, and a weekly tenant is certainly not answerable for deterioration of that character. Therefore, the learned judge, in my opinion, was in error, because, whatever the liability of a weekly tenant may be, it does not extend to the damage which is complained of in this case—which, as I say, is due to ordinary deterioration by wear and tear. I, accordingly, agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Merton Jones, Lewsey & Jefferies* (for the tenant); *Pengelly & Co.* (for the landlord).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

BOARLAND (INSPECTOR OF TAXES) *v.* KRAMAT PULAI, LTD.
INLAND REVENUE COMMISSIONERS *v.* KRAMAT PULAI, LTD.
INLAND REVENUE COMMISSIONERS *v.* SOUTHERN MALAYAN
TIN DREDGING, LTD.

INLAND REVENUE COMMISSIONERS *v.* MALAYAN TIN
DREDGING, LTD.

[CHANCERY DIVISION (Danckwerts, J.), October 14, 15, 1953.]

Income Tax—Deduction against profits—Expenditure on company chairman's "supplementary remarks" at annual meeting—Political objects—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a).

Directors of three companies engaged in tin mining in Malaya incurred expenditure on printing and circulating to shareholders and members of Parliament and publishing in "The Times" and the "Financial Times", a pamphlet containing supplementary remarks of the chairman of the companies at their annual general meetings in December, 1949. The pamphlet was an attack throughout on the policy and acts of the Socialist government, addressed to the shareholders by the chairman "as an independent Englishman who, like yourselves, has the interests of our country, commonwealth and empire, including Malaya, very much at heart". Passages included in the pamphlet were: "Socialist propaganda preached class hatred and disunity", and that certain facts "should be rammed home to the younger generation so that they can be informed about these synthetic patriots, before they record their votes at the coming general election". Evidence was given by the chairman's successor that: (i) the directors had for some years been of the opinion that the vital political and economic factors which had a predominant bearing on the success or failure of tin mining operations in Malaya should in the interests of the [companies] be published to shareholders and to others; (ii) the directors disagreed profoundly with the policy of the Socialist government to which they attributed most of the difficulties under which

the companies were operating; (iii) they did not have in mind the fact that a general election was forthcoming; and had the witness thought the document was in the nature of a political pamphlet for the purpose of influencing the election he personally would have had nothing to do with it". The general commissioners held that the expenditure on the pamphlet was a deductible expense in arriving at the profits of the companies for income tax and profits tax purposes.

A HELD: whether on the evidence the expenditure on printing, publishing and circulating the pamphlet was "money wholly and exclusively laid out or expended for the purposes of the trade" within the meaning of r. 3 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, was a question of law, and, on consideration of that question, the expenditure was not solely incurred with that object, and was, therefore, not deductible.

B AS TO DEDUCTIONS FROM THE PROFITS OF TRADE UNDER CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, see HALSBURY, Hailsham Edn., Vol. 17, pp. 309-327 and 371, paras. 149-161 and 177.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 3 (a), see HALSBURY'S STATUTES, Second Edn., Vol. 12, C p. 156; and FOR CASES, see DIGEST, Vol. 28, pp. 42-49, Nos. 215-252.

Cases referred to:

- (1) *Morgan v. Tate & Lyle, Ltd.*, [1953] 2 All E.R. 162; [1953] Ch. 601.
- (2) *Strong & Co., Ltd. v. Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 94 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (3) *Union Cold Storage Co., Ltd. v. Jones*, (1923), 129 L.T. 512; 8 Tax Cas. 725; 28 Digest 53, 270.
- (4) *Atherton v. British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421; 94 L.J.K.B. 319; 132 L.T. 288; *affd.* H.L., *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; 28 Digest 52, 264.
- (5) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; 28 Digest 56, 287.
- (6) *Mitchell v. Noble (B.W.), Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; *sub nom. Noble (B.W.), Ltd. v. Mitchell, Mitchell v. Noble (B.W.), Ltd.*, 11 Tax Cas. 372; Digest Supp.
- (7) *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412; [1941] 1 K.B. 111; 110 L.J.K.B. 705; 23 Tax Cas. 597; 2nd Digest Supp.
- (8) *Cooke v. Quick Shoe Repair Service*, (1949), 30 Tax Cas. 460; 2nd Digest Supp.
- (9) *Inland Revenue Comrs. v. Dowlall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 3rd Digest Supp.
- (10) *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.
- (11) *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 6 Tax Cas. 477; 28 Digest 52, 262.

H CASES STATED by the General Commissioners of Income Tax for the City of London under the Income Tax Act, 1952, s. 64, and the Finance Act, 1937, sched. V, Part II, para. 4. The respondent company in the first two appeals appealed against assessments to income tax made on it under Case I of sched. D to the Income Tax Act, 1918, for the year ending Apr. 5, 1951, and to profits tax for the chargeable accounting periods of six months each ending on Sept. 30, 1949, and on Mar. 31, 1950, respectively. The respondent companies in the third and fourth appeals appealed against two assessments to profits tax made

on each of them for the chargeable accounting periods of three months ending on Sept. 30, 1949, and of nine months ending on June 30, 1950. The question for determination was whether each company's share of the total cost (£2,551) incurred in printing, publishing and circulating a document described as "chairman's supplementary remarks at annual general meetings of the companies on Dec. 15, 1949", was an allowable deduction under r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, in computing its profits for profits tax purposes and in the case of the first appeal for income tax purposes. Under s. 20 (1) of the Finance Act, 1937, which related by reference to profits tax, profits arising from a trade or business in each chargeable accounting period were required to be computed on income tax principles as adapted in accordance with the provisions of sched. IV. The three companies together constituted the "Malayan group", one of the two principal groups of tin companies operating in Malaya, and they were concerned with the winning and disposal of tin ore in Malaya. Each had its own shareholders, the shares being widely held by the public, very largely in small denominations. The interests of the three companies were substantially identical, their chairman and directors were usually the same and their annual meetings were held concurrently. Following their custom since the war, the companies issued to shareholders at the annual general meetings on Dec. 15, 1949, the chairman's "supplementary remarks" relating to political and economic factors affecting the companies and explaining to shareholders the political and economic issues involved. In order that as many people as possible might be persuaded to read it and so to canvass public opinion, and, if possible, procure support in obtaining from the British and Malayan governments the political and economic changes thought by the directors to be required in the interests of the company's business, the "supplementary remarks" were subsequently printed and published in "The Times" and the "Financial Times" and were circulated to members of both Houses of Parliament.

The companies contended: (i) that the "supplementary remarks" were in fact part of the companies' annual reports and were published solely for the advantage of their trade, to protect their assets and preserve their goodwill, and so enable them to carry on and earn profits; (ii) that the costs of the publication were wholly and exclusively laid out for the purposes of the trade, their object being to preserve the companies' businesses and assets; and (iii) that the costs were, therefore, an allowable deduction from profits for income tax and profits tax purposes under r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. For the Crown it was contended: (i) that the contents of the "supplementary remarks" showed that it was a document of a general political nature, bearing little or no direct relation to the companies' trade, and that it was printed, published and circulated with a view to the forthcoming general election; (ii) that the costs of such political propaganda could not be regarded as expenses laid out in order to enable the companies to carry on and earn profits, and were not, therefore, money laid out or expended for the purposes of the companies' trade within r. 3 (a); (iii) that, if the costs were money so laid out and expended, they were also incurred for other purposes, e.g., (a) general political propaganda, and (b) the securing of lower taxation, and were, therefore, not "wholly and exclusively" laid out or expended within the meaning of the rule. The costs were, therefore, not allowable as an expense for income tax and profits tax purposes. The commissioners found that the sum was money wholly and exclusively laid out for the purposes of the companies' trade and was an admissible deduction. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

Borneman, Q.C., and Beattie for the companies.

DANCKWERTS, J.: This is an appeal from a decision of the Commissioners for the General Purposes of Income Tax for the city of London, and the question which arises is concerned with certain expenses of three Malayan tin mining companies mining tin in Malaya, or, for the purpose of this (the first) case, one of those companies. The expenses are the expenses of printing, publishing and circulating a pamphlet containing the chairman's supplementary remarks made at the annual general meetings of the three companies on Dec. 15, 1949. The relevant statutory provision laying down what expenses may be deducted for the purposes of assessing income tax on profits of the taxpayer—in this case the company—is to be found in r. 3 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. The rule provides:

“In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . .”

It is expressed in a curious negative manner, but the result is that, in order to be deductible, any expenses the deduction of which is claimed must be wholly and exclusively laid out or expended for the purposes of the trade of this company.

That phrase in that rule has received judicial interpretation in a large number of cases, and the law is very conveniently summarised, after a full examination of the cases, by JENKINS, L.J., in *Morgan v. Tate & Lyle, Ltd.* (1). He sets out his conclusions as follows (ante, p. 181):

“The principles which emerge seem to be these: (i) the prohibition against the deduction of disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade means that, in order to be deductible, a disbursement or expense must be laid out or expended wholly and exclusively for the purpose of enabling the trader concerned to carry on and earn profits in the trade: LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (2) ([1906] A.C. 453); but (ii) notwithstanding LORD DAVEY's additional observation to the effect that the disbursement must be made ‘for the purpose of earning the profits’, LORD LOREBURN's observation in the same case (ibid., 452) to the effect that disbursements to be deductible must be ‘really incidental to the trade itself’, and ROWLATT, J.'s reference in *Union Cold Storage Co., Ltd. v. Jones* (3) (129 L.T. 516) to ‘bringing grist to the mill’, it is clear that disbursements to be deductible need not be directly or immediately productive of profit. ‘. . . a sum of money expended . . . voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade . . .’ per VISCOUNT CAVE, L.C., in *Atherton's case* (4) ([1926] A.C. 212); and (iii) payments made for the purpose of preserving the assets or goodwill of a business, and thereby safeguarding its earning capacity, and payments for protecting the trader from losses in his trade or from being deprived of the means of carrying it on, may be wholly and exclusively laid out for the purposes of the trade, just as much as payments made for the immediate purpose of producing or increasing profits: compare the fire insurance premiums in *Usher's Wiltshire Brewery case* (5), the payment to the retiring director in *Mitchell v. B. W. Noble, Ltd.* (6), the legal expenses in the *Borax case* (7), and the discharge of the liabilities of the predecessor in business in the *Quick Shoe Repair case* (8); but (iv) payments made out of profits when earned (such as the Irish tax in *Dowdall, O'Mahoney & Co., Ltd.* (9)), or in relation to the determination of a liability to tax on those profits (as in *Smith's Potato Estates* (10)), or (by parity of reasoning) payments made with a view to preventing the transfer from one person or

class of persons to another of the right to receive, through the trader, the profits when earned, are not made for the purposes of the trade within the meaning of the statutory prohibition."

The last case does not really affect the present appeal. In *Morgan v. Tate & Lyle, Ltd.* (1) the question was whether it was permissible to deduct the expenses incurred by a sugar refining company in launching a political campaign for the purpose of endeavouring if possible to prevent the nationalisation of the sugar industry. It was held that such an expense did fall within the terms of the rule, and, therefore, was deductible from the profits of the company for the purposes of tax. That actual decision is a long way from the facts of the present case, but the principles which were considered by the Court of Appeal are material to the point which I have to decide. The decision of the Court of Appeal, I understand, is under appeal to the House of Lords, but for the purpose of my judgment I must take the law as being correctly laid down by the majority of the court (SINGLETON, L.J., dissented). A

The expenses which I have to consider are a share amounting to £193 of printing, publishing and circulating the chairman's supplementary remarks at the annual general meeting. The pamphlet is in effect an attack throughout on the policy and acts of the Socialist government, which was in office after 1945 and also at the date of the annual meeting. The author of the remarks does not state that he is addressing the shareholders as chairman of their companies, but says: C

"I therefore address the following supplementary remarks to you, not as a politician, but as an independent Englishman, who, like yourselves, has the interests of our country, commonwealth and empire, including Malaya, very much at heart." D

He discusses a lot of things which he considers to be mistaken or foolish acts of policy on the part of the Socialist government, and it is only incidentally, as it seems to me, that he discusses the effects of Socialist policy on the operations of the tin companies concerned at all. At p. 7, col. 2, after quoting an article in "The Recorder" and the quotation "Socialist propaganda preached class hatred and disunity", he says: E

"'These are not pretty words', says 'Brutus', 'but they are true.'

Well, of course they are, and they should be rammed home to the younger generation, so that they can be informed about these synthetic patriots, before they record their votes at the coming general election."

It seems to me that, at any rate on its face, a speech of that kind cannot possibly fall within the limits of a rule which requires the expenditure in question to be wholly and exclusively for the purpose of the trade of the company. F

But it is suggested that, however unreasonable I may think the conclusion reached by the commissioners, the question in issue is a question of fact, and I am bound by their decision and may not give effect to the conclusion which I would have reached myself on the evidence given before the commissioners, unless there was no evidence on which they could have reached that conclusion. G
In answer to that, the Solicitor-General has referred me to the observations of LORD REID in *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (9) ([1952] 1 All E.R. 535):

"It was argued for the respondents that this is a question of fact, and that, therefore, the decision of the commissioners on this matter is final in their favour. I cannot accept this argument. If certain payments made by a taxpayer are of such a kind that they are capable in law of being regarded as coming within the exception in r. 3 (a), then, no doubt, it is for the commissioners to determine whether the circumstances of the case are such that in fact they do come within that exception. But it is, in my judgment, a question of law whether particular payments are H

of a nature capable of coming within the exception, and that is the issue here."

A Counsel for the company says that he completely accepts the principles laid down in that quotation, but if it is possible for the expenses in question to come within the rule, then it is a question of fact whether they do come within the rule, as, indeed, LORD REID says. And he says that, once the conclusion is reached that the expenses may come within the rule, the decision of the commissioners on the evidence before them is binding and cannot be upset by me, if there was any evidence at all on which they could have come to that conclusion. In support of that, he referred me to *Smith v. Incorporated Council of Law Reporting for England & Wales* (11). That case concerned a payment made to a law reporter on his retirement, a very different point from that which I have to consider. Though the reporter was in no way entitled to a retiring gratuity, such payments had been habitually made by the Council of Law Reporting because they improved the efficiency of their reporting service, no doubt, by inducing a better class of lawyer to undertake that service. SCRUTTON, J., said ([1914] 3 K.B. 684):

B

C "It seems to me that the question whether money is wholly and exclusively laid out or expended for the purposes of a trade is a question of fact. Judges of the High Court may know, by the accident of their previous training, something about a particular trade. To take a personal instance, I may be assumed to know something about shipping, but there are many trades about which I know absolutely nothing, and there are equally many trades about which any of my learned brethren would know nothing except what they were told by the commissioners. In many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of the trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, of the effect of payments made in that trade, all of which are questions of fact. There may be cases where it is clear even to a judge who knows nothing about the trade, that a particular payment could not be wholly or exclusively laid out for the purposes of the trade. I do not desire to discuss politics, but I take examples which seem to me fairly clear. Payments for political purposes might conceivably be for the purposes of trade. It might be that a payment by a company to the Tariff Reform League might be of great advantage to its trade. It might be that a payment by a company to a political party which was supposed to be identified with the interests of a particular trade might be to the advantage of the trade; but one can easily imagine cases, such as a payment by a company to the National Service League, where it would be impossible to conceive that anybody could find that such money was wholly or exclusively laid out or expended for the purposes of the trade. There may be cases in which the court would have to say there is no evidence on which any tribunal could find that this sum was laid out or expended for the purposes of such trade, but in most cases it appears to me that it depends on the facts of the trade of which the court has no knowledge, and for which it must depend on the findings of the commissioners."

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H It is said that those remarks apply to the present case because it is plain from what SCRUTTON, J., said, and, perhaps, also from the decision of the Court of Appeal in *Tate & Lyle's* case (1), that payments made for a political purpose may be for the purposes of advancing the trade of the company and enabling it to protect its assets and earn profits, and if, therefore, it is possible that payments for political purposes of that kind may be for advancing the trade of the company, it is then a question of fact to be decided by the commissioners, whose decision is binding, whether in fact on the evidence the payments were made for that purpose. It is said that the evidence in the present case shows

that the expenditure for the purpose of circulating this pamphlet was in fact incurred by the directors of the company for the purpose of advancing the trade of the company and its interests as a trader.

The material passages in the evidence given before the commissioners, appear in paras. 5, 6 and 9 of the Case stated by the commissioners. Paragraph 5 reads:

"The directors of the 'Malayan group' companies, while recognising the necessity for the report and accounts presented at annual general meetings to be accompanied by a chairman's address to the members of each company relating to its individual activities and finances for the particular year under review, had nevertheless for some years been of the opinion that the vital political and economic factors which had a pre-dominant bearing on the success or failure of tin mining operations in Malaya should, in the interests of the company, be published to shareholders and to other persons. The winning of tin ore in Malaya has since the last war been vitally affected by the economic, financial and political policies of the United Kingdom and Malayan governments in so far as they affect Malayan affairs."

Then reasons are given why the method of circulating the supplementary remarks separately from the annual report was adopted, in order to bring the matter more directly home to the shareholders and to other persons. In para. 6 it is said:

"The post-war period immediately preceding the meetings on Dec. 15, 1949, had been one of anxiety and concern to the directors of the Malayan group. This was due (inter alia) to their profound disagreement with, and apprehension as to, the policy of the Socialist government to which they attributed most of the difficulties under which their companies were operating."

Then the difficulties are summarised under a number of heads: "(a) Communist activities in Malaya"; "(b) Labour conditions in Malaya"; "(c) The price of tin"; "(d) War damage compensation and rehabilitation"; and "(e) Inflation", of which it is fair to say that there is practically no discussion at all in the pamphlet in question issued by the company.

Paragraph 9 reads:

"Mr. Ernest Vivian Pearce, chairman of the companies of the 'Malayan group', gave evidence on behalf of the company, (which evidence we accepted) to the following effect . . ."

I should say that the author of the pamphlet, Mr. Herbert Ashworth Hope, did not give evidence because he was ill, and, therefore, Mr. Pearce gave, no doubt, the evidence which might otherwise have been given by Mr. Hope. The evidence of Mr. Pearce as stated by the commissioners was as follows:

"His boards, with a view to the protection of these companies' businesses and interests, had consistently regarded it as being to the advantage of these companies to see that public opinion should be stirred up and that the shareholders (and as many people as could be persuaded to read the 'supplementary remarks') should appreciate the harm that the policies of the governments were thought by the directors to be doing to their business. He stated that the complaint of the company's directors was against the policies as a whole of the Labour Party and one of these complaints was the high taxation proposed by the Labour government. The 'supplementary remarks' had been prepared by the then chairman, Mr. Ashworth Hope, who submitted a draft to the board for their comments. He did not think the directors had in mind at all when the 'supplementary remarks' were written that there was a general election forthcoming.

Had he thought that this document was in the nature of a political pamphlet for the purpose of influencing the election he personally would have had nothing to do with it."

In view of the passage in p. 7 of the pamphlet which I read a little earlier, it seems to me that either those statements by the witness, Mr. Pearce, were untrue or he had not read the supplementary remarks with any care, and I cannot help thinking that the commissioners were unduly credulous in accepting that statement as being true in fact. His evidence continued in this way:

"He regarded it as a booklet for the protection of the company's business. They had gone into these politics particularly as relating to Malaya. He agreed that the trading results of the three companies at the relevant time were satisfactory up to a point. He affirmed the facts set out in paras. 3 to 8 hereof."

From that last statement I must conclude that evidence was given on the lines of the earlier paragraphs which I have read and that such evidence was accepted by the commissioners.

The argument is that it was open to the directors of this company to think that, by reason of the past conduct of affairs by the Labour government, its continuance in office was bound to be damaging to the interests of the company and obstructive of its attempts to earn profits and carry on its trade, and that, therefore, it was a justifiable activity on the part of the company to subsidise the circulation of a speech which was nothing but an attack on the policies of the Labour government and an inducement to the voters to turn them out of office at the earliest possible opportunity. It is said that that is a possible way of advancing the interests of the company's business, and that, if it is a possible way of advancing the interests of the company's business, I am bound by the conclusion of the commissioners that, in fact, the evidence did support that that was the fact. I do not take that view. It seems to me that on the authorities it is a question of law whether a pamphlet in this form is capable of being wholly and exclusively for the purpose of advancing the trade of the company, and it is a question of law whether the expenditure incurred in printing, publishing and circulating this pamphlet is expenditure which was incurred wholly and exclusively for the purposes of the company's trade. One has only to peruse the pamphlet in question to see that, if it had any such object as is contended, it was not the sole object of the pamphlet in question. It seems to me, therefore, that I am entitled to hold as a matter of law that this pamphlet is not capable of being solely for that purpose, and the expenditure incurred in printing, publishing, and circulating it is not wholly and exclusively for the purpose of the company's trade, and, therefore, does not come within the terms of the rule.

Having reached that conclusion, it is unnecessary to consider whether there was, in fact, any evidence capable of supporting the conclusions of the commissioners, and the appeal must be allowed. The same result will follow in the other cases relating to expenditure for the same purpose.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Stephenson, Harwood & Tatham* (for the companies).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

TEMPLE v. LEWIS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 13, 1953.]

Rent Restriction—Premium—Recovery—Premium paid, not by tenant, but by third party—Period of limitation for recovery—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 14 (1)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 8 (2) (as amended by Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (c. 26), s. 7 (6)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (5).

The plaintiff was the landlord and the defendant was the tenant of premises to which the Rent Restrictions Acts applied. In an action for possession based on non-payment of rent, the tenant filed a counterclaim, dated June 17, 1953, seeking to recover a premium of £200 which, in May, 1951, had been paid to the landlord by a third party, the son of the tenant. The landlord contended (i) that under s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, a premium was recoverable only if paid by the tenant himself, and (ii) that s. 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, as amended by s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, imposed a period of limitation of two years for the recovery of premiums, and that period had expired before the date of the tenant's counterclaim.

HELD: (i) section 2 (5) of the Act of 1949 gave a right to recover to a third party where the premium had been paid by that third party; (ii) s. 8 (2) of the Act of 1923 (as amended by s. 7 (6) of the Act of 1938) did not impose any limitation for the recovery of a premium since a premium was recoverable under s. 8 (1) of the Act of 1920 and not under s. 14 (1) of that Act which merely gave an additional right to recover a premium by deduction from the rent; (iii) and, therefore, the premium was recoverable by the tenant and could be set off against the rent due.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 8 (1) and s. 14 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 994 and 1015; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 2 (5), see *ibid.*, p. 1097.

APPEAL by the plaintiff from an order of His Honour JUDGE PUGH at Bloomsbury County Court dated July 16, 1953.

The plaintiff was the landlord and the defendant was the tenant of premises to which the Rent Restrictions Acts applied. In May, 1951, the letting had been negotiated by one Lytton, a son of the tenant and an employee of the landlord, who made himself responsible for payment of the rent. The rent was duly paid by Lytton until 1952, when he left the landlord's employment, and from that time onwards no further rent was paid. In an action by the landlord for possession based on non-payment of rent amounting to £162 18s. 9d. the tenant alleged that prior to the date of the letting he had paid to the landlord a premium of £200 which sum he claimed to set off against the rent due under s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949. The county court judge found that a premium of £200 had been paid by Lytton to the landlord as agent for the tenant and held that the tenant was entitled to a set-off in respect of that sum.

Fortune for the landlord.

Lester for the tenant.

SOMERVELL, L.J., stated the facts and continued: The first point taken by the landlord was that the premium was paid by Lytton and not by the tenant, and, therefore, was not recoverable. That may raise the question whether, if a premium is paid by a third party as principal, it can be recovered

under the Act. The learned judge found against the landlord on that point, because he held that, in making these payments, Lytton was acting as agent for the tenant. I take it that means that as between the parties concerned Mr. Lytton was saying to the landlord: "I am asking that you should grant a lease to the tenant. He is to be the principal, but you can apply to me for the rent and for the premium. You will get my cheque, but I am acting on behalf of the tenant." I can see no reason in law why the learned judge should

A not have so construed the position. In other words, the tenant was the proper plaintiff on the counterclaim in respect of the premium. But we need not be troubled about that because, in my view, even if one treats the premium paid by Lytton as a payment by a principal he could recover it. The learned judge said in his judgment that, if there was in law any necessity for Lytton to be joined as a party, he would give leave for him to be joined.

B Counsel for the landlord submits that both the earlier and the present legislation should be construed as conferring the right to recover a premium only on a tenant, and only, therefore, in circumstances where the tenant has, as principal, himself paid the premium. I do not accept that contention. It seems to me that the original section, s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, are plainly so worded as to cover a case, if it arose, where a premium was exacted by a landlord and paid by a third party. Section 8 (1) of the Act of 1920 reads thus:

D "A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after Mar. 25, 1920, the amount or value thereof shall be recoverable by the person by whom it was made or given."

E It does not, in other words, say "recoverable by the tenant". Similar words are to be found at the end of what is now the relevant provision, namely, s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949. That, again, contains the words

"shall be recoverable by the person by whom it was paid."

F If, therefore, any criticism in law could be thrown on the learned judge's findings as to agency, the matter could and would have been set right by the joining of Lytton, who could have succeeded in proceedings for the recovery of the premium. That point, therefore, in my opinion, fails.

G The other point is this. It is said that under the Act of 1920 there is a period of limitation of two years for the recovery of premiums and that in the present case the two years had elapsed because the premium which it is sought to set off was paid on May 3, 1951, and the counterclaim was dated June 17, 1953. That is a view which is supported by a note in the LAW NOTES book, RENT AND MORTGAGE INTEREST RESTRICTIONS, 22nd ed., p. 44. But in MEGARRY'S RENT ACTS, 7th ed., p. 383, the view is taken that there is no period of limitation applicable to the recovery of premiums. The relevant sections are, first H of all, s. 8 (1) of the Act of 1920 which gives the right to recover the premium. Section 14 (1) of the Act of 1920, as originally drafted, provides:

"Where any sum has . . . been paid on account of any rent or mortgage interest, being a sum which is by virtue of this Act, or any Act repealed by this Act, irrecoverable by the landlord or mortgagee, the sum so paid shall be recoverable from the landlord or mortgagee who received the payment or his legal personal representative by the tenant

or mortgagor by whom it was paid, and any such sum, and any other sum which under this Act is recoverable by a tenant from a landlord or payable or repayable by a landlord to a tenant, may, without prejudice to any other method of recovery, be deducted by the tenant or mortgagor from any rent or interest payable by him to the landlord or mortgagee."

Pausing there, the effect is that the right to recover rent over-paid, or mortgage interest, is conferred by this section, but in respect of a premium, the right to recover which arises under s. 8 (1), this s. 14 (1) confers a right to deduct it from the rent without prejudice to other methods of recovery. There were at that time no special limitations on the right to recover with which these sections dealt, although, no doubt, the ordinary general provisions of the Limitation Acts were applicable. Section 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, provides as follows:

"Any sum paid by a tenant or mortgagor which, under s. 14 (1) of the [Act of 1920], is recoverable by the tenant or mortgagor shall be recoverable at any time within six months from the date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards."

That period of six months was extended by s. 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, to two years, again with certain exceptions which do not matter. The question is whether those words are applicable to premiums recoverable under s. 8 (1) of the Act of 1920. I think that quite plainly they are not. The premium, in my opinion, was recoverable, not under s. 14 (1) of the Act of 1920, but under s. 8 (1), and all that s. 14 (1) did was to give an additional right to deduct it from the rent, on the assumption, presumably, that it could not have been set off under ordinary principles of law.

In my opinion, therefore, there never has been in this code a period of limitation applicable to a premium. It may be that, even if there had been such a limitation under these earlier Acts, the legislation of 1949 would not be construed as incorporating them. Once, however, one comes to the conclusion that the sections to which I have referred do not impose a two years' limitation, the basis of the argument disappears altogether. For these reasons, I think the two points taken by the landlord fail, and the appeal should be dismissed.

DENNING, L.J.: It is plain that when a person other than the tenant pays a premium, the time limit for recovery is not two years, but six years. So, also, when a person other than the landlord exacts a premium, the time limit for recovery is not two years, but six years. No sensible distinction can be drawn between those cases and the case of a premium paid by a tenant to a landlord. There also the time limit is not two years, but six years. On an analysis of the sections such as **SOMERVELL, L.J.**, has made it is quite plain that the time limit for recovery of a premium is six years. The premium was not recoverable under s. 14 (1) of the Act of 1920. It was originally recoverable under s. 8 (1) of that Act, and it is now recoverable under s. 2 (5) of the Act of 1949. I agree, therefore, that the appeal should be dismissed.

ROMER, L.J.: I also agree. On the question of limiting the period for the recovery of premiums it seems to me that the landlord, in order to succeed, would have to delete from s. 8 (2) of the Act of 1923 the express reference which is found there to s. 14 (1) of the Act of 1920 and read it as though it had said

"any sum paid by a tenant or mortgagor which under the principal Act is recoverable",

and so on. That is not what is there. A special period of limitation is imposed by the legislature with regard to certain claims. Those claims are limited to sums which are recoverable under s. 14 (1) of the principal Act and amongst those sums premiums are not included. Accordingly, I agree with the view expressed on this point at p. 383 of MEGARRY'S RENT ACTS, 7th ed.

Appeal dismissed.

Solicitors: *Renshaws* (for the landlord); *Beach & Beach* (for the tenant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

JENKINS v. ELDER DEMPSTER LINES, LTD.

B [COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), March 30, 1953.]

Workmen's Compensation—"Arising out of and in the course of the employment"—*Seaman returning to ship after shore leave—Fall from mole—Police stationed at entrance to mole, but public allowed entry—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).*

C On the night of Dec. 26/27, 1947, the ship in which the deceased was employed moored against the harbour mole of Las Palmas. At the landward end of the mole was a gateway where police were stationed for the purpose, ostensibly, of keeping unauthorised persons off the mole, but all kinds of people were allowed there and entry to it was practically unrestricted. Shortly after the ship moored, the deceased and other members of the crew went ashore for a short while. When they were returning to the ship, the policemen at the gate of the mole asked them which was their ship and allowed them to enter the mole. In the darkness, the deceased fell over the side of the mole and was drowned. In a claim by the widow against the employers for compensation under the Workmen's Compensation Acts,

E HELD: on the facts, there was not such a restriction on the right of persons to enter the mole as would have justified the deceased in saying, when he passed the gate, that he was now acting in the course of his employment, within the Workmen's Compensation Act, 1925, s. 1 (1), and, therefore, the claim failed.

F Per SIR RAYMOND EVERSHED, M.R.: "I cannot take LORD MACMILLAN [in *Northumbrian Shipping Co., Ltd. v. McCullum* (101 L.J.K.B. 668)] as meaning and intending that a seaman who loses his life, or is injured by a fall, is not disentitled to recover unless it is shown against him that at the time he suffered death or injury he was in exactly the same position as any member of the public at the place where he was killed or hurt. I think that that over-simplifies or over-states the point. It is . . . essential to bear in mind that the overriding consideration is: Was the workman at the relevant time acting in the scope of his employment?—and the explanation, it is true, which the cases have added will entitle him to say that he was if his presence at the point where he met with the accident is so related to his employment as to lead to the conclusion that he was acting within its scope. It is, I think, quite possible to imagine cases in which a man might be in a place which was not open to every member of the public, that is to say, as regards which some restrictions were imposed (though they had not, in fact, prevented him being there), but in which the restrictions and the man's exemption from them would have nothing whatever to do with his employment so that he could not claim that his presence there was so closely related to his employment as to justify the conclusion that he was acting within its scope."

AS TO ACCIDENTS ARISING WHILE WORKMAN GOING TO AND FROM WORK, see HALSBURY, Hailsham Edn., Vol. 34, pp. 825-828, paras. 1164, 1165; and FOR CASES, see DIGEST, Vol. 34, pp. 277-279, Nos. 2341-2357.

EDITORIAL NOTE. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, s. 89 (1), and sched. 9, as from July 5, 1948, when the Act of 1946 came into force, but the phrase "accident arising out of and in the course of the employment", in s. 1 (1) of the Act of 1925, is still of importance as regards industrial injuries: see s. 1 (1) and s. 7 (1) of the Act of 1946.

Cases referred to:

- (1) *Northumbrian Shipping Co., Ltd. v. McCullum*, (1932), 101 L.J.K.B. 664; 23 B.W.C.C. 284; *sub nom. McCullum v. Northumbrian Shipping Co., Ltd.*, 147 L.T. 361; Digest Supp.
- (2) *Stewart (John) & Son (1912), Ltd. v. Longhurst*, [1917] A.C. 249; 86 L.J.K.B. 729; 116 L.T. 763; 10 B.W.C.C. 266; 34 Digest 279, 2357.
- (3) *Davidson (Charles R.) & Co. v. M'Robb or Officer*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 10 B.W.C.C. 673; 34 Digest 276, 2339.

APPEAL by the applicant, Mrs. Mary Jenkins, from an order of His Honour JUDGE BROWN, made at Liverpool County Court on Jan. 5, 1953, whereby he dismissed her claim to compensation under the Workmen's Compensation Acts in respect of the death of her husband, Albert Jenkins.

The deceased, a seaman, was employed as a member of the crew of m.v. Fulani, owned by Elder Dempster Lines, Ltd. On the night of Dec. 26/27, 1947, the vessel moored against the harbour mole of Las Palmas for the purpose of re-fuelling. At the landward end of the mole were some gates at which police officers, or similar officials, were stationed. Shortly after the vessel moored the deceased and some other members of the crew went ashore for a short while, having obtained leave to do so. When they were on the mole on their way back to the vessel, the deceased stepped behind to relieve himself, fell off the edge of the mole, and was drowned, notwithstanding the attempt of one of his companions to save him. On Dec. 29, 1947, the applicant was informed of his death. On or about Aug. 18, 1948, the vessel returned to England, and on the day after her return the Board of Trade held an inquiry into the death. On Sept. 1, 1948, the claim for compensation was first made. The applicant contended, *inter alia*, that the mole was a place to which the deceased had access only by reason of his employment, and that, therefore, the deceased lost his life in the course of his employment, within the meaning of the Workmen's Compensation Act, 1925, s. 1 (1). The learned judge held that the accident did not arise in the course of the deceased's employment. He further held that the provisions of s. 14 (1) (b) of the Act of 1925 were imported into s. 35 (1) (c), so that, in the case of a seaman, a claim for compensation could be made after the expiration of six months from the time when news of the death was received by the claimant provided that the failure to make the claim within the specified period was "occasioned by mistake . . . or other reasonable cause", but that, on the facts, no such mistake or reasonable cause was shown.

Blackledge, Q.C., and *Nance* for the applicant.

Nelson, Q.C., and *Nicklin* for the employers.

SIR RAYMOND EVERSHED, M.R., stated the facts, and, after saying that, in the circumstances, it was not necessary to decide (i) whether s. 14 (1) (b) of the Workmen's Compensation Act, 1925, was imported into s. 35 (1) (c), and (ii) whether or not the circumstances were such as to amount to "reasonable cause" within s. 14 (1) (b), His LORDSHIP continued: In my judgment, it is not possible to disturb the conclusion (which, in essentials, is a conclusion

of fact) at which the learned county court judge arrived on the vital question: Was the deceased, at the moment that he fell into the harbour of Las Palmas, then on his job, i.e., was he then acting in the course of his employment? From the facts, it is clear that he was not acting in the course of his employment in the sense that he was then doing his duty in the ship as a member of the crew. But several cases have decided that the liability of the employers extends beyond the performance of actual duties so as to cover, in certain circumstances,

- A injury or loss of life while a workman is going to or from the place of his employment. The case to which attention has been mainly directed is *Northumbrian Shipping Co., Ltd. v. McCullum* (1). In that case the workman was engaged as boatswain in a ship which was then in dock loading cargo. He agreed to act during a Saturday night as a watchman in the ship, which was an additional duty, distinct from his ordinary duties as boatswain, but
- B covered by general clauses in his contract. On his way to take up his position as watchman, he passed the gates which separated the public part of the harbour from the private dockyard where the vessel lay, and was never seen again alive. He had somehow fallen off the side of the dock, and, owing to injuries received in the fall, was killed. The opinion of LORD MACMILLAN in that case was concurred in by the other noble and learned Lords. One of the
- C difficulties to which LORD MACMILLAN'S speech was directed was that of steering a course, not altogether easy to steer, between two earlier decisions in the House of Lords, *John Stewart & Son (1912), Ltd. v. Loughurst* (2), in 1917, and *Charles R. Davidson & Co. v. M'Robb or Officer* (3), in 1918. In the latter case, a seaman, while returning to his ship, fell from the quay and was drowned. It was held that his widow was not entitled to recover, although the dock at which
- D the ship lay had been temporarily cordoned off by the Admiralty, under wartime regulations, so that it was contended that it was no longer a public place, but was, in effect, private property. LORD MACMILLAN analysed the distinction between that which might be called private property, part of the employer's premises or of the private property over which the servant must go to get to the employer's premises, on the one hand, and public places, on the other,
- E and, to meet the difficulty of *M'Robb's* case (3), he held that the temporary restriction imposed by the Admiralty had not deprived the relevant part of the harbour in that instance of its public character. But counsel for the applicant in the present case contended that there are passages in LORD MACMILLAN'S speech which lead to the view that the real distinction lies between that which is a public place, in the sense that any member of the public has
- F unrestricted access to it, on the one hand, and all other places which are subject to some restriction. Counsel went on to say that, in the present case, although others as well as the deceased might have obtained leave to go on the mole at Las Palmas, still the right to go there was restricted, leave was required, and the deceased obtained his leave by virtue of the fact that he was a member of the crew of this ship.

- G I cite one passage from LORD MACMILLAN'S speech on which counsel for the applicant particularly relied. LORD MACMILLAN said (101 L.J.K.B. 668):

- H "So long as the seaman on leave, whether quitting or returning to his ship, is in a public place where he might equally well be although he was not employed as a seaman, an accident befalling him there is not identifiable with his employment; it has not befallen him within the sphere of his employment, and it is not due to risks not shared by him with every member of the public."

That passage, like all other passages in the case, must, of course, be read in the light of its context, and I cannot take LORD MACMILLAN in that passage as meaning and intending that a seaman who loses his life, or is injured by a fall, is not disentitled to recover unless it is shown against him that at the time he suffered death or injury he was in exactly the same position as any member

of the public at the place where he was killed or hurt. I think that that oversimplifies or over-states the point. It is, as counsel for the employers pointed out, essential to bear in mind that the overriding consideration is: Was the workman at the relevant time acting in the scope of his employment?—and the explanation, it is true, which the cases have added will entitle him to say that he was if his presence at the point where he met with the accident is so related to his employment as to lead to the conclusion that he was acting within its scope. It is, I think, quite possible to imagine cases in which a man might be in a place which was not open to every member of the public, that is to say, as regards which some restrictions were imposed (though they had not, in fact, prevented him being there), but in which the restrictions and the man's exemption from them would have nothing whatever to do with his employment so that he could not claim that his presence there was so closely related to his employment as to justify the conclusion that he was acting within its scope. A B

This is a difficult and, indeed, a tragic case, and it is necessary to look at the evidence. Two witnesses gave evidence which was relevant. The first was Captain Kay, the second officer of the ship, whose evidence was taken on commission. He was called by the employers, and said this at the end of his examination-in-chief:

“Q.—With regard to the wharf itself, is there a gate providing admission to it? A.—Yes, there is a gate at the inboard end of the sea—the land end of the mole—and a guard. C

Q.—I do not know whether you know the answer to this: Is admission to the public restricted or not? A.—It is absolutely unrestricted in my experience.”

That was taken up in cross-examination, and the following questions were put: D

“Q.—And the land gate is controlled by the civil police? A.—By the police, yes. There are three or four types of police there, as a matter of fact. They may have been special harbour police:

Q.—They may have been special harbour police, civil police, or what else? A.—Maybe a civil guard. There is a peculiar kind of uniform—there are four I can remember. There is certainly a policeman, a guard, on the gate. E

Q.—For the purpose of keeping unauthorised persons off? A.—Yes.

Q.—So a person without authority was not allowed on? A.—That is in theory. I find everybody, including all the rogues and vagabonds of Las Palmas, are allowed on that wharf. F

Q.—But the theory is that unauthorised persons are not allowed on? A.—That is what I presume.

Q.—Of course, [the deceased], whether he had permission or not to go ashore, was an authorised person to go back to his ship? A.—Oh, he is authorised on the wharf.”

The second witness, who was called for the applicant, was Hayden, the shipmate who had attempted to rescue the deceased. In examination-in-chief he said: G

“There is a gate with two policemen. Two little doorways for pedestrians, larger one for traffic. Gates permanently open. They are there to stop people coming on the mole. Spanish people—thieves. They stopped us coming back and asked what ship. [The deceased] stopped behind to relieve himself . . .”, H

and then the next Hayden knew was hearing a cry for help. In cross-examination he said:

“Captain and chief officer know all hands go ashore at Las Palmas. Gates always open. Policemen keep order—deter obvious criminals. Several of them, dressed like generals.”

The last observation, I take it, refers to the police rather than to the criminals.

In face of that evidence, the learned county court judge came to this conclusion:

A "I have no doubt that the police would, especially at night, be, at any rate, in some way concerned to prevent known thieves obtaining access to the mole. They might well be on the look-out for persons entering or leaving the island without proper authority, or to prevent the entry of uncustomed goods, but in the absence of proper and cogent evidence of the regulations, or, at any rate, the practice governing ingress and egress of the public, I find it impossible to hold that the mole constituted, even at that time of night (following the language of LORD MACMILLAN in *Northumbrian Shipping Co., Ltd. v. McCullum* (1)) premises which [the deceased] was *only* entitled to traverse because he was going to or coming from his work. In my view, the present case much more closely resembles that of *Charles R. Davidson & Co. v. M'Robb* (3)."

B I find myself unable to accept the argument that that part of the learned judge's judgment is open to challenge. He is applying, as I think rightly, the law which was applicable. He is saying: "I have not been persuaded in this case, on the evidence which I have heard, that there was such a restriction on the right of persons to enter this part of the mole as entitles or justifies the deceased in saying, when he passed the gate: 'I am now acting in the course of my employment'." I think I should be merely repeating myself if I elaborated the matter. As I have said, I have not found this an easy case, but, once the real point is apprehended, it is, I think, a question for the judge to decide on the facts: Has the applicant proved her case that the deceased was acting in the course of his employment when he met with this calamity? The learned judge came to the conclusion that she had not so succeeded, and I cannot see that that conclusion ought to be set aside. I think, therefore, that the appeal fails, and must be dismissed.

E JENKINS, L.J.: I agree, and have nothing to add.

HODSON, L.J.: I also agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Dubovie, Freeman & Co.*, agents for *A. D. Abrahamson & Co.*, Liverpool (for the applicant); *Lawrence Jones & Co.*, agents for *Forwood, Williams & Co.*, Liverpool (for the employers).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

COWAN v. WRAYFORD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 14, 15, 16, 1953.]

Agriculture—Agricultural holding—Notice to quit—Notice by reason of breach by tenant of term of tenancy—Notice invalid—Validity of notice as general notice—Agricultural Holdings Act, 1948 (c. 63), s. 24 (1), (2).

The plaintiff was the landlord and the defendant was the tenant of agricultural land to which the Agricultural Holdings Act, 1948, applied. By a notice in writing dated Sept. 29, 1951, the landlord required the tenant to remedy certain defects therein specified by Dec. 21, 1952. On Dec. 22, 1951, the landlord served on the tenant a notice to quit headed "Notice to quit by landlord to tenant stating reasons under s. 24 (2) of the Agricultural Holdings Act, 1948", the reasons stated being failure to remedy the defects specified in the notice of Sept. 29. In an action for possession based on the notice to quit of Dec. 22, 1951,

HELD: at the date when the notice to quit was served the time specified in the notice to remedy had not elapsed, and, therefore, the conditions laid down in s. 24 (2) (d) had not been fulfilled, and the notice could not operate as a valid notice under s. 24 (2); the landlord, having elected to proceed under s. 24 (2), and the notice not being a clear and unambiguous notice that if he wished to rely on it in the alternative as having been given under s. 24 (1), should he fail under s. 24 (2), could not rely on the notice as a general notice under s. 24 (1), it being essential for him to let the tenant know clearly under which sub-section he was proceeding; and, therefore, he was not entitled to possession.

Budge v. Hicks ([1951] 2 All E.R. 245), explained.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 46.

Cases referred to:

- (1) *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd. v. Rogers*, [1925] 1 K.B. 14; 93 L.J.K.B. 1009; 132 L.T. 240; 89 J.P. 1; 31 Digest, Replacement, 496, 6221.
- (2) *Budge v. Hicks*, [1951] 2 All E.R. 245; [1951] 2 K.B. 335; 2nd Digest Supp.
- (3) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 31 Digest, Replacement, 556, 6757.

APPEAL by the plaintiff from an order of His Honour JUDGE PRATT at Newton Abbot County Court, dated July 27, 1953.

The plaintiff was landlord and the defendant was tenant of agricultural land to which the Agricultural Holdings Act, 1948, applied. By a notice in writing dated Sept. 29, 1951, the landlord required the tenant to remedy certain defects therein specified by Dec. 21, 1952. On Dec. 22, 1951, the landlord served on the tenant a notice in the following terms:

"Notice to quit by landlord to tenant stating reasons under s. 24 (2) of the Agricultural Holdings Act, 1948. I, the undersigned, hereby give you notice to quit and deliver up on Dec. 25, 1952, possession of the holding known as . . . This notice is given for the following reasons: That you have failed to remedy the breaches of your tenancy agreement as set out in a notice served on you on Sept. 29, 1951, viz. . . ."

The tenant remained in possession, and on Feb. 16, 1953, the landlord commenced an action for possession in which he relied on the notice of Dec. 22, 1951, as terminating the tenancy. The tenant admitted the notices, but alleged in para. 2 of his defence,

A "the said tenancy has not been effectually determined for while the defendant admits receipt of the purported notice to quit (hereinafter called 'the second notice') it alleges failure to comply with the first notice (of Sept. 29, 1951) and was expressed to take effect during the period allowed to the defendant to carry out the said works required by the first notice, and there was, therefore, at the time of service of the second notice no ground as required by s. 24 (2) (d) (of the Act of 1948) entitling the plaintiff to serve the same".

B The landlord contended that, if the notice were inoperative under s. 24 (2) of the Act, it should operate under s. 24 (1), and, as the tenant had not served a counter-notice as required by s. 24 (1), he (the landlord) was entitled to possession without the Minister's consent. The county court judge held that the notice of Dec. 22, 1951, was not a valid notice to quit, and that the landlord, having elected to proceed under s. 24 (2), could not later proceed under s. 24 (1).

P. H. R. Bristow for the landlord.

Cripps for the tenant.

C **SOMERVELL, L.J.:** Section 24 (1) of the Agricultural Holdings Act, 1948, is in these terms:

D "Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof".

From s. 24 (2) I shall read only the words which I think are material to the present case:

E "The foregoing sub-section shall not apply where . . . (d) at the date of the giving of the notice to quit the tenant had failed to comply with a notice in writing served on him by the landlord requiring him . . . within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid".

F Of course, in a case where the landlord thinks he is entitled to bring those words into operation the tenant may desire to dispute that fact. Section 34 (1) provides:

G "Where the tenancy of an agricultural holding terminates by reason either—(a) of a notice to quit the holding given by the landlord; or (b) of a counter-notice given by the tenant under s. 32 of this Act after the giving to him of such a notice to quit part of the holding as is mentioned in that section; and in consequence of the notice or counter-notice, as the case may be, the tenant quits the holding, then, subject to the provisions of this section, compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section: Provided that compensation shall not be payable under this sub-section where the operation of s. 24 (1) of this Act in relation to the notice to quit the holding or part, as the case may be, is excluded by virtue of . . . para. (d) . . . of sub-s. (2) of that section . . ."

So there is not only a difference in procedure, but also a financial difference affecting both landlord and tenant according to whether the landlord is able to establish a right to proceed under the words I have read from sub-s. (2) or has no case for bringing himself within those words, but serves an ordinary notice and does in fact get the Minister's consent if the counter-notice is served. In one case compensation for disturbance will be payable and in another case it will not.

[HIS LORDSHIP stated the facts and continued:] It is not now suggested, and, indeed, could not be suggested, on the part of the landlord once the dates are looked at, that the notice to quit was a notice which was within the terms of s. 24 (2) (d), because to come within that provision the tenant must be shown to have failed to comply with a notice requiring him to remedy within a reasonable time, and so on. At the time when the notice to quit was served the time specified in what I will call the remedy notice had not elapsed, and, therefore, the conditions laid down in s. 24 (2) (d) had not been fulfilled. It, therefore, admittedly cannot operate under that sub-section. To succeed, the landlord must satisfy us that this was a good notice to quit irrespective of the breaches or alleged breaches referred to in the document and irrespective of s. 24 (2) (d). If it were a good notice irrespective of all those matters, then he submits (and this again is not disputed) that the tenant did not serve a counter-notice requiring that the Minister's consent should be sought and that the notice should not be operative unless that consent was obtained. In other words, the landlord submits that the court should treat this notice of Dec. 22, 1951, as if there was no reference in it to s. 24 (2) (d).

Many points as to notices to quit have been regarded as obscure, but one point is plain, and that is that a notice to quit, to be good, must be clear and unambiguous. That point will be found laid down and applied by this court in *P. Phipps & Co. (Northampton & Towcester Breweries), Ltd. v. Rogers* (1). The first point, therefore, as it seems to me is whether this document brought home to the tenant in clear and unambiguous language that the landlord was intending to terminate the tenancy subject to s. 24 (1) irrespective of any breaches by the tenant. I do not think it did. We were invited, and I think rightly, to consider this document and the meaning it would convey to a reasonable mind in the light of the Act. If one reads the notice to quit with the Act, in the first place it is plain that the case is not within s. 24 (2) (d), because the time for remedying had not elapsed. In those circumstances it might well be regarded as a piece of waste paper, something which is based, as I think it was in fact based, on a misconception as to the time limit in the original notice to remedy. If the tenant assumed that the landlord's agents had read the first document on which this second document was based, then, I think, he might well have concluded that this was an attempt in advance to bring about a termination if, but only if, he did in fact fail to remedy in the time which the earlier notice had specified. It was not suggested that if that was, as I think it was, a natural interpretation it would be a clear, unambiguous and valid notice to quit. It would, I think, probably fall under the principle which says notices to quit must not be conditional.

We were, however, invited to consider the matter on a rather wider ground, and I think that it is right to do so, because this Act does affect a great number of people and it would be right that we should seek to give what guidance we can on this wider point. If one assumes in the present case that the original remedy notice had been limited to expire on Dec. 21, 1951, and then, as happened here, on Dec. 22, 1951, a notice to quit in the form of the notice in this case giving reasons was served, and then the tenant, either by going to arbitration or, as this court held in *Budge v. Hicks* (2), by going to the county court, succeeded in showing that the landlord's claim failed not in form but on the facts, could the landlord maintain that he relied in the alternative on this

document as what I would call an unqualified notice to quit not in any way based on s. 24 (2)—in other words, one to which s. 24 (1) applied—and then say: “As you did not serve your counter-notice the Minister’s consent is not necessary”. I do not think he could have done so. This notice states on the head of it that it is a

“Notice to quit by landlord to tenant stating reasons under s. 24 (2) of the Agricultural Holdings Act”.

A The sub-paragraph of s. 24 (2) which is relied on is sub-para. (d). When a landlord is proceeding under that sub-section s. 24 (2) of the Act says that

“The foregoing sub-section (that is sub-s. (1) with its provisions as to serving notice) shall not apply . . .”

B I have already referred to the differences, not merely procedural, between the provisions of sub-s. (1) and sub-s. (2) as affecting both landlord and tenant. I think, therefore, that, if a landlord wishes to rely on a notice in the alternative as a general common law unqualified notice should he fail under s. 24 (2), that must appear on the face of the notice, or, as we were told in argument is sometimes done, two notices can be served. As against that it is said, and

C said rightly, that s. 26 (1) (a), which deals with the regulation-making power, contemplates cases where a landlord gives a notice which raises points under s. 24 (2) but which thereafter can be relied on as a notice under s. 24 (1), because it refers particularly to a power to make regulations for extending the period within which a counter-notice may be given by the tenant where arbitration has been required to deal with issues under sub-s. (2). I do not think there

D is any inconsistency between s. 26 (1) (a) and the conclusion to which I have come, because, as I have said, it is open to a landlord to make it clear, and as I think in one document, that he does wish the notice treated as an ordinary common law notice which would be within the meaning of sub-s. (1) should he fail under sub-s. (2). The words in s. 26 (1) (a) would be applicable in cases where obviously the main contention in the first instance would be under sub-s.

E (2) to prevent the tenant having to serve a counter-notice under sub-s. (1) at the time when he first received the notice. Therefore, I do not think there is any real inconsistency there.

I would refer to certain observations I made in *Budge v. Hicks* (2), where a notice had been served and the notice undoubtedly gave reasons. It

F read: “The reason for this notice is,” and so on, and the court held there that the notice was bad because it did not indicate on which of the relevant sub-sections of s. 24 the landlord was seeking to rely. The tenant had served a counter-notice under sub-s. (1), and the words which I used were obiter in the sense that they were not necessary to the decision, nor in that case was the point with which I am now dealing raised, namely, whether notices which

G on the face of them fall expressly under sub-s. (2) must always be taken to be good notices under sub-s. (1) if sub-s. (2) is inoperative? What I said was this ([1951] 2 All E.R. 247):

“When the tenant received the notice he served the counter-notice contemplated by s. 24 (1). The notice to quit was good in the sense that

H the length of notice which is laid down by the Act was complied with . . . I think one has to regard it as a notice which falls under . . . s. 24 (1) with certain words added to explain the reason why it was served, but that does not affect its legal nature.”

It is to be noted that in the notice in that case there was no express reference to s. 24 (2). It is also to be noted that the tenant in that case had in fact taken it as a notice which might be valid under sub-s. (1) and had served his counter-

notice. In case anybody wishes to quote these words in future I think it would be better if I had put it in this form:

“Assuming in the landlord’s favour that this notice to quit was a good notice which required a counter-notice under sub-s. (1)”,

and then gone on to show that he had lost his rights. However, the notice was in a different form, but I do not think those words I used there should be relied on as deciding the point or throwing any real light on the point being decided in the present case. A

For these reasons I think the learned judge was right. He held that the notice to quit was not a valid notice to quit and I agree with him on that point. He also held that the landlord, having elected to proceed under s. 24 (2), could not in the circumstances of this case later proceed under s. 24 (1). I hope I have made it clear that I do not put it precisely in that way. I would have said that this notice to quit was not a clear and unambiguous general notice of which the landlord might avail himself in the alternative. He then dealt with an issue of estoppel which it is unnecessary to determine. Speaking for myself, I think in the circumstances of this case one might find an estoppel in law, but so far as appears from the learned judge’s notes of the evidence I do not think there was sufficient evidence which would justify a finding on those grounds. For those reasons I would dismiss this appeal. B C

DENNING, L.J.: If this notice to quit could be considered at common law without any regard to the Act, I should have thought it was a perfectly good notice. The operative words are clear and unambiguous, and all that is wrong is that it states a bad reason. At common law a landlord need give no reason at all. Even if he gives a bad or an inapposite reason I should not have thought it would invalidate the notice. But this case cannot be considered at common law apart from the Act. The ancient script of the common law has been over-written by the Act, and the two have to be integrated together. In order that a notice to quit an agricultural holding should be good, it must be clear and unambiguous, and for that purpose it must either be a simple notice without stating reasons at all, in which case it will operate under s. 24 (1), or it must be a notice stating reasons as prescribed by sub-s. (2), in which case it will operate under sub-s. (2). The consequences of giving a notice which is intended to operate under sub-s. (1) are so different from the consequences of a notice under sub-s. (2) that it is imperative that the landlord should make it clear under which of those two sub-sections he is proceeding. Just as in the case of *Budge v. Hicks* (2), this court held that under sub-s. (2) the landlord must make it clear under which sub-paragraph he was proceeding, so also under the whole of s. 24 he must make it clear whether he is proceeding under sub-s. (1) or sub-s. (2). In this case the notice was purported to be given under sub-s. (2), but, considered as such, it was a bad notice because it said the tenant had failed to remedy certain breaches, whereas in fact the period allowed for remedy had not then expired. It being a bad notice under sub-s. (2), it is not, in my judgment, now permissible for the landlord to pray it in aid as a notice under sub-s. (1). It certainly was not a clear and unambiguous notice for that purpose. If the landlord had intended to go under sub-s. (1), he should have made it quite clear. D E F

On the further point of estoppel I think there was a great deal to be said for the judge’s view that the tenant was led to think that if he completed the work by December, 1952, then the landlord would not seek to eject him. Following *Hughes v. Metropolitan Ry. Co.* (3) it may well be that if the tenant did the work in the permitted time, the landlord would not be allowed to insist on this notice to quit. It is unnecessary, however, to come to any conclusion on that point. It is sufficient to say that the notice to quit was bad and that the appeal fails accordingly. G H

ROMER, L.J.: The notice to quit purported plainly to be given under s. 24 (2) of the Act of 1948. There is no question as to that, having regard to the reference to s. 24 (2) in the notice itself and to the terms in which the notice was couched. But that it failed to qualify as a good notice under s. 24 (2) cannot be disputed. The only question, therefore, is whether it can be preserved as a valid general notice to quit giving rise to the tenant's rights which are conferred by s. 24 (1). Of course, there may be cases where a landlord serves
A a notice to quit primarily invoking sub-s. (2), but which may be expressed to be, or which may be fairly regarded as being, in the alternative a general notice. I think, however, that *prima facie* if a lessor elects to proceed in a particular way which gives rise to particular rights in the tenant he cannot, if he fails, treat his notice as founded on a different approach which would have dictated a different course of action by the tenant. It is certain that
B an unsuccessful notice under sub-s. (2) cannot automatically be converted, when it fails, into a general notice to quit, and indeed, if it could be, considerable hardship might be inflicted on the landlord, who might be only desirous of getting the tenant out provided he got him out in such circumstances that he would not have to pay compensation. He might not desire to get him out by determining the tenancy by a general or ordinary notice to quit, which
C would involve the payment of compensation. As I say, it is, therefore, impossible, I think, to suggest that a notice founded on sub-s. (2), if it fails, must be converted of necessity into a notice under sub-s. (1); and I quite agree with my brethren that the lessor must indicate under which he elects to go.

In the present case I can see no reason why the landlord should be able to say that, in the alternative, his notice should operate as a general notice. The
D fact that it expressly referred to s. 24 (2) would be calculated to suggest to the tenant that the lessor was nailing his colours to that mast and to nothing else, and that, therefore, it would be quite inappropriate for him (the tenant) to take action under sub-s. (1). But at the lowest the document would, I think, give rise in this connection to ambiguity as to the lessor's intention, and it is well established that notices to quit must be plain and unequivocal. Further,
E I think the notice to quit offended the principle of certainty as to its meaning in another way, because it had to be construed in the light of all relevant surrounding circumstances, and one of the circumstances was the service of the notice to remedy and the terms in which that notice had been expressed. That notice gave until Dec. 21, 1952, to do the work which was specified in the notice. There was no reason why the tenant should think a mistake had
F been made, and indeed it was suggested with some force in argument that having regard to the reference in the notice to remedy

“to clean and properly cultivate eastern portion of field 1125”,

which is a job which can be done in a short space of time, but can be done much more efficiently in a long space of time, the document could fairly be
G taken to mean what it said. That first notice was never cancelled; and a little while afterwards the notice to quit arrived. Accordingly, the tenant might well think, as in fact he did think, that it merely meant that unless he complied with the notice to remedy, he would have to go. Accordingly, I agree that the notice to quit gave rise to an ambiguity in that sense also and cannot be treated as a good and valid notice.

H On the final question whether the particular equity to which LORD CAIRNS, L.C., and LORD SELBORNE referred in *Hughes v. Metropolitan Ry. Co.* (3) applies, it seems to me that there is a difficulty in relying on that in this case. Here the point, as I understood it, shortly, was that the landlord, having acquired certain rights by virtue of the tenant's breach of covenant, elected to exercise one particular right, from which the inference would arise that he released the others and that by serving the notice to remedy he was relinquishing any other rights which might arise from the breach of covenant to which the notice referred.

The argument is that having done that, he could not, as he purported to do, serve a notice to quit founded on exactly the same breaches of covenant a short time afterwards. When I say founded on the same breaches of covenant, that is, I think, a true statement having regard to the strict terms in which the notice to quit was framed. The reasons given in the notice to quit were not that the tenant had failed to remedy the breaches within the time specified by the notice to remedy, but simply that he had failed to remedy what were exactly the same breaches as the ones to which the first notice referred. As I say, I do not think as at present advised that the suggested equity could avail the landlord here, because, first, there was no evidence that any consideration moved from the tenant to the landlord for what would on this view be an entirely voluntary release of legal rights; nor was there any evidence that the tenant altered his position on the faith of some implied promise by the landlord. In the absence of either consideration or of a change by the tenant of his position, it seems to me that the equity in question does not arise in the present case. I agree with my brethren that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Smith & Hudson*, agents for *Harold Michelmores & Co.*, Newton Abbot (for the landlord); *Baileys, Shaw & Gillett*, agents for *Tozers*, Newton Abbot (for the tenant).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

KINNANE v. KINNANE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), October 6, 7, 1953.]

Justices—Husband and wife—Maintenance—Wilful neglect to maintain child—Validity of order in favour of wife.

The parties were married in 1940 and there was one child of the marriage. After a separation, the parties came together again in May, 1952, the husband then agreeing to pay the wife £6 a week for housekeeping and maintenance. Later, that sum was reduced to £3 a week. On Jan. 3, 1953, the husband left the matrimonial home and after that date he paid the wife £1 a week as maintenance for the child. The wife issued summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her and wilfully neglected to maintain her. On Feb. 11, 1953, the justices dismissed the summons for desertion on the ground that the husband's departure was not against the will of the wife "as she had stated she had not wanted him to return [in May, 1952], but had given him a chance, and she did not wish him to return now [at the hearing]". They found the husband guilty of wilful neglect to maintain and ordered him to pay the wife £3 10s. a week, being £2 for herself and £1 10s. in respect of the child. The husband appealed, contending that, in effect, the justices found the separation to have been consensual, and that, since there was no agreement, express or implied, that he should continue to maintain his wife, the justices' finding of wilful neglect to maintain her could not be supported. The wife cross-appealed against the dismissal of her summons for desertion.

HELD: (i) on the facts the justices were entitled to find the husband guilty of wilful neglect to maintain the child; an order for the maintenance of the child was in law an order in favour of the wife; and, therefore, the justices had power to make the order which they made for the maintenance of the wife.

(ii) in any event, even assuming that the separation on Jan. 3, 1953, was consensual, on the facts it was agreed to on the implied undertaking that

the husband's liability to support the wife and child continued; and (iii) on the facts the husband had deserted the wife.

AS TO WILFUL NEGLECT TO MAINTAIN, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 701-703, Nos. 6703-6721.

Cases referred to:

- A (1) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest, Replacement, 363, 3005.
(2) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest, Replacement, 82, 630.

APPEAL by the husband and CROSS-APPEAL by the wife against a decision of Luton borough justices dated Feb. 11, 1953.

- B The parties were married in October, 1940, and in 1943 the child of the marriage was born. Later, the parties separated, but they were reconciled in May, 1952, the husband agreeing to pay the wife £6 a week for housekeeping and as maintenance. Subsequently that amount was reduced to £3 a week. On Jan. 3, 1953, the husband left the wife. He was then £15 in arrears of the weekly payments to her and after that date he paid her only £1 a week as maintenance in respect of the child. The wife issued summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her and had wilfully neglected to provide her with reasonable maintenance. The justices dismissed the summons for desertion, but found that the husband had wilfully neglected to provide the wife with reasonable maintenance and ordered him to pay her the sum of £3 10s. a week, being £2 for the wife and £1 10s. for the child, the custody of whom they gave to the wife. The husband appealed against the finding of the justices on the second summons, and the wife, having obtained leave for an extension of time, cross-appealed against the dismissal of the summons for desertion.

- D
E *D. R. Ellison* for the husband.
T. H. K. Berry for the wife.

- F LORD MERRIMAN, P., stated the facts and continued: The justices dismissed the charge of desertion on the ground that the parting was not against the will of the wife, but was, in effect, a consensual separation. From that it is argued by the husband that not only can there be no order on the ground of desertion, as, indeed, there is not, but also that the order on the ground of wilful neglect to maintain necessarily fails because, if the separation was consensual, there is no finding that there was any agreement, express or implied, that it was on the basis that the husband would continue to maintain his wife, so that the order of the justices is bad, except as to the award of £1 10s. a week in respect of maintenance for the child. I do not think there is any difficulty about the law. The difficulty in this case is to see what is the proper inference from facts which are, to a large extent, not in dispute. But I think it is necessary at the outset to remind ourselves once more of the underlying basis of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and that is, in a sentence, that it is the wife who is the applicant and that it is in her favour, and in that of nobody but her, that whichever of the permitted orders the court decides to make is made*. We talk loosely of an order for the children. It is not an order for the children. Although under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (b), the custody of the children might be awarded to the wife, there was nothing in that Act about any support for the children at all. It was not until the Married

* For the special circumstances in which a husband may be the applicant, see Licensing Act, 1902, s. 5 (2), the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (3), and the Matrimonial Causes Act, 1937, s. 11 (2).

Women (Maintenance) Act, 1920, that it was provided by s. 1 (1) that, in addition to any of the other orders which might be made for the wife, a sum, then limited to 10s. a week as a maximum, might be ordered to be paid to her in respect of any child of whom she was given the custody. That amount is now 30s., and the wife's maximum amount is £5 instead of £2, but, as I read the amending Acts, no alteration whatever has been made in the fundamental conception that whatever order is made is an order in the wife's favour. A separation order can theoretically be made if any of her complaints is proved, although, as has been laid down by the Court of Appeal, justices should not make a separation order unless, in the exercise of their discretion, they consider that it is necessary for the protection of the wife. An order for the custody of the children is an order in favour of the wife. Justices have no power under the Act of 1895 to order custody of the children to the husband, and any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife. Speaking generally, any of these orders, as I read the code, can only be made if it is established that one of the complaints made by the wife under the code is found to be proved. In other words, I reject the argument that an order cannot be made in favour of the wife for the maintenance of the wife unless it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that, if the only finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that is the law. It may be that the amount which a court thinks reasonable as an award in favour of a wife may depend on whether the neglect has been of the wife or of the children or both, but, in my opinion, the right to make an order is established when the justices are satisfied that any one of the complaints set out in the Act of 1895, s. 4, is proved.

That principle is important in this case. After the parting the husband sent the wife only £1 a week as maintenance for the child. The justices have thought it right to quantify the reasonable amount to be paid to the wife in respect of the child as £1 10s. and it is admitted that the inference is that they did not think the amount sent by the husband, even for the maintenance of the child, was reasonable. Therefore, there has been neglect to pay reasonable maintenance in respect of the child whom he was legally liable to support. That being so, I should be prepared to hold that the whole order can be supported. If, now that the maximum amount which may be ordered to be paid to a wife is £5, the justices had chosen to say that they would order this wife to receive £3 10s. and had not apportioned that sum between wife and child, in my opinion, that order could not have been challenged. But I do not think we can decide this case solely on that narrow ground. This is one of those cases in which the question of the wife's right to support for herself is bound up with the question whether or not she has been deserted and I will examine the case from that point of view. It sounds a logical argument and one at first sight difficult to answer, that, as the justices have found there was no desertion because the wife was not unwilling that the husband should leave her, it, therefore, follows that the separation was consensual, and, there being no finding that there was any agreement, express or implied, to pay maintenance, therefore, she cannot recover under any head whatever—even though, as I have already said, it is admitted to be implicit in the justices' findings that there has been neglect to provide a reasonable amount in respect of the child.

On the assumption for the moment that the separation was consensual, I will deal with the question whether or not it was on the footing that the husband expressly or impliedly agreed to maintain his wife. Manifestly, the question must not be approached on the basis that there is some underlying presumption that a husband is liable to support his wife and that an agreement to continue to

do so ought necessarily to be inferred. I do not think that will do. If a wife deliberately chooses to walk out of the matrimonial home even with the tacit consent of her husband, it does not necessarily import that he has agreed to support her outside the matrimonial home. There is abundant authority for that proposition. But that is not this case. This is a case in which a husband, having already left home on an earlier occasion, has begged to be reinstated, and as a condition of reinstatement has agreed to a fixed sum by way of maintenance.

A I will assume that the agreement was varied, and that he was not in the wrong in the first instance in halving the amount which he had promised to pay, but that at the time immediately preceding the separation there was a de facto agreement to pay £3 at least for the maintenance of himself, his wife and the child. Then he is found by the justices to have packed his suitcase before the final quarrel, and to have done so with the deliberate intention of leaving the wife. There is a quarrel on Jan. 3 which resulted in his leaving, thus, as the justices find, wilfully bringing to an end the existing state of cohabitation. Now, if words mean anything (and there is ample evidence to support these findings) there is a clear concurrence of the intention to desert and the fact of separation wilfully brought about by the action of the husband. But the justices go on:

C “The [husband’s] action in leaving was not against the will of the [wife] as she had stated she had not wanted him to return in the first place [in May, 1952] but had given him a chance, and she did not wish him to return now [at the hearing].”

D It seems to me that, even if that is to be taken to mean that she was a party to this separation, the natural implication from the facts is that she consented to it only on the basis that the maintenance continued. To some extent that is recognised by the husband’s own conduct in sending the maintenance of £1 a week, though, in my opinion, he had no right to limit that to the support of the child, and, if the finding that it was a consensual separation is correct, I should be prepared to hold that the surrounding circumstances lead to the inference that it was on the basis that the husband undertook to continue to support the wife and child.

E But I do not think that this was a consensual separation. One does not need to rely on the authority of BUCKLEY, L.J., in a passage ([1909] P. 148) in *Harriman v. Harriman* (1) for the proposition that

F “Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her.”

G For that there is abundant authority, apart from that passage. It is one thing to say that this wife took the husband back reluctantly, and to give him a chance. Nevertheless, they resumed cohabitation and she was willing to continue the cohabitation so long as he supported her and the child, and she had done nothing, as I understand it, and nothing is found against her to the contrary, to depart from that attitude until, having made up his mind to go, the husband took advantage of a quarrel to leave her. Supposing, at the moment when he announced his intention of walking out of the house, the wife said: “Well, I don’t mind your going. I shall be thankful to see the last of you. But let us understand what this means. What are you suggesting about the future?” and the husband said: “Please understand that the moment I am outside the front door I wash my hands of you altogether. I have no further liability to support you or the child”. It is unnecessary to ask the rhetorical question: “What would her answer to that have been?” I decline to hold that she is to be taken to have consented to a parting on those terms; of course she did not; and to say that, because at the hearing of her charge of desertion she said she did not then want her husband back because of

the way he had treated her in the past and was likely to treat her in the future, she was prevented from asserting that he had deserted her, is, in my opinion, to fly in the face of authority. I cannot see that there is any evidence of her consenting to a parting on the basis that the husband was entitled to shed his responsibility for her and the child. It is really a corollary of the corresponding question of the wilful neglect to maintain, and, in my opinion, the fundamental criticism of the justices' conclusion is that, for a wrong reason, as I think, they have found that the husband's intention to desert, put into effect by the fact of separation, was not desertion because the wife was not unwilling to see the last of him. That decision, in my opinion, was fundamentally wrong, and has given rise to the argument that the finding of wilful neglect to maintain is in conflict with the dismissal of the desertion charge.

The reality of the matter, in my opinion, is that on the facts of this case as found by the justices, the husband intended to desert, gave effect to that intention by the overt act of leaving the matrimonial home and of paying an inadequate amount by way of maintenance afterwards, and that there is nothing in the wife's conduct which disentitles her to charge the husband with desertion and to succeed on that basis as well as on the basis of wilful neglect to maintain.

For these reasons, whichever way one looks at it, in my opinion, this appeal fails and should be dismissed.

PEARCE, J.: I agree. The order based on wilful neglect to maintain can be supported on the narrow ground that on the admitted facts the justices could find wilful neglect to maintain the child. This would entitle them to make an order in favour of the wife. Since the order is for £1 10s. for the child (and £2 for the wife), it appears that the justices considered that to be the proper amount of maintenance. It follows that the £1 which the husband paid for the child unaccompanied by any provision for the wife cannot have been adequate maintenance for the child when one considers the added difficulty and expense of maintaining a child when the mother is forced to work to support herself.

The order can also be upheld on the broader ground of failure to maintain both wife and child. Starting from the principle laid down in *Baker v. Baker* (2) one has to investigate the facts of the case to see whether the circumstances of the separation (if it did not amount to desertion) raised the implication of a continuing liability by the husband to support his wife. When one considers the history of this marriage, and the background and the facts surrounding the parting as my Lord had set them out, I am led to the belief that, if there was any consensual separation, it was on the implied understanding by both parties that the husband's liability to support continued.

I agree also with what my Lord has said with regard to the issue of desertion. I think that the justices were wrong in drawing the inference that the wife consented to the parting. In my opinion, the husband's appeal must be dismissed and the wife's cross-appeal on the dismissal of her summons for desertion allowed.

Appeal of husband dismissed. Cross-appeal of wife allowed.

Solicitors: *Turner & Evans*, agents for *John Q. Clayton & Co.*, Luton (for the husband); *Lathom & Co.*, Luton (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

CHRISTIE OWEN & DAVIES, LTD. v. STOCKTON.

[QUEEN'S BENCH DIVISION (Slade, J.), October 12, 13, 1953.]

Estate Agent—Commission—Agreement to pay commission “should the owner withdraw after having accepted an offer to purchase by a person able and willing to enter into a formal contract”—Sale of business agreed by vendor and purchaser to be subject to contract—Refusal of vendor to complete.

A The defendant instructed the plaintiffs, a firm of estate agents, to sell his business, and the terms of his agreement with them provided (inter alia) that, “should the owner withdraw after having accepted an offer to purchase by a person able and willing to enter into a formal contract”, the plaintiffs should be paid their commission. The plaintiffs introduced a prospective purchaser who was able and willing to enter into a formal contract, and the defendant came to an oral agreement with him for the sale of the business. It was agreed by both parties that the agreement should be subject to contract. The prospective purchaser's solicitors, on receiving the draft contract, made certain revisions to it, which the defendant's solicitors said they would advise the defendant to accept, but after the prospective purchaser had signed his part of the contract and given his solicitors a cheque for the deposit, the defendant refused to proceed with the sale.

D HELD: “offer” meant a firm offer which was capable of being turned into a contract by acceptance: dicta of SIR RAYMOND EVERSHED, M.R., in *Bennett, Walden & Co. v. Wood* ([1950] 2 All E.R. 136), applied; and the words “after having accepted an offer” meant “after that offer had been turned into a contract by acceptance”; an offer to purchase “subject to contract” was inconsistent with the person making the offer being willing to purchase, because the words “subject to contract” prevented the matter from going beyond the realms of negotiation: dicta of COHEN, L.J., in *Graham & Scott (Southgate), Ltd. v. Oxlade* ([1950] 1 All E.R. 861), applied; further, such an offer could not be accepted in the legal sense of the word “acceptance”; and, therefore, there had been no firm offer which could have been accepted, and it could not be said that the defendant had withdrawn, and, accordingly, the plaintiffs were not entitled to their commission.

F AS TO ESTATE AGENTS' COMMISSION, see HALSBURY, Simonds Edn., Vol. 1, p. 198, para. 457; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692, and pp. 512-514, Nos. 1770-1776.

Cases referred to:

- G (1) *Bennett, Walden & Co. v. Wood*, [1950] 2 All E.R. 134; 2nd Digest Supp.
(2) *Graham & Scott (Southgate), Ltd. v. Oxlade*, [1950] 1 All E.R. 856; [1950] 2 K.B. 257; 2nd Digest Supp.
(3) *Eccles v. Bryant & Pollock*, [1947] 2 All E.R. 865; [1948] 1 Ch. 93; [1948] L.J.R. 418; 12 Digest, Replacement, 70, 396.
(4) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

H ACTION for money due and owing by way of commission.

On Feb. 28, 1952, the defendant, who was the lessee of premises known as “The Turn of the Way” in Earl's Court Road, London, W.8, and the owner of the restaurant business carried on there, instructed the plaintiffs, who were estate agents, valuers and auctioneers, in writing to offer the property for sale by private treaty for £3,500. In consideration of the plaintiffs' so doing, he agreed in writing to pay them commission in respect of any completed transaction, and he was also to pay their commission should he withdraw

"after having accepted an offer to purchase by a person able and willing to enter into a formal contract."

The plaintiffs offered the property for sale and introduced a Mr. Hannay as a prospective purchaser. On Apr. 24, 1952, there was a meeting between the defendant and Mr. Hannay which resulted in Mr. Hannay agreeing to purchase the business for £2,800. Both parties agreed that that should be subject to contract. On May 6, 1952, the defendant's solicitors sent the draft contract to Mr. Hannay's solicitors, and on May 27, 1952, it was returned to them with certain revisions. On May 28, 1952, the defendant's solicitors wrote to Mr. Hannay's solicitors saying that they would advise the defendant to accept the revisions. On June 5, 1952, Mr. Hannay signed his part of the contract and paid a cheque for the deposit to his solicitors. On June 12, 1952, the defendant's solicitors wrote to Mr. Hannay's solicitors informing them that the defendant did not propose to proceed with the proposed sale of the business to Mr. Hannay. The plaintiffs claimed their commission from the defendant under the terms of their agreement.

Desmond Neligan for the plaintiffs.

Harold Lightman for the defendant.

SLADE, J., stated the facts and continued: I have no hesitation in finding as facts, first, that Mr. Hannay was at all material times able to find the sum of £2,800 necessary to complete a transaction of this kind; secondly, that Mr. Hannay was at all material times in the colloquial sense not only willing, but anxious, to buy this restaurant, the goodwill, and the lease, for the sum of £2,800; and, thirdly, that it was through no fault of his (Mr. Hannay's) that the transaction did not mature into a binding contract followed by completion.

Having thus dealt with the facts, I have to return to the agency contract. The rights of the parties depend entirely on the language of the contract between them, that is to say, the agency contract, and the proper interpretation of that language. Counsel on both sides have told me that they have been unable to find any case where the language of an agency contract was substantially the same as the language in the present case, and I myself have been equally unsuccessful. I do not think it is of very great assistance to look at decisions on other contracts unless the contracts are substantially identical with the terms of the one which I have to construe. The agency contract itself defines the events on the happening of which the plaintiffs are to become entitled to commission. The events are twofold. For convenience during the argument we called them (A) and (B). (A) was: "Commission is payable by the owner in respect of any completed transaction pertaining to the premises," and (B) was:

"Should the owner withdraw after having accepted an offer to purchase by a person able and willing to enter into a formal contract then [the plaintiffs] shall be paid their commission."

Counsel for the plaintiffs says that he relies on what I have called (B). However, it is material to look at (A): "Commission is payable . . . in respect of any completed transaction . . ." because (B) is, I think, clearly used in contradistinction to (A). Although it is not necessary for me to construe (A), I should say that a completed transaction not only means a transaction which has proceeded to completion—that is to say, in the case, for example, of the sale of freehold premises, by conveyance, or, in the case of leasehold premises, by assignment or an under-lease, and in each case by an assignment of the goodwill of the business, and so on—but also includes the case where the transaction has been completed in equity, that is to say, when a binding and enforceable contract has been signed by both parties to the transaction, or at least by the party to be charged, and which can, in a proper case, be enforced

by an order for specific performance. Those are the two events which, I think, are included in (A). Although, in the second case, completion has not taken place, the transaction may well be said to have been a completed transaction, in the sense that the right to the property has passed to the purchaser in equity. The effect of (B) is this. First, the agents, that is to say, the plaintiffs, must introduce a person who is able and willing to enter into a formal contract; secondly, that person must manifest his willingness to do so by making an offer; thirdly, the owner must accept that offer; and, fourthly, having accepted that offer, the owner must withdraw, and when those requirements are fulfilled the agents are expressed to be entitled to their commission, although by reason of the withdrawal the transaction is never completed. It is, of course, open to a principal and an agent to enter into any agreement they are mutually willing to make, and to provide for any event, or any number of events, on the happening of which the right of the agent to his remuneration shall arise. The only question in any particular case is to see what those events are by construing the language which the parties have used. Counsel for the defendant contends that all that is covered by (B) is the case where a prospective vendor and a prospective purchaser, having agreed on the terms of the contract into which they propose to enter, enter orally into a contract containing those terms. Then, as the contract is purely oral and there is no memorandum of it in writing such as is required by s. 40 of the Law of Property Act, 1925, although it is a perfectly valid and legal contract, it is a contract which the law will not enforce. He says that that is the true construction of (B), and is clear, first, from the use of the word "offer", secondly, from the use of the word "accepted", thirdly, from the use of the word "withdraw", and (one might also add), fourthly, from the use of the words "formal contract."

I confess I find it difficult to envisage a person who can be said to be able and willing to enter into a formal contract of which no one knows the terms, or of which one only knows one of the terms, such as the price. I should have thought that "a person able and willing to enter into a formal contract" means a person able and willing to enter into a formal contract of which the terms have already been agreed, albeit orally. First, counsel for the defendant says the word "offer" means, and can only mean, a firm offer, that is to say, an offer which is capable of being turned into a contract by acceptance, that "acceptance" is the word for the process used by the offeree in turning the offer into a contract, and that the word "withdraw" of necessity implies that the contract is an unenforceable one because one party to a contract cannot withdraw from it if it is an enforceable contract. He can fail to perform it or he can refuse to perform it, but he cannot withdraw from it because he is legally bound, and, indeed, in a proper case may be enjoined, to perform it. Counsel says that the word "offer" used in a contract of this nature has been held by the Court of Appeal to connote a firm offer. That appears to be so from the decision of the Court of Appeal in *Bennett, Walden & Co. v. Wood* (1), where the words of the agency contract were that the agents were to be entitled to commission on "securing for you an offer," that is to say, precisely the same word "offer" was used as in the agency contract in this case. It was held:

"on a proper construction of the words 'securing for you an offer' the word 'offer' meant a firm offer which by acceptance would give rise to a contractual relationship. An offer subject to contract lacked that essential characteristic, for its acceptance did not create a contract, and the plaintiffs were, therefore, not entitled to commission."

SIR RAYMOND EVERSHED, M.R., said ([1950] 2 All E.R. 136):

"To decide the present case, that . . . is all I need refer to of the facts of the case. The question is solely this: By the phrase in the letter of Oct. 7, 'securing for you an offer,' is it contemplated that something

short of what is ordinarily called a firm offer will do? Is it sufficient, in order that the agents shall earn their commission, that they should provide or produce something which, though expressed to be an agreement to purchase on the terms of an offer, is, in truth, no more than a proposal in the negotiations? To my mind, the answer to that question is in the negative."

I can see no distinction in principle between the words "an offer to purchase by a person able and willing to enter into a formal contract" and the words "securing for you an offer", so far as the meaning of the word "offer" is concerned. Therefore, quite apart from other considerations, I should hold the word "offer" in the agency contract that I have to consider to mean "an offer capable of being turned into a contract by acceptance." Equally, I should regard the words "after having accepted an offer" as meaning "after that offer had been turned into a contract by acceptance," albeit (there being no memorandum) an unenforceable contract.

I also derive assistance in arriving at the conclusion at which I have arrived from the decision of the Court of Appeal in *Graham & Scott (Southgate), Ltd. v. Oxlade* (2), where the words of the agency contract were: "... in the event of our introducing a person or persons willing and able to purchase ...". I am not concerned with ability to purchase here—Mr. Hannay always possessed that—but with willingness to purchase, in the light of the words in the contract. I have to construe the words "a person willing to enter into a formal contract." In *Graham & Scott (Southgate), Ltd. v. Oxlade* (2) the Court of Appeal held that a mere offer to purchase subject to contract was inconsistent with the view that the person making the offer was a willing purchaser, because all he was prepared to do to manifest his willingness was to enter into an agreement in the colloquial sense, which, by the addition of the words "subject to contract", prevented the matter from going beyond the realm of negotiations and gave him what COHEN, L.J., described as a locus poenitentiae to withdraw from the so-called agreement at any stage until the contracts envisaged by the agreement became binding, that is to say, according to the decision of the Court of Appeal in *Eccles v. Bryant & Pollock* (3), not only until the parties had signed the contracts and both were ready to exchange contracts, but until the exchange of the signed contracts was actually effected. In *Graham & Scott (Southgate), Ltd. v. Oxlade* (2) COHEN, L.J., said this ([1950] 1 All E.R. 861):

"In reaching my conclusion I am not saying that the introduction into the preliminary arrangements of the expression 'subject to contract' would necessarily in all cases prevent the agent establishing that the person he introduced was willing to purchase. It clearly would not be fatal to the agent's claim if it was introduced by the vendor in accepting an unqualified offer, but, if it was introduced by the prospective purchaser, the normal inference would be that he did so with a view to reserving to himself a locus poenitentiae, conduct which seems to me inconsistent with the view that he is a willing purchaser."

Where you have an agreement made subject to contract there are four possible outcomes of that so-called agreement. The first one is a completed transaction; the second one is a legally enforceable contract, but one which, at the time when the agent issues his writ claiming commission, for example, has not yet actually proceeded to completion; the third one is a contract, but a contract which is not legally enforceable; and the fourth one is a state of affairs which has never passed beyond the realm of negotiation. Of those four possible outcomes I think the first two, as I have said, are covered by (A) in the agency contract. The third one is the one which, as I construe the phraseology of (B), (B) is designed to cover, because there there is an offer in the sense of a firm offer,

an acceptance of the offer, and a person who not only has been willing, but has, in fact, shown his willingness, to enter into a formal contract, the terms of which are, *ex hypothesi*, already agreed, though not then reduced into writing. Accordingly, there is a position in which a person can lawfully withdraw, because the contract, as I have said, is an unenforceable one. With regard to the fourth outcome, where nothing has proceeded beyond the stage of negotiation, it is, of course, open to a principal and agent to arrive at any agreement they choose, and many attempts have been made by highly reputable estate agents, like the plaintiffs, to hit on a form of phraseology which will prevent a person who has had the benefit of their services and has gone right up to the point of being about to put his pen to sign a contract, from discarding, either from caprice, or, more likely, because at the last moment he receives a better offer, any moral obligation he may have incurred and merely resiling from the negotiations in order to get more money. I feel considerable sympathy with any agent who takes steps to secure a contract which will protect him from being deprived of the remuneration which he might reasonably have expected to receive for his services by perfectly lawful conduct on the part of his principal of that kind, but if he wants to make a form of contract which will render the principal liable to pay him commission on a transaction which has never got beyond the realm of negotiation (that is to say, on the fourth possible outcome of an agreement subject to contract), he must make it perfectly clear to his principal that that is one of the events on which he is to be entitled to commission. I am not suggesting any form—I can imagine it is a very difficult problem—but it seems to me that the principle which counsel for the plaintiffs has advanced so powerfully does involve my construing what I have called (B) in this way: “Should the owner withdraw after having accepted an offer subject to contract to purchase by a person able and willing to enter into a formal contract, to the terms of which he is at the moment in ignorance, then [the plaintiffs] shall be paid their commission.” Even then the word “accept”, except in the colloquial sense, is inappropriate, because you cannot in the legal sense accept an offer which is expressed to be subject to contract.

I was reminded of the words of LORD RUSSELL OF KILLOWEN in *Luxor (Eastbourne), Ltd. v. Cooper* (4), although I think that there he was dealing with offers in the sense of firm offers, and not offers subject to contract, where he said ([1941] 1 All E.R. 47):

“It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language.”

A fortiori, I think it would require clear and unequivocal language to provide that the principal should be liable to the agent for commission in a case where the offer is subject to contract, when the acceptance is only a colloquial acceptance of something which is incapable of being turned into a contract, when there is no formal contract at the time of the acceptance, and the terms of any formal contract which may thereafter come into existence have not even been negotiated, and when the word “withdraw” can only apply to withdrawal from negotiations because there is nothing else from which to withdraw. If it is to be provided that, in those circumstances, the agents are entitled to commission, it must be so stated in the agency contract in the plainest possible terms. Moreover, I find it difficult to see how the responsibility for having withdrawn (because this only applies if the owner withdraws) can be imputed to one person rather than to the other when the negotiations fail to reach fruition simply because the parties are unable to agree on the terms of the contract.

For those reasons, in my judgment, this action fails. In so saying I should like to add that my sympathies are entirely with the plaintiffs, and it is only

right to say that the document which they invited the principal to sign is quite irreproachable in its form. The commissions charged are those fixed by the recognised professional institutions, the document is in large print, and, to make assurance double sure, the contract contains a separate sheet which is retained by the principal and sets out the terms as to commission in an equally legible form, so that the principal is at all times fully aware of the terms on which he has availed himself of the agent's services. In a word, throughout this case, the plaintiffs have behaved with exemplary propriety, but I cannot allow that fact to influence my judgment, and there will, accordingly, be judgment for the defendant.

Judgment for the defendant.

Solicitors: *Underwood & Co.* (for the plaintiffs); *Raymond Pollard & Co.* (for the defendant).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

PRACTICE DIRECTION.

Administration of Estates—Grants of representation—Deceased person dying domiciled abroad.

This direction is a consolidation, with minor alterations and additions, of all current directions and circulars relating to applications for grants of representation of the estates of persons dying domiciled out of England.

ORDERS FOR GRANTS IN FOREIGN DOMICIL CASES.—Where the deceased died domiciled out of England, unless the applicant is an executor entitled to probate as hereinafter set out or his attorney or in special circumstances an order to the contrary is made, the grant will be made by order to the person entrusted with administration by the court of the deceased's domicile or entitled to administer by the law of the deceased's domicile. A person entrusted who applies takes precedence over all others and it is not necessary for him to clear an executor. Unless the applicant is entrusted, an affidavit of law is required in every case. An exception to this general principle may be made if the whole of the estate in England consists of immovable property, when a grant limited thereto may issue in an ordinary English title, and no order need be obtained.

Orders for grants to persons entrusted or entitled will be made under s. 73 of the Court of Probate Act, 1857, or s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, but it will not normally be necessary for a declaration to be filed or for sureties to justify in such cases. An affidavit of law stating that a person is entitled to administer the estate by the law of the place at which the deceased died domiciled will be accepted without further inquiry, and without the persons entitled being required to take a grant or complete any formalities in the foreign country. On the other hand, if it is specifically stated in the affidavit of law that the applicant would be entitled by the law of the domicile only if he were to obtain a grant or comply with some necessary formality, no order can be made for a grant to him in that capacity; but if the circumstances justify it, a discretionary order may still be made under s. 162, and a declaration and justification will be required. Registrars of the Principal Registry have jurisdiction to make such orders whatever the amount of the estate. They will require to know why no representation has been established in the place of domicile and whether this will ultimately be done.

If the powers of a person entrusted are limited as to time, the order for the grant may be made subject to a similar limitation if the registrar is satisfied that the grant is required for the purpose only of collecting English assets, and

that this can be done within the time limited by the foreign court, and that there are no debts in this country.

AFFIDAVIT OF LAW.—The registrars will normally accept affidavits of law made by a barrister or advocate practising, or who has practised within the relevant period, in the foreign country and is conversant with its laws and constitution.

A In cases which do not present serious difficulty the registrar may, in special circumstances, accept the affidavit of a person not so qualified if satisfied that by reason of his official position or otherwise he has knowledge of the law and constitution of the foreign country.

The office of consul of itself will not be regarded as a qualification enabling the holder to speak to the law of his country.

B Variations will normally be allowed in the following special cases:—

1. A solicitor's affidavit will normally be accepted as to the law of Scotland, Northern Ireland, Republic of Ireland, Jersey or Guernsey.
2. An affidavit by a lawyer with adequate French qualifications, showing also that he is well conversant with the law of Belgium and is entitled to practise and has actually practised in Belgium, will normally be accepted as to the law of Belgium.
3. A lawyer adequately qualified in one State may speak to the law of any other State of the United States of America if he is able to swear that he is fully conversant with its laws.

C An affidavit by the person claiming to be entitled or his attorney will be rejected whatever his qualifications.

ATTORNEY.—Where a grant has been made by order to the attorney of a person entrusted by the court of the domicile or of the person entitled to administer by the law of the domicile “until further representation be granted,” and the person giving the power applies later for a direct grant, an affidavit will be called for showing:—

- E
- (a) that the order entrusting is still in force, or
 - (b) that the person concerned is still entitled to administer, and a further order will be necessary.

COMMUNITY OF PROPERTY.—Where, by the law of the place of domicile of the deceased, community of property exists between the spouses, the following concluding paragraph to the oath to lead the grant is appropriate and should be used:—

G “the whole of the estate in England in respect of which a grant is required amounts in value to the sum of . . . to the best of my knowledge, information and belief: and that . . . [half] . . . of that sum has accrued to the surviving spouse by reason of the existence of community of property under the law of the place of domicile of the said deceased.”

The grant will be in respect of the whole estate, but a court fee will be payable in respect of half of it only. The penalty in the bond, if any, will be in respect of half the estate.

H **DANISH WILLS.**—Since 1926 the surviving spouse of a domiciled Dane may take, in Denmark, what is equivalent to a grant of simple administration, notwithstanding any will left by the deceased. Though it is not proved, the will has some legal effect. In such cases a grant of administration with the will annexed will be made in this country, upon registrar's order, to the person entitled to administer by the law of the domicile, or to the person entrusted with the administration by the court of the domicile, upon the usual affidavit of law.

DOMICIL.—Whenever foreign law is relied upon, including cases under Lord Kingsdown's Act, the domicile at the date of death must be sworn to in the oath and recited in the grant. Where, as in the provinces of the Union of South Africa or the States of the United States of America, there are separate jurisdictions, the province or State must be specified and law of the province or State spoken to. It is not necessary to specify the particular division of a country where the testamentary law is uniform, as in Switzerland.

EXECUTOR.—(a) *Appointment in English language.*—If a valid will of a testator, wherever domiciled, is in the English or Welsh language and appoints an executor, he will be accepted as having full rights of executorship. No expression in a foreign tongue purporting to mean "executor" will be accepted as constituting an executor; but if such a will sets out the duties of a person named therein in terms sufficient to constitute him executor according to the tenor thereof, he may obtain probate or appoint an attorney in that capacity. Failing this, administration with the will annexed will issue to the person entitled to administer the estate under the law of the domicile.

(b) *Foreign company.*—A foreign corporation appointed executor in a will which would be regarded as giving a right to probate were the executor an individual able to apply, may as executor appoint an attorney to take a grant for its use and benefit and until further representation be granted. It is immaterial whether the will has been proved in the court of the domicile or not, unless there is some other person entrusted by the foreign court who has applied here.

LORD KINGSDOWN'S ACT.—This Act can be used only for curing faults of execution, and appointing executors, but no further. It cannot make good, for example, the will of a minor the law of whose domicile does not permit him to make a will.

Unless the will is in English form the grant should be limited to personalty.

When it is necessary to decide whether the deceased was a British subject reference should be made to the British Nationality Act, 1948, and the Ireland Act, 1949.

INLAND REVENUE AFFIDAVITS.—In all foreign domicile cases the Inland Revenue affidavit must be controlled by the Estate Duty Office prior to the issue of the grant.

MINORITY OR LIFE INTERESTS.—The statement in the oath as to minority or life interests should be based on the law of the domicile. If a minority or life interest arises, even if under the law of the domicile a single person can take the grant, s. 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, requires that the English grant shall go to not less than two individuals or to a trust corporation.

In straightforward cases, including cases under Lord Kingsdown's Act, the statement of the applicant in the oath that a minority or life interest does, or does not, exist may be accepted without further evidence. If, however, it appears on the face of the will and in the events which have happened that a minority or life interest does exist, and the oath states that it does not, the statement should be verified by an affidavit of law.

NEW ZEALAND.—Under the statutory procedure in New Zealand the Public Trustee of New Zealand can elect to administer an estate which does not exceed £1,000 in New Zealand, but is required subsequently to take a grant if such estate is increased to over £1,500. Where the Public Trustee applies as the person entrusted, and his capacity as such is established by an election to administer, it should be sworn in the oath that the property of the deceased in New Zealand does not exceed £1,500 and that since the election was filed in the New Zealand Supreme Court no grant has been issued by that court.

OATH AND BOND.—In cases where under s. 73 or s. 162 an order has been made for a grant to the person entrusted by the court of the domicile or entitled by the law of the domicile, an oath or bond describing the applicant as the person entitled or entrusted will normally be accepted whether it recites the order under the section or not.

- A In all other cases where an order has been made under one of these sections the oath and bond must describe the applicants as persons authorised under s. 73 or s. 162 as the case may be.

PERSONAL APPLICATION DEPARTMENT.—An application for a grant to the person entrusted or entitled will not be accepted in the Personal Application Department.

- B TRANSLATIONS OF WILLS.—In applications for a grant where the testator's will written in English has been lodged with a notary abroad, the notarially certified document lodged may contain a copy of the original will or it may merely contain a translation into a foreign language and a re-translation therefrom into English.

- C In this latter case a photographic copy or a duly verified copy of the original will be called for. In view of the decision *In the Goods of Rule* (4 P.D. 76)*, however, if the applicant objects it will not be open to the registry to insist on the production of such photographic or other copy of the original will. If, however, it appears on the face of the document that the re-translation is, or may be, inaccurate, the registry will require that the re-translation be checked with the original.

- D TREASURY SOLICITOR.—Particular regard must be paid to the provisions of Non-Contentious Probate Rule 75. It must be shown by the applicant that there are kin who under the foreign law will take estate in England passing under a partial or total intestacy, or that the Treasury Solicitor does not propose to take a grant on behalf of the Crown. The case of *Re Barnett's Trusts* ([1902] 1 Ch. 847)* is in point.

- E VALIDITY OF WILLS IN ENGLISH FORM.—A will in English and in English form will normally be accepted as valid without further inquiry if the domicile is Scotland, Northern Ireland, the Irish Republic, or any of the dominions or colonies except South Africa.

B. LONG,
Senior Registrar.

May 5, 1953.

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* (1) *In the Goods of Rule*, (1878), 4 P.D. 76; 47 L.J.P. 32; 39 L.T. 123; 42 J.P. 776; 23 Digest 96, 892.

(2) *Re Barnett's Trusts*, [1902] 1 Ch. 847; 71 L.J.Ch. 408; 86 L.T. 346; 11 Digest, Replacement, 398, 548.

Re PARKER DAVIES & HUGHES, LTD.

[CHANCERY DIVISION (Roxburgh, J.), October 19, 1953.]

Legal Aid—Costs—Winding-up petition—Certificate for action and “to enforce any order made therein”—Winding-up petition after judgment obtained.

The petitioner was granted a civil aid certificate under the Legal Aid and Advice Act, 1949, Part I, in connection with proceedings brought against him by a company for arrears of rent “and to enforce any order or agreement made in connection with the said proceedings”. On a counterclaim the petitioner obtained judgment for £313, and he then petitioned for the winding-up of the company. His petition was dismissed. On the question of costs,

HELD: the petition for winding-up was not a mode of enforcing the order made in connection with the proceedings to which the civil aid certificate related, and, therefore, in the matter of the petition the petitioner was not a person in respect of whom a certificate was in force, and he was liable to pay the costs.

Re A Company ([1915] 1 Ch. 520), applied.

FOR THE LEGAL AID AND ADVICE ACT, 1949, Part I, see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 532-554.

Case referred to:

(1) *Re A Company*, [1915] 1 Ch. 520; 84 L.J.Ch. 382; 10 Digest 828, 5399.

PETITION by a judgment creditor to wind-up a company.

The petition was dismissed, and this report relates only to the question of costs.

Whipham for the petitioner.

Woolley for the company.

ROXBURGH, J.: I must order the petitioner to pay the costs unless he is an assisted person under the Legal Aid and Advice Act, 1949, Part I, and that depends on the construction of the civil aid certificate which he has obtained and which is before me. It reads as follows:

“This is to certify that Albert Arthur Jones . . . (hereinafter called ‘the assisted person’) is entitled, in accordance with the Legal Aid and Advice Act, 1949, and the regulations and scheme made thereunder, to legal aid as defendant in connection with the following proceedings.”

Then it describes proceedings in the King's Bench Division, as it then was, and goes on (and these are the material words):

“and to enforce any order or agreement made in connection with the said proceedings.”

Albert Arthur Jones obtained judgment in those proceedings for £313. I now have to determine whether the petition for the winding-up of the judgment debtor is a proceeding to enforce that order.

I must confess that, but for authority, I should have thought this a difficult question, and it is obviously one of far-reaching importance. Fortunately—and I say “fortunately” because I think, quite apart from authority, that, if it is intended that a civil aid certificate should extend to a winding-up petition, it would be desirable to state that expressly on the face of the certificate—it seems to me that the decision of the Court of Appeal in *Re A Company* (1) is indistinguishable from the present case and is binding on me. In that case the question was whether a winding-up petition was within the following words in the Courts (Emergency Powers) Act, 1914, s. 1 (1):

“ . . . no person shall—(a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court . . . for the pay-

ment or recovery of a sum of money . . . except after such application to such court and such notice as may be provided for by rules or directions under this Act."

A The Court of Appeal had to consider two questions—(i) whether the winding-up petition was "proceeding to execution" on the judgment, (that point does not arise here), and (ii) whether it was "proceeding to the enforcement" of the judgment, and that is precisely the question which arises here. In delivering his judgment, LORD COZENS-HARDY, M.R., said, with reference to the words "otherwise to the enforcement" of the judgment ([1915] 1 Ch. 526):

B " . . . I cannot so construe the section as to extend it to a winding-up petition which may be presented by a petitioner who is not a judgment creditor, and which does not enure for the sole benefit of the judgment creditor, but must enure for the benefit of all the creditors."

PHILLIMORE, L.J., in the course of his judgment, said (*ibid.*, 528):

C "In the particular case she is a creditor because her damages have been liquidated by a judgment. But it would be the same if she were a simple contract creditor whose debt was merged in a judgment. She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors, as in a creditor's suit for the administration of the estate of a deceased debtor or in a bankruptcy."

D It appears to me that the ratio decidendi of that decision is binding on me, and that there is no possible way of distinguishing the present case from that case. Therefore, though with some reluctance, I must confess, I cannot hold that this present petitioner is covered by the civil aid certificate in these proceedings. The order must follow the usual course and he must be ordered to pay the costs of the petition, to be taxed as between party and party.

Order accordingly.

E Solicitors: *Witham & Co.*, agents for *R. C. Roberts*, Wrexham (for the petitioner); *T. D. Jones & Co.*, agents for *Howel V. O. Cook & Co.*, Wrexham (for the company).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

F

CHANCERY DIVISION

PRACTICE DIRECTION.

Trust and Trustee—Trustee—Costs—Amount to be allowed.

G In cases in which trustees are parties in their capacity as such and in which it is appropriate that they should be indemnified as to their proper costs and expenses of the proceedings, the order as to the costs of the trustees should direct taxation of their "costs and expenses of and incident to this action [application] [matter]" without the addition of the words "as between solicitor and client". On such a direction all costs and expenses properly incurred by the trustees will be allowed by the taxing master. The costs of other parties H to the proceedings will, as hitherto, be ordered either (a) "to be taxed" (i.e., as between party and party) or (b) "to be taxed as between solicitor and client".

By direction of the judges of the Chancery Division.

W. S. JONES,
Chief Registrar
Chancery Division.

27th October, 1953.

R. J. REUTER CO., LTD. v. FERD MULHENS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
July 8, 9, 10, 13, 14, 15, 16, October 16, 1953.]

Trading with the Enemy—Custodian of Enemy Property—Assignment of trade marks—Trade marks vested in custodian by Board of Trade—Assignment by custodian—Extent of powers of board and of custodian—“With a view to preventing the payment of money to enemies and of preserving enemy property . . .”—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1)—Distribution of German Enemy Property Act, 1949 (c. 85), s. 1 (1)—Distribution of German Enemy Property (No. 1) Order, 1950 (S.I., 1950, No. 1642), para. 18 (1), (3).

Trade Mark—Assignment—Enemy property—Assignment with goodwill by Custodian of Enemy Property—Retention by former owner of right to use mark at common law—“Exclusive rights”—Effectiveness of assignment—Failure to advertise assignment—Trade Marks Act, 1938 (c. 22), s. 22 (1), s. 22 (4), s. 22 (7).

The defendant succeeded to the business of Mulhens in Cologne, Germany, which, before the outbreak of the second world war, was exclusively associated in Germany and elsewhere with the name or description of “4711” eau de cologne. Mulhens was the registered proprietor of a number of English trade marks relating to the perfume known as “4711” eau de cologne and associated products. Until 1930 the products of Mulhens were bought and imported into England by the plaintiffs, an English company, but in that year Mulhens acquired, through a Dutch subsidiary, ninety-five per cent. of the shares in the plaintiffs. Thereafter, some of the products of Mulhens were still imported from Germany, some subsidiary products were manufactured in England from essences made up in Germany, the formulae and methods for making these essences being a closely guarded secret. At the outbreak of the war of 1939 the business of selling the products of Mulhens continued because the plaintiffs were able to acquire from Holland a substantial supply of the essences, sufficient to enable them until 1946 to put the unchanged products on to the English market. The plaintiffs started at some time to make their own perfume, corresponding in appearance to the German product, but until 1950 they described themselves as the sole concessionaires of Mulhens. By an order dated June 26, 1940, the Board of Trade, under powers given to it by the Trading with the Enemy Act, 1939, s. 7 (1), vested the shares of the plaintiffs, held by the Dutch subsidiary, in the Custodian of Enemy Property. By a second order (also made under s. 7 (1)) dated Jan. 31, 1941, the trade marks, theretofore registered in the name of Mulhens, were vested in the custodian whose name was placed on the register of trade marks. By a third order (made under the same powers) dated Apr. 17, 1951, the second order was varied and the custodian obtained the right to assign the trade marks with or without the goodwill in the United Kingdom of the business concerned. On June 15, 1951, the Custodian of Enemy Property assigned to the plaintiffs all the trade marks together with the goodwill, if any, in the United Kingdom, and on Nov. 13, 1951, the plaintiffs were registered as proprietors of the trade marks. By an Order in Council dated July 6, 1951, the state of war with Germany came to an end. On Dec. 3, 1951, the plaintiffs commenced proceedings against the defendant, inter alia, for infringement of five of the trade marks in question all containing the description “4711” eau de cologne. The defendant claimed (a) that the order of Apr. 17, 1951, was made in excess of the powers of the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and also that the assignment of the trade marks to the plaintiffs was invalid, as being similarly in excess of powers conferred on

the Board of Trade or the custodian by the Act of 1939; and (b) that under the Trade Marks Act, 1938, s. 22, the assignment of the marks to the plaintiffs was void on the ground that there was a failure to advertise as required by s. 22 (7) and that, in view of s. 22 (4), the marks were incapable of being validly assigned to them because the defendant was entitled at common law to the use of the marks, and, therefore, was entitled to rectification of the register and to restrain the plaintiffs from making any use of the marks, as constituting a passing off of their goods as the goods of the defendant.

HELD: (i) the opening words of s. 7 (1) of the Act of 1939—"with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace . . ." were an expression of the Parliamentary purpose in conferring on the Board of Trade the order-making powers, and not an expression of the purposes to which the orders to be made by the Board of Trade must be directed; they ought not to be treated as having a restrictive effect; and, therefore, s. 7 (1) (d) and s. 15 (5) were sufficient authority for the Board of Trade to make the order of Apr. 17, 1951, and to authorise the assignment of the trade marks; but, even if the opening lines of s. 7 (1) of the Act of 1939 would not have justified the making of the order of Apr. 17, 1951, and the assignment, nevertheless, after the passing of the Distribution of German Enemy Property Act, 1949, it was the duty of the Board of Trade to realise the trade marks to best advantage, and, having regard to the Distribution of German Enemy Property (No. 1) Order, 1950, both the order of Apr. 17, 1951, and the assignment made thereunder became *intra vires* the Board of Trade to make and execute, or direct to be executed.

(ii) the assignment of the trade marks was not rendered ineffective by reason of the failure to advertise the assignment in accordance with the Trade Marks Act, 1938, s. 22 (7), because the assignment was "in connection with the goodwill of [the] business" in which the trade mark was used, and, in any case, the question what advertisements, if any, should be published by the assignee was a matter for the registrar, who took the view that in the circumstances no advertisement was necessary.

(iii) accepting that, if, notwithstanding an assignment of a trade mark, the assignor retains an exclusive right himself to use the same mark at common law, the assignment will be ineffective by virtue of s. 22 (4) of the Act of 1938, the defendant had not retained the "exclusive rights" at common law (within s. 22 (4)) so as (for instance) to enable him to support an action for passing-off, for he had in England no proprietary right which he was entitled to protect, because the assignment of the trade marks to the plaintiffs operated to confer on them all rights therein whether statutory or at common law, and the business goodwill with which the marks were associated in England was distinct from the goodwill concerned with the trade in other countries, and was effectively assigned to the plaintiffs.

Principle in *Lacteosote, Ltd. v. Alberman* ([1927] 2 Ch. 117), no longer law.

Per SIR RAYMOND EVERSHERD, M.R.: It is now clear that by virtue of the Trade Marks Act, 1938, s. 22 (1), a trade mark may be validly assigned by one manufacturer to another without any assignment of the business or goodwill of the assignor and so as thenceforth to be distinctive of a manufacturing origin different in fact from the previous manufacturing origin, so long, at any rate, as the mark is not deceptive.

FOR THE TRADE MARKS ACT, 1938, s. 22, see *ibid.*, Vol. 25, p. 1199.

Cases referred to:

- (1) *Bank Voor Handel en Scheepvaart N.V. v. Slatford*, [1952] 2 All E.R. 956; 3rd Digest Supp.
- (2) *Royal Baking Powder Co. v. Wright, Crossley & Co.*, (1900), 18 R.P.C. 95; 32 Digest 205, 2551.
- (3) *Samuelson v. Producers Distributing Co., Ltd.*, [1932] 1 Ch. 201; 101 A L.J.Ch. 168; 146 L.T. 37; 48 R.P.C. 580; Digest Supp.
- (4) *Re Lewis's Declaration of Trust*, [1953] 1 All E.R. 1005; *sub nom. Loudon v. Ryder* (No. 2), [1953] Ch. 423.
- (5) *Fitzwilliam's (Earl) Wentworth Estates Co. v. Minister of Housing & Local Government*, [1952] 1 All E.R. 509; [1952] A.C. 362; 116 J.P. 183; 3rd Digest Supp.
- (6) *Blackpool Corpn. v. Locker*, [1948] 1 All E.R. 85; [1948] 1 K.B. 349; [1948] L.J.R. 847; 112 J.P. 130; 2nd Digest Supp.
- (7) *Lacteosote, Ltd. v. Alberman*, [1927] 2 Ch. 117; 96 L.J.Ch. 305; 137 L.T. 319; *sub nom. Lacteosote, Ltd. v. Alberman, Re Lacteosote, Ltd.'s Trade Mark*, 44 R.P.C. 211; 43 Digest 210, 566.
- (8) *Leather Cloth Co. v. American Leather Cloth Co.*, (1865), 11 H.L. Cas. 523; 35 L.J.Ch. 53; 12 L.T. 742; 29 J.P. 675; 11 E.R. 1435; 43 Digest 211, 570.
- (9) *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; [1945] A.C. 68; 114 L.J.Ch. 52; 172 L.T. 69; 2nd Digest Supp.
- (10) *Re Betts*, [1949] 1 All E.R. 568; 2nd Digest Supp.
- (11) *Lecouturier v. Rey*, [1910] A.C. 262; 79 L.J.Ch. 394; 102 L.T. 293; 27 D R.P.C. 268; 43 Digest 203, 488.
- (12) *Impex Electrical, Ltd. v. Weinbaum, Re Impex Electrical, Ltd.'s Trade Marks*, (1927), 44 R.P.C. 405; 43 Digest 220, 655.
- (13) *Green & Sons (Northampton), Ltd. v. Morris*, [1914] 1 Ch. 562; 83 L.J.Ch. 559; 110 L.T. 508; 43 Digest 85, 896.
- (14) *Walker v. Mottram*, (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 43 Digest 83, 872.
- (15) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 2 Digest 145, 195.
- (16) *Re Munster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; Digest Supp.
- (17) *Spalding & Brothers v. Gamage (A. W.), Ltd.*, (1915), 84 L.J.Ch. 449; 32 R.P.C. 273; 43 Digest 264, 1018.
- (18) *Inland Revenue Comrs. v. Muller & Co.'s Margarine, Ltd.*, [1901] A.C. 217; 70 L.J.K.B. 677; 84 L.T. 729; 43 Digest 79, 834.

APPEAL by the defendant and CROSS-APPEAL by the plaintiffs from an order of DANCKWERTS, J., dated Mar. 16, 1953.

The plaintiffs, as registered owners of certain trade marks relating to "4711" Eau de Cologne and associated products, commenced proceedings against the defendant for infringement of their trade marks, and for trade libel or slander by alleging that the plaintiffs' goods were not the original "4711" Eau de Cologne products. The defendant challenged the right of the plaintiffs to sue as registered proprietors of the trade marks on the grounds that (i) the assignment of the trade marks by the Custodian of Enemy Property to the plaintiffs under a direction of the Board of Trade was in excess of any powers conferred by the Trading with the Enemy Act, 1939, s. 7; and (ii) under the Trade Marks Act, 1938 (*inter alia*), the assignment to and registration of the plaintiffs were void because the trade marks were incapable of being validly assigned to the plaintiffs. The defendant argued that he was entitled at common law to use the marks, and he counterclaimed for rectification of the register and also to restrain the plaintiffs from using the marks as constituting a passing-off of their goods as and for the goods of the defendant. DANCKWERTS, J.,

gave judgment for the plaintiffs on their claim for infringement of the trade marks, and dismissed the plaintiffs' claim for trade libel or slander. He further dismissed the defendant's counterclaim.

Mould, Q.C., R. G. Lloyd and D. S. Paul for the defendant.

Tookey, Q.C., and Aldous for the plaintiffs.

J. P. Ashworth for the Board of Trade as *amicus curiae*.

A Oct. 16. The following judgments were read.

Cur. adv. vult.

SIR RAYMOND EVERSHED, M.R.: This appeal and cross-appeal have raised a number of questions, some of them under the trading with the enemy legislation of 1939, and some under the Trade Marks Act, 1938, relating to a perfume which has been well known in this country for very many years as "4711" Eau de Cologne.

The plaintiffs in the action, R. J. Reuter Co., Ltd., are an English company who are now the registered proprietors of a number of trade marks relating to "4711" Eau de Cologne and claim to be rightly registered as such proprietors and to be entitled to all the goodwill belonging to the marks and to the business of making and marketing "4711" Eau de Cologne in England.

C The defendant, who is an infant appearing by his mother as next friend, is the present owner of the business in Cologne, Germany, which is, and has for several generations been, associated with the manufacture in Germany and the sale in Germany and elsewhere (but not now in England) of "4711" Eau de Cologne, and he now challenges the plaintiffs' claims, already stated, to proprietorship of the English trade marks and to the business in England of making and selling "4711" Eau de Cologne.

Before I attempt any formulation of the many and complex issues that are raised (one of which appears to involve a consideration for the first time by the courts of the change made in English trade mark law and in the nature and significance of a trade mark by the provision in s. 22 of the Act of 1938 that trade marks are assignable with or without goodwill) it is necessary that I should make some recital of the history of the respective businesses of the plaintiffs and of the defendant, though, for reasons which will appear, it is unnecessary for me to go into all the relevant matters of fact in the same detail as that in which they are set forth in the judgment of DANCKWERTS, J.

The total number of the English trade marks relating to "4711" Eau de Cologne and other associated products is over fifty, but the present action was founded on eleven only of them. For simplicity, it will suffice to describe one mark only, registered in class 48 in respect of perfumery, being the mark well known to users of "4711" Eau de Cologne. It consists of a blue and gold label on the bottles, having prominently in the middle the figure "4711" enclosed in what has been referred to as a "scroll" of simple character but having a small bell depicted on its right side. The so-called "scroll" appears in fact to be an elaboration of the letters "No" meaning "Number". For the rest, the badge has at the top the words "Blue and gold", "Eau de Cologne" and "Double", and it contains representations of a number of medals symbolising awards which the product has gained at European exhibitions. There is at the bottom of the badge a space adapted for a statement of the business origin of the product. In the case of the German product there is in this space (*inter alia*) the name and address "Glockengasse No. 4711 Koln am Rhein"—the street name accounting for the origin of the bell on the scroll. In the case of the English product, the space is occupied by the plaintiff company's name and address.

H The German business to which the defendant has succeeded and which, until the events later stated, was exclusively associated both in Germany and elsewhere with the name or description of "4711" Eau de Cologne, is an old one, having been established in the second half of the eighteenth century. The use

of the number "4711" arose out of the occupation of Cologne by the French armies about 1792. It then occurred to Napoleon I or his representatives to number all the houses in Cologne consecutively and without regard to streets. No. 4711, accordingly, fell to the premises of the defendant's predecessor, who turned the circumstance to account by adopting the number as the distinguishing characteristic of his business and its products, calling the premises "Das Haus der Zahl". The large number of exhibits which we have seen, including printed cards for dispatch by post to the German business in Cologne, establish clearly that No. 4711 Koln am Rhein had become, without more, well recognised as a sufficient, and, indeed, the actual, address. The number "4711" in an appropriate context had become as distinctive of a particular place and of the business carried on thereat as, for example, "No. 10" in a wholly different context may be said to signify the official residence of the British Prime Minister.

Before the first world war the products of the German business (to which I will sometimes refer as "Mulhens") had achieved a great reputation inside Germany and elsewhere in Europe, but they were not sold in England directly or by agents. They were bought and imported into England by the firm of R. J. Reuter, who were given by Mulhens the sole right so to do. In 1914 the undertaking of the firm of R. J. Reuter was transferred to a limited company, the plaintiffs in this action. The name of the plaintiffs underwent more than one change before assuming its present form. These changes are not, in my judgment, material, but, since they were referred to by counsel for the defendant, I will state the fact that the earlier inclusion in the name of the number "4711" was later omitted at the request of the defendant's then predecessor.

We have not been told (and I, therefore, assume it to be immaterial) what exactly were the arrangements (if any) made during the first world war in regard to the trade marks then registered in Mulhens' name or in regard to the carrying on or preservation of the business of selling "4711" Eau de Cologne in England. I take it that under the trade mark law, as it then was and as it remained till the Act of 1938, it would not have been possible to dispose of the marks, e.g., by a sale to an English buyer, separately and dissociated from the German business from which the goods had originated. In any case, after that war had ended, the previous business arrangements appear to have been resumed, "4711" Eau de Cologne and associated products being bought and imported into England from Germany by the plaintiffs and sold by them in this country. The first change in these previously existing arrangements occurred in 1930 on the death of Mr. R. J. Reuter himself. Ninety-five per cent. of the shares in the plaintiffs were at the date of Mr. Reuter's death held by him or members of his family. The whole of these shares were acquired by a Dutch company which was itself, albeit at one remove, wholly controlled by Mulhens. It thus came about that on the outbreak of the second world war the plaintiffs became enemy-controlled within the meaning of the trading with the enemy legislation.

The next material change in the old business products and relationship occurred in or about 1931, and was the result of the fiscal problems then affecting most of the nations of the world. As a consequence, it became desirable that some part at least of the Mulhens' products should be manufactured here. To enable this to be done, and by arrangement between the plaintiffs and Mulhens, a manufacturing plant was established near the plaintiffs' place of business in Slough. Although most of the required personnel appear to have been provided by the plaintiffs, the plant itself was, and was always treated as, the property of Mulhens. The amount of actual manufacturing done was in fact strictly limited. So far as the ordinary "4711" Eau de Cologne perfume was concerned—which has been called in this case "the classic Eau de Cologne"

—this was always wholly made and packaged in Germany and imported as theretofore by the plaintiffs for sale in this country, and the classic Eau de Cologne continued to constitute the greater part of the total of the “4711” products. But in the case of the subsidiary “4711” products, a substantial proportion of them was thenceforth manufactured in England in the sense that the final process of distillation or dilution of the essential essences was carried out at Slough with spirit acquired for the purpose in England. It has, however, been made clear, and it is not disputed, that these essential essences were made up in Germany, or outside England, under direct German supervision, and imported here, and that the formulae and methods for the making of these essences were, as they still are, closely guarded secrets. The method of production of these essences may be properly called a secret process, and the composition of the essences is known only at any one time to three persons—at the present time, to the aunt and grandmother of the defendant and one of the two general managers of the defendant’s business, a Herr Schutte, who personally undertakes or supervises the blending, etc., of the essences under conditions of complete secrecy.

Such was the situation at the time of the outbreak of the second world war on Sept. 3, 1939, Mulhens then becoming an enemy and the plaintiffs becoming enemy-controlled. There then were, as counsel for the defendant pointed out, three distinct commercial entities: (i) Mulhens, owning all the trade marks, (ii) the plaintiffs, who were contributing, however, little or nothing to the manufacture of the products and had no interest in the marks, and (iii) the assembly plant at Slough belonging in fact to the plaintiffs, but occupied by or on behalf of Mulhens. The business of the making-up and selling “4711” products continued to be carried on during the war years by the plaintiffs, who were able to acquire from Holland, before that country was invaded, a substantial supply of the essences sufficient to enable the products made therefrom as theretofore to be continuously marketed till as late as 1946. At some time also the plaintiffs began to make up on their own account and to market a perfume corresponding in appearance, at least, to the classic “4711” Eau de Cologne. Whether and to what extent the imported essences were used I am unable to say, but it is certain that for some time since and during the war this English counterpart of the classic perfume, not derived from German essences, has been sold in England by the plaintiffs, and these sales now continue on a large scale. It was a point made by counsel for the defendant that the volume of business in this so-called “4711” Eau de Cologne and other associated products has, on the plaintiffs’ own statement, greatly increased both during and after the war by comparison with the plaintiffs’ former sales of products made in Germany or from essences imported by the plaintiffs. It follows, therefore, that for some fourteen years past bottles bearing the badge I have described have been on sale in England, and this badge has been and is, on the face of it, indicative of an English origin, namely, the manufacture of the plaintiffs. On the other hand, it is also the fact, as counsel for the defendant emphasised, that on their letter headings the plaintiffs continued, at least until the autumn of 1950, to relate their products with the former German source by describing themselves as sole concessionaires for Great Britain for No. 4711, the famous house of Eau de Cologne.

The business carried on by the plaintiffs after the outbreak of war appears at first to have been the result of some informal arrangement between the plaintiffs and the Board of Trade. Later, however, vesting orders were made in favour of the Custodian of Enemy Property by virtue of the Trading with the Enemy Act, 1939, s. 7. I shall have to refer later to the terms of that section, but, since the form of the vesting orders made is important to one part of the defendant’s case, it is convenient to refer to them now in some detail. The first order, which has been referred to by its number “238”, was made on

June 26, 1940, and related to the 35,186 shares in the plaintiffs then registered in the name of Mulhens' Dutch subsidiary. By the order the Board of Trade, in exercise of its statutory powers, thereby ordered:

"(1) That the right to transfer the said shares and to receive any dividends now due and to accrue due thereon do vest in [the Custodian for England under the Trading with the Enemy Act]. (2). That the said Custodian is to be at liberty to transfer the shares or any of them into his own name to be held by him as such Custodian and shall do so as and when requested by the Board of Trade. (3) That the said Custodian (whether the said shares or any of them shall be transferred into his name or not) shall sell all or any of the said shares as and when requested so to do by the Board of Trade."

The remaining two paragraphs need not be recited. We were given to understand that the shares were in fact in due course registered in the Custodian's name. It follows that from the date of that order all enemy taint affecting the plaintiffs was removed.

The second order is known as "238A" and was not made until Jan. 31, 1941. It related specifically to the trade marks, and by it the Board of Trade, in exercise of its statutory powers, ordered, so far as material, as follows:

"(1) That the said trade marks [specified in the schedule and registered in Mulhens' name] together with the goodwill (if any) in the United Kingdom of the business concerned in the goods for which the trade marks are registered do vest in [the Custodian for England under the Trading with the Enemy Act]. (2) That the provisions of s. 22 (7) of the Trade Marks Act, 1938 [relating to advertisements on sales of trade marks apart from goodwill] shall not apply to the assignment of the said trade marks affected by this order. (3) That the said Custodian do have power (a) to apply under s. 25 of the Trade Marks Act, 1938, for the registration of his title to the said trade marks in the register of trade marks; (b) to apply with R. J. Reuter & Co., Ltd., for the registration of R. J. Reuter & Co., Ltd., as registered users of the said trade marks in accordance with the provisions of s. 28 of the Trade Marks Act, 1938."

It will be observed that there is not in this order, as there was in the first order relating to the shares, any power for the Custodian to sell or transfer to another any of the marks or the goodwill (if any) vested in him by the order. It was not in fact until Oct. 15, 1941, that the Custodian's name was put on the register of trade marks in respect of all the marks vested in him by the order, and at the same time the plaintiff company was registered as registered users of the marks as contemplated by para. (2) of the order. The effect, then, of this vesting order was that the Custodian became the legal owner of the marks and of any other proprietary rights which the order had been apt to vest in him. In accordance with what must now be taken as well established, the beneficial ownership of the marks became in statutory suspense. Counsel for the defendant has drawn attention to certain observations of my own in *Bank Voor Handel en Scheepvaart N.V. v. Slatford* (1) ([1952] 2 All E.R. 967), in support of the proposition that the suspension of the beneficial ownership in the marks did not involve its extinction even during the war; and I assume that this proposition is correct.

The third and last order, for present purposes the most significant of them all, is known as "No. 238B", and was made many years later, after the cessation of hostilities in the war, viz., on Apr. 17, 1951. After reciting the second order, No. 238A and the provisions of the Trading with the Enemy Act, 1939, s. 15 (5), to the effect that any power conferred by the Act to make orders should be construed as including powers exercisable in like manner to vary or revoke them, and after stating that it was deemed expedient that order

No. 238A should be varied as thereafter appearing, the Board of Trade, in exercise of its statutory powers, ordered as follows:

"That the said order [No. 238A] is henceforth to be read and construed as if the following article were included in the said order: '3A. That the said Custodian do have power to assign and transmit the said trade marks either in connection with the goodwill of the business referred to in art. 1 hereto or not'."

This order was, no doubt, made in contemplation of the two assignments which were executed in the following June. By the first of them, the Custodian, in exercise of his powers under the first vesting order (No. 238), sold for a large sum of money (we were told about £300,000) all the shares in the plaintiffs vested in the Custodian to another English company, Scott & Bowne, Ltd.

This company, which also later acquired the shares held by Mr. Cooper, the plaintiffs' manager, thus became in effect the proprietor of the plaintiff company's business. Since, however, the plaintiffs and their predecessors have for many years been exclusively concerned with the marketing of "4711" Eau de Cologne products, first as acquired by them from Germany or made up at the assembly plant in Slough, and since September, 1939, as manufactured by themselves, it is obvious that the value of the shares sold depended on the plaintiffs continuing to have the right to manufacture and market, or at least to market, these goods under their well-established marks.

On June 15, 1951, by deed made between the Custodian of Enemy Property for England of the first part, the Board of Trade of the second part, and the plaintiffs of the third part, after reciting the vesting order No. 238A of Jan. 31, 1941, as varied by the order No. 238B, and after further reciting that the Board of Trade had "directed the Custodian to transfer the trade marks with the goodwill (if any)" to the plaintiffs and that the plaintiffs, in consideration of such a transfer had agreed "to covenant with the Comptroller-General of Patents, Designs and Trade Marks, acting as Registrar of Trade Marks, in manner" thereafter appearing, it was witnessed as follows:

"(1) In pursuance of the said direction the Custodian hereby assigns unto the assignee all the said trade marks together with the goodwill (if any) in the United Kingdom of the business concerned in the goods for which the trade marks are registered. (2) The assignee in consideration of the direction given by the Board of Trade to the Custodian as hereinbefore recited hereby for itself and its successors in title covenants with the Board of Trade that it will not assign the said trade marks and goodwill to nor allow them to come into the ownership or control of any person firm or company residing or carrying on business in Germany or any person firm or company known or believed to be a nominee thereof and further (for the more effectual enforcement of this covenant) to ensure that on the occasion of any assignment during a period of fifteen years from the date of these presents that the written consent of the Board of Trade is first applied for and obtained provided that in the case of an assignee who is otherwise suitable the Board of Trade shall not unreasonably withhold its consent. (3) The parties hereto hereby certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500."

It will be observed that notwithstanding the terms of the second recital the covenant made by the plaintiffs was made not with the Comptroller-General of Patents, etc., but with the Board of Trade. Nothing, however, turns for present purposes on this somewhat peculiar circumstance. Following on the execution of the last-mentioned assignment the plaintiffs in due course applied to have themselves registered as proprietors of the marks and they were so

registered. Two matters of fact should, however, be noted in regard to this application and registration. In the first place, since five of the marks contained on the face of them a reference to German origin, the assignment of these marks, if it was to be effective, would be plainly deceptive. These marks were, therefore, withdrawn by the plaintiffs from their application and abandoned by them as marks. The circumstance is relied on by counsel for the defendant as illustrative of the continued connection between the badges and the goods sold under the badges with the old manufacturing source in Cologne. The second matter of fact is that no advertisement of the application for registration was directed by the registrar under s. 22 (7) of the Trade Marks Act, 1938, the form of application being in fact adjusted, at the suggestion of the registrar, in order to make it unnecessary. Since it is one of the defendant's contentions that for this reason the assignment and registration never became effective in law, I shall have to return to the matter later and refer in greater detail to the circumstances. For present purposes, it is sufficient to note the point.

The date of the actual registration of the plaintiffs as proprietors of the marks was Nov. 13, 1951, but it is conceded that the plaintiffs' title as proprietors dates back to June 15, 1951, being the date of the assignment to them.

On July 6, 1951, His Majesty, by Order in Council, declared that the state of war with Germany had ended, and Mulhens thereupon ceased to have enemy status. He became once again able to litigate in the English courts any rights that he had which were subject to the jurisdiction of those courts. The defendant has, however, not attempted to trade in this country in Eau de Cologne and, as I understand from his counsel (for it is fundamental to one of their points under the Trade Marks Act, 1938), he has no present intention of so doing.

In August, September and October, 1951, occurred the events which have given rise to the present proceedings. The first event arose out of an issue of "Vogue" newspaper in July, 1951, and the juxtaposition in that paper of an advertisement by the plaintiffs and of an article by a Mrs. Forbes relating to a visit by her to Frankfurt in Germany and the purchase by her there of a bottle of German "4711" Eau de Cologne. The defendant or his solicitors thereupon wrote letters in the months of August, September and October to the editor of "Vogue" and to Mrs. Forbes complaining of this juxtaposition in "Vogue" and alleging that it would be bound to cause confusion between the defendant's products and those of the plaintiffs. In the course of this correspondence the defendant or his advisers referred to the product of the German business as "the genuine original '4711' Eau de Cologne" and to the plaintiffs' produce as "the non-genuine product".

The second incident was a letter dated Oct. 23, 1951, addressed to Lyall, Willis & Co., Ltd., who were and are the export agents of the plaintiffs, complaining principally of an advertisement issued by a customer of Messrs. Lyall, Willis & Co., Ltd., in Eritrea relating to the plaintiffs' products. In the course of this letter, the defendant again referred to his own product as "the genuine and original Eau de Cologne" and accused the plaintiffs of passing-off their goods as and for the goods of the defendant. This letter was enclosed in an envelope, the left hand side of which was largely occupied by the legend: "The original house of genuine '4711' Eau de Cologne, Koln am Rhein". The figure "4711" was represented against a dark green background surmounted by a scroll and bell device in all respects identical with that forming part of the trade marks in suit. It was admitted at the trial that this envelope was of a kind which had been used substantially for the purpose of sending business communications to persons in England.

These incidents may be regarded, as DANCKWERTS, J., regarded them, as of a somewhat trivial character, but they set fire to the train of litigation that has since ensued. For, on Dec. 3, 1951, the plaintiffs issued their writ against the defendant claiming that the envelope constituted an infringement of the

plaintiffs' trade marks, and that the letters I have briefly quoted constituted a trade slander on the plaintiffs' business and their goods, and they sought declarations, injunctions, and other relief accordingly.

The answer of the defendant in his defence and counterclaim, in addition to containing a denial of the plaintiffs' allegations, challenged the validity of the plaintiffs' claims to sue as registered proprietors of the trade marks in question. This challenge was based on submissions in part made in reference A to the trading with the enemy legislation, and in part under the Trade Marks Act, 1938. It was, and is, the claim of the defendant, while not contesting the validity of the vesting order No. 238A, that the later order No. 238B was made by the Board of Trade in excess of their powers under the Trading with the Enemy Act, 1939, as not being fairly required for any of the purposes for which, as the defendant says, orders might be made by the Board of Trade B under s. 7 of that Act. The defendant further claimed and claims that, in the event, the assignment of June 15, 1951, was ultra vires the Custodian and the Board of Trade being similarly in excess of any powers conferred on, or capable of being conferred on, them by the Trading with the Enemy Act, 1939, particularly since it amounted, on the face of it, to a giving away or relinquishment of the marks and any interests connected therewith formerly belonging C to Mulhens, and later vested in the Custodian under the trading with the enemy legislation. It is to be observed that if these contentions, or either of them, were well founded, the result would, from the defendant's point of view, be of a somewhat qualified character, for, though the plaintiffs' cause of action would have been successfully challenged, the result would be merely to re-vest the marks and other property transferred by the assignment in the Custodian D of Enemy Property.

Under the Trade Marks Act, 1938, the defendant contended: (i) that, as already indicated, the assignment to the plaintiffs, and their entry in the register as proprietors of the marks, was ineffective by reason of non-compliance with the terms as to advertisement of s. 22 (7) of the Act; (ii) that in any case the envelope used by the defendant did not amount to an infringement under s. 4, E as not having been used in the course of any trade or business transaction in England, and, further, was protected by s. 8 as constituting a bona fide use by the defendant of his name or the name of his place of business; (iii) that the defendant's use of the mark or insignia, if otherwise liable to constitute an infringement of the plaintiffs' rights, was protected by s. 7 as being a use by the defendant of a mark which he and his predecessors in title had continuously used from a date anterior to the use of their marks by the plaintiffs, F or their predecessors in title, or to the registration of those marks in the plaintiffs' name. As counsel for the defendant explained, this contention rested on the proposition that the transfer to, and registration of, the plaintiffs, if otherwise effective, amounted to a forfeiture or confiscation of the defendant's pre-existing rights in the trade marks so as to constitute a fresh root of title in the plaintiffs on registration dissociated from any previous proprietorship. G (iv) More important, however, than any of these contentions has been the point taken by the defendant under s. 22 (4), a point that has seemed to me by far the most difficult question raised in the case. Under that sub-section the defendant claims that the assignment to the plaintiffs, and their registration as proprietors of the trade marks, were void on the ground that the H marks were incapable of being validly assigned to them, and, accordingly, that the defendant, being entitled at common law to the use of the mark or badge which I have above described, is entitled to rectification of the register, and also to restrain the plaintiffs from making any use of the badge themselves, as constituting a passing-off of their goods as and for the goods of the defendant. It will be seen that, if this contention is well founded, the defendant will achieve a much more far-reaching result than would flow from a mere re-vesting of the marks in the Custodian of Enemy Property.

These, then, are the issues raised, and on them the learned judge found substantially in the plaintiffs' favour. He held that the plaintiffs were entitled to remain on the register as proprietors of the marks in question, and that the use by the defendant of envelopes of the kind I have described constituted an infringement of the plaintiffs' rights as registered proprietors of the marks. He rejected, accordingly, all the defendant's submissions based both on the trading with the enemy legislation and the Trade Marks Act, 1938, and dismissed his counterclaim. On the other hand, DANCKWERTS, J., held that the defendant had not slandered the plaintiffs' business or its goods, and he, therefore, rejected so much of the plaintiffs' claim as related to slander of title. Against that judgment and order the defendant has appealed to this court, and the plaintiffs have served a notice of cross-appeal against the learned judge's rejection of their claim in respect of slander of title.

On this last matter, the plaintiffs did not, before us, contend that the judge should have found that they had established a good cause of action for trade slander, but have suggested that the assertion in the letters I have quoted, which was substantially repeated by Herr Schutte in the witness box, amounted to a sufficient threat to justify the court, in its discretion, making some form of declaration under R.S.C., Ord. 25, r. 5. [HIS LORDSHIP considered the facts relating to the relief sought in the cross-appeal and referred to *Royal Baking Powder Co. v. Wright, Crossley & Co.* (2), *Samuelson v. Producers Distributing Co., Ltd.* (3), and *Re Lewis's Declaration of Trust* (4). HIS LORDSHIP continued:] In my judgment, and without the necessity of making any further reference to the facts relied on by the plaintiffs, there is no ground shown for reversing or varying the conclusion of DANCKWERTS, J., on this part of the plaintiffs' case, assuming that in other respects the plaintiffs are entitled to succeed. It follows, therefore, that the cross-appeal must in any case fail.

I turn now to the appeal, and first to the submissions of the defendant on the Trading with the Enemy Act, 1939. I have already stated that the defendant, if right on either or both of his submissions under this Act, would obtain only a qualified respite, since success on his part could do no more than re-vest the trade marks and any goodwill or other proprietary rights in the Custodian of Enemy Property, who could, and presumably would, then proceed to deal anew with them in a manner unlikely to benefit the defendant. Still, such success would suffice to defeat altogether the plaintiffs' right to sue in the present action.

It was made plain by counsel for the plaintiffs that he did not seek to invoke any powers other than those conferred by the Trading with the Enemy Act, 1939, itself; e.g., he did not rely on anything in the Emergency Powers (Defence) Act, 1939, and orders made thereunder; and, though reference was made in the vesting orders to the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), it is plain that, if the powers of the Board of Trade conferred by the Act were limited in the manner and to the extent that the defendant alleges, these powers could not have been effectively extended by a general order made by the Board of Trade itself under the powers which fall to be construed. The question, then, turns exclusively on the true interpretation of the terms of the Act, and more particularly of the opening words of s. 7 thereof. That section, so far as relevant, provides as follows:

"(1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint Custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order . . . (b) vest in the prescribed Custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that Custodian of such enemy property as may be prescribed; (c) vest in the prescribed Custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is

not required by the order to be, vested in the Custodian; (d) confer and impose on the Custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects—(i) property which has been, or is required to be, vested in a Custodian by or under the order, (ii) property of which the right of transfer has been, or is required to be, so vested, (iii) any other enemy property which has not been, and is not required to be, so vested, or (iv) money which has been, or is by the order required to be, paid to a Custodian; . . . and any such order may contain such incidental and supplementary provisions as appear to the Board of Trade to be necessary or expedient for the purposes of the order . . . (4) Any order under this section shall have effect notwithstanding anything in any Act passed before this Act.”

B Reference was also made to s. 15 (5), which is as follows:

“Any power conferred by the preceding provisions of this Act to make an Order in Council or an order shall be construed as including a power, exercisable in the like manner, to vary or revoke the Order in Council or order.”

C The argument of the defendant has been concentrated on the opening words of s. 7 (1). It is said that the only orders or other activities which the section contemplates and empowers the Board to make or direct are orders and other activities which can fairly be required, or justified, on the face of them, for achieving the object of preventing the payment of moneys to enemies, and, whether the word is used conjunctively or disjunctively, of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace. So far as the latter words are concerned, counsel for the defendant observes that it has never been the policy of English law to confiscate the property of enemies (for which proposition there is indeed well established authority), and he contends accordingly that, with the orders vesting in the Custodian the marks and any other property capable of being thereby vested, the powers of the Board of Trade under s. 7 were exhausted quoad the marks and any such other property. Counsel for the defendant conceded that, in the case of consumable goods, and, perhaps, some other kinds of property, a power of sale and a sale would be justified, and, therefore, implicitly conferred, on the ground that, having regard to the nature of the property, nothing, or nothing of value, could otherwise be “preserved” in contemplation of peace arrangements; but these considerations could, according to his argument, have no place in the case of the trade marks here in question, or, indeed, in the case of the shares in the plaintiff company.

I have no doubt that, unless the opening words of sub-s. (1) have the limiting or restrictive effect for which counsel for the defendant contends, the opening words of para. (d) of the sub-section, the final three lines of the sub-section, and the terms of s. 15 (5) are together amply sufficient, on their ordinary construction, to justify the conferment of a power of sale or transfer and its subsequent exercise. The question, then, resolves itself into that of construing the opening words of sub-s. (1). On this matter we had the advantage, in addition to hearing counsel for the plaintiffs, of hearing also the argument of counsel for the Board of Trade as *amicus curiae*. It was submitted to us that the formula here used—“with a view to preventing . . .”—is quite distinct from the formulae used in other Acts, e.g., the Town and Country Planning Act, 1947, and the Supplies and Services (Transitional Provisions) Act, 1945, where the power conferred on the Minister or government department are powers to make orders or do other acts for a particular purpose, e.g., in the case of s. 43 of the former Act to acquire land “for any purpose connected with the performance of their functions under the following provisions of this Act . . .”:

see *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing & Local Government* (5), and in the case of the latter Act to make orders

"for the purpose of so maintaining, controlling and regulating supplies and services as—(a) to secure a sufficiency of those essential to the well-being of the community . . .":

see *Blackpool Corpn. v. Locker* (6). In the present case the formula used is not, according to the argument, on its fair interpretation an expression of the purposes to the achievement of which the orders to be made by the Board of Trade must be directed, but is rather an expression of the Parliamentary purpose in conferring on the Board of Trade the order-making powers later specified. In support of this argument it was pointed out that in the trading with the enemy legislation passed on the occasion of the first world war the corresponding Parliamentary intention was expressed by way of a preamble to the Trading with the Enemy Amendment Act, 1914. The preamble to that Act is thus framed:

"Whereas it is expedient to make further provision for preventing the payment of moneys to . . . 'enemies' . . . and for preserving with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies . . ."

This earlier legislation remained on the statute book until it was repealed by the Act of 1939 now in question, and it was forcibly argued to be highly unlikely that Parliament, in enacting new trading with the enemy legislation on the occasion of the outbreak of the second world war, could have intended by what is in effect a transposition of the preamble in the old Act, still subsisting until the repeal, to cut down substantially the powers conferred. I was for myself somewhat troubled by what appears as a cross-heading immediately before s. 7 in the print of the Act, bound up with the orders made thereunder, with which we were supplied, namely: "Property of Enemies and Enemy subjects. Collection of enemy debts and custody of enemy property." But a reference to the King's Printer's copy of the Act in the LAW REPORTS shows that the second part of the cross-heading is not in fact any part of the Act.

In the circumstances I think that the argument put forward by counsel for the plaintiffs and counsel for the Board of Trade is well-founded and that the opening words of the sub-section ought not to be treated as having the restrictive effect for which counsel for the defendant contends. But if I am wrong on that matter there is, in my judgment, a second answer to the defendant's attack on the vires of the power of sale and transfer and its exercise, viz., the effect of the Distribution of German Enemy Property Act, 1949, and the Distribution of German Enemy Property (No. 1) Order, 1950 (S.I., 1950, No. 1642) made thereunder. This Act (passed, we were told, in implementation of the Potsdam Agreement and other later allied conferences, and described in its preamble as "An Act to provide for the collection and realisation of German enemy property and for the distribution of the proceeds thereof") provided by s. 1 (1):

"His Majesty may by Order in Council make provision for the collection and realisation of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the order, to persons who establish claims in respect of German enemy debts."

It is not in doubt that the words "German enemy property" were apt, by virtue of the interpretation section, s. 8, to comprehend the marks and other property here in question. I need not refer at length to the terms of the order of 1950. Paragraph 18 of that order provides:

"(1) Except in accordance with the foregoing provisions of this part of this order, or with the consent of the administrator, no person other than a custodian shall transfer, dispose of or otherwise deal with any German

enemy property; and any transfer, disposal or dealing in contravention of this paragraph shall be void . . . (3) Nothing in this article shall prohibit or restrict the transfer or disposal of or dealing with any property or the payment of any money—(a) by or to a custodian, or (b) in accordance with any direction, or with the consent, of the Board of Trade.”

A In my judgment, the passing of the Act of 1949 materially altered the nature of any arrangements that could reasonably be contemplated as likely, or, indeed, possible, to be made at the conclusion of peace. Thenceforward it was, as it seems to me, plain that any such arrangements would not comprehend the return to German nationals of property formerly belonging to them, such as the trade marks here in question (at least if capable by their nature of being sold or disposed of), and that thenceforth it was the duty of the Board of Trade, in contemplation of arrangements which would ultimately be made for applying the proceeds of German enemy property in the manner indicated in the Act of 1949 to realise the trade marks to the best advantage as occasion offered. In these circumstances, even if prior to the passing of the Act of 1949 the terms of the opening lines of s. 7 (1) of the Act of 1939 would not have justified the making of vesting order No. 238B and the assignment of June 15, 1951, thereunder, after the passing of the Act of 1949 both the order and the assignment became *intra vires* the Board of Trade to make and execute or direct to be executed. In my judgment, this conclusion can clearly in no way be affected by anything stated by the Board of Trade in the *TRADE MARKS JOURNAL* for Feb. 4, 1953, which related exclusively to trade marks vested in the Custodian by virtue of the later Trading with the Enemy (Custodian) (No. 2) Order, 1951 (S.L., 1951, No. 779).

D [HIS LORDSHIP referred to an argument advanced on behalf of the defendant that, in any event, even if the Board of Trade had power to sell the trade marks, it could not give them away, as, on the face of the assignment, it had purported to do. HIS LORDSHIP found that the point was not open to the defendant on his pleading, and continued:] My conclusion, therefore, on the points raised by the defendant under the trading with the enemy legislation is in accordance with the view of DANCKWERTS, J., that they cannot be sustained.

E I turn, therefore, to the arguments under the Trade Marks Act, 1938. I have already tabulated them and, save for the substantial and difficult question under s. 22 (4) of the Act, I can deal with them briefly, for I agree with DANCKWERTS, J., in rejecting all of them. I shall take them in the order in which I have stated them, save that it will be convenient to postpone consideration of the contention made under s. 7 of the Act until after I have considered the argument under s. 22 (4). Section 22 (7) of the Act is as follows:

G “Where an assignment in respect of any goods of a trade mark that is at the time of the assignment used in a business in those goods is made, on or after the appointed day, otherwise than in connection with the goodwill of that business, the assignment shall not take effect until the following requirements have been satisfied, that is to say, the assignee must, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the registrar may allow, apply to him for directions with respect to the advertisement of the assignment, and must advertise it in such form and manner and within such period as the registrar may direct.”

H I have already stated the point made by the defendant under this sub-section, viz., that, no directions having been given and the registrar, indeed, having held, wrongly, that the sub-section was inapplicable, the assignment never became effective. The relevant facts are stated in greater detail by the learned judge (70 R.P.C. 115). From this recital it appears that the plaintiffs applied in the usual form to the registrar for registration of themselves as proprietors of the marks by virtue of the assignment, and tendered the assignment

showing that its subject-matter was the marks together with "the goodwill (if any)", etc. Thereupon, at the suggestion of the registrar or those acting on his behalf, the application was altered so as to state that "the trade marks at the time of the assignment were not used in the business of the assignor . . .", the view of the registrar being that the word "business" in the second line of the sub-section meant the business of the assignor, in which case it followed, since the Custodian carried on no business, that the sub-section, therefore, did not apply. If this view were wrong, I agree, nevertheless, with DANCKWERTS, J., that

"it is hard to see how the assignment was otherwise than in connection with the goodwill of the business in which the trade marks were used"

in fact. In any case, the question what advertisements, if any, should be published by the assignee was a matter for the registrar. The plaintiffs made their application in due form and without any attempt to avoid compliance with the sub-section. All that followed was the result of the view taken of the matter by the registrar. In my judgment, there is nothing on the facts proved which enables the defendant to challenge the effectiveness of the assignment under this sub-section, and I, therefore, agree with DANCKWERTS, J., in rejecting this part of his case.

The point sought to be made by the defendant under s. 4, which was strenuously argued before us by Mr. Lloyd on behalf of the defendant, is, as I understand it, that the envelope of which the plaintiffs complain, though having on it a device clearly identical or so nearly identical with the plaintiffs' trade mark as otherwise to constitute infringement, is not an infringing use within this s. 4, since the use was neither use as a trade mark (having particular regard to the terms of the definition section, s. 68) nor as an advertisement issued to the public. As regards the latter alternative, it was clearly shown to have been by way of advertisement and admitted as such by Herr Schutte. It was also admitted that the envelope in the plaintiffs' hands was one of many sent to members of the public in England. As regards the former alternative, counsel argued that for the use of the mark to be an infringing use it must have been the present intention to use the mark in the United Kingdom in relation to goods in the course of some transaction which could fairly be described as trading in the United Kingdom, and it was said that (as I have already noticed) there was and is no present intention on the defendant's part to undertake any trading in the class of goods in question in the United Kingdom. I cannot find any justification for importing this qualification into the language of s. 4. Since, admittedly, the device on the envelope was advertising matter, the use of the envelope constituted, in my judgment, an infringement of the plaintiffs' rights under s. 4 if they are in other respects entitled to succeed.

I can deal more briefly still with the argument under s. 8, that the use of the device on the envelope was no more than a bona fide use (within the terms of the section) by the defendant of the name of his place of business. The bona fides of the defendant is not now in question, nor do I doubt that, as I have earlier explained, "No. 4711" in connection with the city of Cologne may fairly be said to be the name of the defendant's place of business. But the use here is not merely use of the number, but the use of the number represented in a particular and characteristic way with the embellishment of the scroll and bell. Counsel for the defendant read the terms of s. 68 (2):

"References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark . . ."

But we are here concerned not with the use of a mark, but, as it is said, with the use by the defendant of the name of his place of business. In my judgment, it is clear that, according to the ordinary meaning of language and the common sense of the matter, the use of this particular representation of the number

4711 is not within the protection of s. 8 (a) of the Act. I, therefore, agree with DANCKWERTS, J., that this defence also fails.

I approach now what I have stated to be, and what to my mind is, the most substantial and difficult question raised in the appeal, one, moreover, which involves a consideration for the first time of the extent and effect of the change made in trade mark law by s. 22 (1) of the Act of 1938:

- A “notwithstanding any rule of law or equity to the contrary, a registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible either in connection with the goodwill of a business or not.”

- The last few words, and particularly the use of the phrase “in connection with”, make it clear to my mind that, subject to whatever may be the effect of the qualification in sub-s. (3) and sub-s. (4), it was from the passing of the Act contemplated that trade marks could be assigned, as it is said, “in gross”, that is, dissociated from the goodwill of their business of origin. Beyond doubt this enactment involved a far-reaching and significant change in trade mark law, in which it had been previously regarded as fundamental that trade marks, whether registered or unregistered, being indicative of a particular origin, usually but not necessarily a manufacturing origin, could not be separated from the business of origin and from the goodwill of that business.

- The old principle is well illustrated in *Lacteosote, Ltd. v. Alberman* (7) before CLAUSON, J., on which counsel for the defendant strongly relied, partly because of the similarity in language between the purported assignment in that case and the language of the assignment in the present case, and partly because, as he contended, the principle stated by CLAUSON, J., survived the amending effect of the Trade Marks Act, 1938, and still applies so as to provide the answer to the present question.

- The *Lacteosote* case (7) concerned a product known as Sirop Famel, which was at all material times manufactured in France according to the process and specification of M. Pierre Famel, a chemist in Paris to whom, before the purported assignment, the mark in question had unquestionably belonged. The plaintiffs had for many years been the sole wholesale agents for the sale of Sirop Famel in the United Kingdom, but as such they were, of course, unable to sue in England for infringement of the mark. The purported assignment was intended to give to the plaintiffs that right, so as to enable them to prevent the sales of the Sirop in England by persons (the defendant being one) who, having purchased it in bottles in France, brought it over to this country to offer for sale here, which, by reason of the state of the exchange, they were able to do at a less price than that charged by the plaintiffs. The English trade mark was thereupon “assigned” by Famel to the plaintiffs

- “together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered.”

- G These goods were in fact described as “a pharmaceutical product for medical use made in France”. It was plain, accordingly, that the assignment did not operate, and was never intended to operate, as an assignment of the goodwill of the entire manufacturing business in France. It was, however, contended that ([1927] 2 Ch. 129):

- H “the assignment must be treated as being what obviously all parties must have intended it to be, namely, an assignment of the British portion of Famel’s business, namely, the business of importing the preparation into Great Britain and selling it there.”

It was this argument which CLAUSON, J., rejected, holding that, according to trade mark law, it was incompetent effectually to assign a mark, not together with the business of origin (and in this case, of declared origin) as a whole but with a department only of that business. The learned judge

(who had earlier referred to the *Leather Cloth Co. v. American Leather Cloth Co.* (8), as the leading authority for the proposition that a purchaser of a mark becomes owner of it only if he becomes at the same time purchaser of the manufactory or the business concerned in the goods to which the mark has been affixed) used this language in stating his conclusion (*ibid.*, 130):

"If it were not so, the result would be that a mark distinctive of goods produced and sold in the business carried on by Famel would become by the assignment distinctive, not of goods produced and sold in that business by Famel, or his successors, but of goods sold in a newly separated and, therefore, different business by persons who succeeded Famel as vendors in Great Britain of the goods, but not as producers of them. Such a position seems to me to be inconsistent with the principle that a trade mark is distinctive of goods with which a particular business (whether carried on by the original trader or his successors) is concerned. If the identity of the business is destroyed, the mark is destroyed with it."

In my judgment, CLAUSON, J., in using the phrase "distinctive of goods", clearly meant in the context "distinctive of the origin of goods."

It may well be that it is still true to say that a mark which is on the face of it distinctive of goods made by "A" cannot be assigned or transferred so as to be applied to goods made by "B", for a trade mark is still distinctive of origin: see *Aristoc, Ltd. v. Rysta, Ltd.* (9), which decided that a trade mark could not be validly registered in respect of goods which was not distinctive of the business origin of the goods, but only of the fact that a repairing process had been applied to them. A mark on the face of it distinctive of one origin, if applied to goods of a different origin, would *prima facie* be deceptive and, therefore, subject to the terms of s. 11 of the Act. It was not, however, suggested by the defendant in the present case that the marks, if registered in the name of the plaintiffs, would be so deceptive. They still indicate their manufacturing origin, which is in fact the plaintiffs' business, and, in my judgment, it is now clear that by virtue of s. 22 (1) of the Act of 1938 a mark may be validly assigned by one manufacturer to another without any assignment of the business or goodwill of the assignor and so as thenceforth to be distinctive of a manufacturing origin different in fact from the previous manufacturing origin, so long, at any rate, as the mark is not deceptive. It is also, no doubt, true that since the Act a mark distinctive of a manufacturing origin, which is in fact the business of "A", may be assigned by "A" to "B" and will thenceforth be applied by "B" to goods originating from "A" so that the mark still remains distinctive of the same manufacturing origin. But circumstances of this character are not material to the present case.

To the extent I have indicated the earlier principles of trade mark law to which CLAUSON, J., referred have, in my view, been altered by the express terms of the new Act. Nor did counsel for the defendant contend to the contrary. An example was taken during the course of the argument which may be cited here as simply illustrative of the point and of the change made. A firm of well-known cigarette manufacturers and proprietors of a trade mark such as "Gold Flake" might, as I apprehend, effectively sell or transfer to another cigarette manufacturer the mark "Gold Flake" without any contemporaneous transfer of their own goodwill or any part thereof, and thereafter the mark, although still indicative of origin, would be indicative of the manufacturing origin of the assignee and no longer of the previous owners. So much I understood counsel for the defendant to concede. If that is so, then, unless the registration of the mark in the assignee's name were held to be deceptive under s. 11, it would appear not to matter that the goodwill previously attached to the mark was a manufacturer's goodwill associated in fact with the well-known business of the assignors. I cannot, therefore, think that the validity of the transfer to the plaintiffs is affected by the circumstances, assuming it

to be the fact, that, as counsel for the defendant contended in opening his appeal, the goodwill attached to the marks was the goodwill of a manufacturer whose business was situated in Germany and was based on secret knowledge belonging to that German business. Indeed, as it seemed to me as the argument developed, the defendant's point under the section was a different and narrower point, viz., that the vesting and transfer still left the defendant, once he had disembarrassed himself of his enemy character, with an unqualified right at common law to the use of the mark or badge so as to bring into play the qualification placed on s. 22 (1) of the Act by s. 22 (4).

It is appropriate at this stage to refer to the relevant language of the section. I have already cited sub-s. (1). Sub-section (2) is directed to the assignability of a mark in respect of part only of the goods in respect of which it is registered, and sub-s. (3) provides that unregistered (that is common law) marks are also assignable in gross, provided (inter alia) they are at the time of the assignment used in the same business as registered marks which are also assigned at the same time and to the same person. Then follows sub-s. (4), which provides:

"Notwithstanding anything in the foregoing sub-sections, a trade mark shall not be, or be deemed to have been, assignable or transmissible in a case in which as a result of an assignment or transmission there would in the circumstances subsist, or have subsisted, whether under the common law or by registration, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be, or have been, likely to deceive or cause confusion: Provided that, where a trade mark is, or has been, assigned or transmitted in such a case as aforesaid, the assignment or transmission shall not be deemed to be, or to have been, invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, or were, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within the United Kingdom (otherwise than for export therefrom) or in relation to goods to be exported to the same market outside the United Kingdom."

It follows, then, says counsel for the defendant, that, if notwithstanding an assignment the assignor retains an exclusive right himself to use the same mark at common law, the assignment will be ineffective. That proposition I am prepared, at any rate for the purposes of the assignment, to accept. Thus, to revert to my previous illustration, if on the sale of the trade mark "Gold Flake" it was provided by or resulted from the sale agreement that the sellers were still entitled to the use of the name or insignia of "Gold Flake" on their own products, the assignment would be ineffective, and obviously and necessarily so, for the resultant competition would inevitably create deception and confusion. But has the defendant the exclusive right at common law within the terms of the section, as he contends that he has, such a right as entitles him to bring an action for passing-off, as he has done by his counterclaim, against the plaintiffs or against any third party who seeks to make use of the number "4711" in regard to perfume? In my opinion, he has not. Counsel for the defendant sought to rest this part of his case largely on two propositions; (i) that, as a fact, there was a substantial number of persons, members of the public in England, to whom the use of "4711" in relation to eau de cologne signified the products of the German business, and (ii) that the "exclusive rights" in the sub-section meant no more than the right to exclude others from using the badge. In my judgment, neither premise is established or valid.

On the matter of fact, the learned judge who heard the evidence of the dozen

or so witnesses called, to the transcript of which we have been referred, came to the conclusion that such evidence was "of no assistance". On a matter of this kind, where the weight of the evidence must depend on the way in which it was given no less than on the words in fact used, I should hesitate long before drawing a different inference from that of the trial judge. And, plainly, if the defendant be unable to prove the requisite association of the marks with his business, any passing-off action on his part must fail. I will, however, assume that the witnesses should be taken as proving the association alleged, and, as the judge himself observed, to anyone at all well acquainted with the pre-war German-made "4711" confusion would be inevitable. Still, I do not think the defendant is entitled to succeed in his claim for passing-off. He is conducting in England no business, selling here no goods. As it seems to me, he has not in this country any proprietary right which he is entitled to protect. Proof of the facts as I have assumed does not create or give him such a right. Reverting again to my example, if the sale by the cigarette manufacturers were of their English trade mark "Gold Flake" with the English goodwill connected therewith and if the sellers covenanted not to use in England the name "Gold Flake" in connection with any of their products, it could not affect the matter that, as would, no doubt, be the case, large numbers of people continued to associate the name "Gold Flake" with the old and well-known manufacturing business. And if the sellers retained the right to the use of "Gold Flake" on cigarettes made by them here but for sale outside this country, the terms of the proviso to s. 22 (4) show that the assignment would not be invalidated under that sub-section. Equally, in the case supposed the original manufacturers would, as I think, have no cause of action for passing-off against a third party who used the name "Gold Flake" on cigarettes of his manufacture for sale by him in England.

Nor am I satisfied that the "exclusive rights" referred to mean no more than the right to exclude others. According to the ordinary use of language an "exclusive right" to the use of something, whether a room in a house or a trade mark, signifies primarily the "sole" or "single" use. In the case of one having been given the exclusive use of another's room, he is probably not in law able to exclude others, having no such proprietary or other interest as would support an action for trespass. In the case of a trade mark, whether registered or unregistered, the proprietary right is, no doubt, sufficient to support an action to exclude. Nevertheless, I cannot think that, at any rate in the absence of some very special circumstances, a person who is not trading in this country and has in this country no proprietary interest in a name or mark can be said to have "the exclusive rights" contemplated by s. 22 (4) because of the goodwill he possesses in another country. As DANCWERTS, J., observed, we are not here concerned with the respective rights the plaintiffs or the defendant may have in some other country, say, in Eritrea. Those rights will presumably depend on the laws of that other country. The question, and the only question, with which we are concerned is whether the defendant in this country has any such proprietary interest, under common law or otherwise, in the mark or badge or in the business of making and selling eau de cologne as will support a claim on his part for passing-off against the plaintiff company or any other person.

I agree with counsel for the plaintiffs that the vesting and assignment of the trade marks, whether (having regard to s. 22 (1)) the latter was expressed to be in connection with the goodwill of a business or not, *prima facie* operated to confer on the plaintiffs all rights whether statutory or at common law to the use of the mark or badge. Further, the vesting and assignment, according to their terms, operated to assign to the plaintiffs "the goodwill (if any) in the United Kingdom of the business concerned in the goods for which the trade marks are registered"—i.e., all the business goodwill with which the marks

had been associated in this country and which, apart from the war, would or might have belonged to the defendant. The nature of goodwill has been many times stated; it represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses. However difficult of identification, an English goodwill appears to be a species of English personal property capable of being sold or charged (as commonly in the case of a company's goodwill by debentures) or of being bequeathed by will: see *Re Betts* (10). And in the case of a business product sold all over the world, the English goodwill dependent on the English trade in the product may be a proprietary interest distinct from the goodwill concerned with the trade in the product in another country: see, for example, the "Chartreuse" case (*Lecouturier v. Rey* (11)) where the respondents, who were in fact the original producers and held the secret of the liqueur, were held entitled to the English trade marks, and, therefore, the English goodwill, notwithstanding the sale by order of a competent French court of the goodwill of the business in France, and the "Dario" case (*Impex Electrical, Ltd. v. Weinbaum* (12)) where the mark was held validly registered in England in the name of the plaintiffs, who carried on the business of marketing under that name valves manufactured by a French company who sold them in France under the same name but themselves did no business in England: see also the terms of the proviso to s. 22 (4) already noticed.

It seems to me, therefore, that the plaintiffs are entitled to say that they are in the same position, vis-à-vis the defendant, as if the defendant had voluntarily sold to the plaintiffs, not only all his English marks relating to eau de cologne, but the goodwill formerly belonging to him in England by virtue of the association of those marks, on sales of the products in England, with the products of his manufacturing business, together with the right, which a sale of goodwill confers, to represent themselves as the defendant's successors in that business. Such a transaction might have taken place, and, if it had done so, the defendant could clearly not thereafter have said that the mark was inseparable from his manufacturing business in Germany. If the plaintiffs' rights are as I have described them then, in my judgment, the defendant cannot now bring an action for passing-off against the plaintiff company and cannot invoke s. 22 (4) of the Trade Marks Act, 1938, to invalidate the assignment to the plaintiff company.

Reference was made by counsel for the defendant to *Green & Sons (Northampton), Ltd. v. Morris* (13) in support of the general proposition that, since the assignment to the plaintiffs had been an involuntary assignment from the point of view of the defendant of his former property, the rights acquired by the assignee are of a far more limited character than would have been obtained from a voluntary assignment from the defendant himself. But *Green v. Morris* (13) (a case of an assignment of a business with its goodwill by a trustee under a deed of arrangement), which followed the earlier case of an assignment by a trustee in bankruptcy (*Walker v. Mottram* (14)), establishes only that the assignee under an involuntary assignment fails to obtain those benefits which require the covenant of the assignor, viz., the covenant, normally given by a vendor on a voluntary sale, not personally to compete with the business sold or to solicit in his own name his old customers. Nothing in those cases qualifies the right of an assignee under an involuntary assignment to enjoy the benefits properly flowing from an assignment of goodwill, including the right to represent himself as carrying on the business as the successor of its former owner.

For these reasons I think that the learned judge rightly rejected the defendant's contentions based on s. 22 (4) of the Trade Marks Act, 1938, and that part also of his counterclaim directed to alleged passing-off.

Finally, s. 7 provides:

"Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date anterior—(a) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his; or (b) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his; whichever is the earlier . . ."

The defendant's argument under this section as presented by counsel in his opening speech involved the proposition that the word "proprietor" in para. (a) meant "beneficial proprietor" as distinct from the registered proprietor or legal owner, and that the defendant had not ceased continuously to use the marks in question by reason of his disability due to the war and his enemy status. Whatever may be said of the latter of these propositions, I have been wholly unable to accept the former, for which it does not seem to me that there is any warrant according to the fair construction of the language. But counsel made it clear in his reply that the validity of his point under this section depended on his establishing that the assignment of the marks to the plaintiffs involved a forfeiture or confiscation of the rights previously vested in the defendant so as to create, as it were, a new root of title in the assignment, or the previous vesting in the custodian, and to disentitle the plaintiffs to treat themselves as the successors in title of the defendant in respect of the marks. I confess that I have experienced some difficulty in appreciating this argument, but, in any case, the reasons I have given for rejecting the defendant's arguments under s. 22 (4) necessarily involve a refutation of the premise that the assignment to the plaintiffs operated by way of a forfeiture or confiscation of the defendant's rights. This point, therefore, falls to the ground.

In the result, I think that DANCEWERTS, J., was correct in all his conclusions and I would dismiss both the appeal and the cross-appeal.

BIRKETT, L.J.: I agree with the judgment of SIR RAYMOND EVERSHED, M.R., which has just been delivered. That judgment has dealt so completely with the contentions raised before the learned judge in the court below and in this court that no useful purpose would be served by travelling over the same ground again and re-stating the same conclusions. I have also had the opportunity of reading the judgment that my brother, ROMER, L.J., will deliver, dealing particularly with the argument addressed to us on the Trade Marks Act, 1938, s. 22 (4), and to his judgment on that matter I have nothing to add except to state my agreement with it. But there is one further matter on which I think it is, perhaps, desirable that I should say a very few words. Counsel in the course of his argument on behalf of the defendant, made certain submissions on the true construction of the Trading with the Enemy Act, 1939. He made those submissions with great force, and at times with great fervour, and he clearly regarded them as being of great importance in the presentation of his case. The opening words of s. 7 of the Act of 1939 were the words on which counsel for the defendant relied, and the material words of the whole section have already been set out in full in the judgment of the Master of the Rolls. Perhaps I may repeat the most material words in s. 7 (1):

"With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint Custodians of enemy property . . . and may by order . . ."

Then follow the detailed matters with which the orders may deal, which have already been read. The first order with which we are concerned, was made

on June 26, 1940, and it related to the 35,186 shares in the plaintiff company then registered in the name of a subsidiary company of the defendant. The second order with which we are concerned was made on Jan. 31, 1941, and related to the trade marks. The third order, and, perhaps, the most vital one of all, was made on Apr. 17, 1951, and it gave power to the Custodian in whom the trade marks had been vested by virtue of the order of January, 1941, to assign and transmit the trade marks either in connection with the goodwill of the business or not. In June, 1951, the two assignments which have already been described so fully were executed, the first dealing with the sale of the shares, and the second dealing with the transfer of the trade marks.

The submission of counsel for the defendant was that the power of the Board of Trade to make orders was limited by the opening words of s. 7. The Board of Trade were confined to the purposes of preventing the payment of money to enemies, or preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, because, on the true construction of s. 7, no other order-making powers were given to the Board of Trade. It is fairly plain, I think, that if the whole of s. 7 is read and considered in conjunction with s. 15 (5) of the Act larger powers are in fact given to the Board of Trade. For example, the board may by order confer and impose on the custodian such rights, powers, duties and liabilities as may be prescribed as respects property which has been vested in the custodian. But counsel for the defendant submits that, despite such wording, everything is governed by the opening words of the section. He says that what has been done in this case by the Board of Trade amounts to confiscation of the property of an enemy, and that confiscation of the property of enemy subjects is not the law of this country. It is true that in the House of Lords both LORD FINLAY, L.C., and LORD HALDANE asserted that the law of this country does not in general confiscate the property of an enemy. In *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* (15) LORD PARKER OF WADDINGTON said ([1916] 2 A.C. 347):

“Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty’s subjects will or ought to be restored to them after the war.”

It is to be observed that the Trading with the Enemy Amendment Act, 1914, contained a preamble substantially in the same form as the opening words of s. 7 of the Act of 1939; and in *Re Munster* (16) RUSSELL, J., said ([1920] 1 Ch. 278):

“In my judgment the Act of 1914 does not depart from these principles or involve confiscation. Under its provisions, the enemy is deprived of beneficial ownership during the war, and the Custodian, after the termination of the war, is bound to deal with it in such manner as His Majesty (keeping no doubt in view the arrangements made at the conclusion of peace) may by Order in Council direct . . . The phraseology used in the preamble and in s. 5 establishes in my judgment that, pending its disposition by Order in Council after the determination of the war, the property is removed from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover, the beneficial ownership will depend upon the arrangements made at the conclusion of peace . . . and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view, under s. 5.”

SIR RAYMOND EVERSHED, M.R., has already pointed out the difference between the words used in the sub-section to s. 7 of the Act of 1939 and the words used

in other enactments conferring powers to make orders for specific purposes, and when the preamble to the Act of 1914 is also kept in mind the argument addressed to us by counsel for the plaintiffs and counsel for the Board of Trade receives strong support. They submitted that it was quite wrong to construe the opening words of s. 7 in the manner contended for by the defendant, and that the true construction was that the words were intended, not to limit the Board of Trade to making orders only for the purposes set out in the opening words, but were rather expressive of the purpose Parliament had in mind when giving to the Board of Trade the powers to make orders relating to the many matters specified in some detail. In my opinion, the construction contended for by counsel for the plaintiffs and counsel for the Board of Trade is a reasonable one, and I think the right one, and I think the argument of counsel for the defendant fails.

I need add nothing to what SIR RAYMOND EVERSHED, M.R., has already said about the effect of the Distribution of German Enemy Property Act, 1949, and the statutory instrument made thereunder. As from the date of the passing of that Act, it was plain that no arrangements on the conclusion of peace would include the return of this property to German nationals, and the Board of Trade had a clear duty to act in accordance with the statute, and to deal with the trade marks in question in the way that brought the greatest advantage. When the transfer of the trade marks was made in June, 1951, it was made in the light of the provisions of the Act of 1949 and the statutory instrument, and the "arrangements to be made at the conclusion of peace" referred to in s. 7 of the Act of 1939 could never be such arrangements as would contemplate the handing back of this enemy property to German nationals. Neither need I add anything to what has already been said about the argument counsel for the defendant addressed to us, that, even if there were power to sell or transfer the trade marks for good consideration, there was no power to part with them for nothing. My Lord has dealt with the facts of that situation and I need not repeat them. I agree with the judgment of my Lord in dismissing this appeal.

ROMER, L.J.: I agree. As SIR RAYMOND EVERSHED, M.R., pointed out in his judgment, the most difficult point in this case is that which arises out of the Trade Marks Act, 1938, s. 22 (4), and such observations as I propose to make are mainly confined to this particular feature, which is, I think, both novel and interesting.

The firm of Mulhens (to whom, for convenience, I will refer hereafter as "the defendants") cannot successfully invalidate the assignment by the custodian to the plaintiffs of June 15, 1951, by invoking s. 22 (4) of the Act unless they can show that at the date of the assignment they (the defendants) possessed exclusive rights at common law to the use in this country, in relation to eau de cologne, of the trade marks which are in dispute in the present proceedings. That they possessed such right in, and for many years prior to, 1939 can hardly be open to doubt, and the question would, accordingly, appear to be whether their rights continued to subsist in them notwithstanding the Trading with the Enemy Act, 1939, and of the relevant orders made thereunder; and, if so, whether in any event such rights survived the assignment to the plaintiffs.

The defendants' business before the war consisted of the manufacture in Cologne of the secret essences which constituted the vital elements in their "4711" products and the marketing of such products in many countries, of which Great Britain was one. They sold their goods to the public of this country through the medium of the plaintiffs, who were the sole concessionaires. For the purpose of protecting their trade in Britain they caused to be registered (*inter alia*) the trade marks which are now in issue, and thus acquired the statutory rights which such registration conferred. Apart from these rights,

however, they had their rights at common law arising out of long user of the marks and the resulting association in the minds of purchasers in this country between such marks and the particular goods to which they were applied. As was pointed out by LORD PARKER OF WADDINGTON in *Spalding & Brothers v. A. W. Gamage, Ltd.* (17) (84 L.J.Ch. 450), an invasion by a third party of the rights conferred at common law by reason of the use of the marks would have constituted a violation of the defendants' goodwill in the business in connection with which the marks were used. In other words, the rights formed part of such goodwill. Did that goodwill have a locality and, if so, what was the locality? Was it in Cologne, where the secret essences were manufactured? Did it exist, as an indivisible entity, in all the markets of the world to which the defendants resorted? Or was its habitat Britain? I cannot but think that the goodwill in question was attached, and solely attached, to the business which the defendants carried on in this country as a distinct and severable enterprise and in respect of which the defendants had had the trade marks registered. If so, then the goodwill did possess a locality and that locality was Britain.

This conception is in accord with the following observations of LORD LINDLEY in *Inland Revenue Comrs. v. Muller & Co.'s Margarine, Ltd.* (18) ([1901] A.C. 235):

"Goodwill regarded as property has no meaning except in connection with some trade, business or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own."

Applying these observations to the facts of the present case I am, as I have said, of opinion that the defendants possessed amongst their assets in 1939 a business goodwill in Great Britain by virtue of which they could have sued at common law in respect of the unauthorised user of their marks, as also in respect of any imitation of the general set-up of their goods which might amount to passing off. From this it follows that, as both the trade marks and the goodwill of the defendants' business here were enemy property when the war broke out, they fell to be dealt with in accordance with the provisions of the Trading with the Enemy Act, 1939, and could properly be, and were, vested in the custodian. Such vesting operated as an assignment of the assets (albeit involuntary) by the defendants to the custodian.

It is true that, as has been pointed out on many occasions (and most recently by this court in *Bank Voor Handel v. Slatford* (1)), the beneficial interest of the defendants was not utterly destroyed by the vesting of the assets in the custodian. The beneficial interest therein was thenceforward in a state of suspense, but it is clear that, so long as that state lasted, the goodwill of the defendants' business here was taken out of the defendants and reposed thenceforth in the custodian. Nor could the defendants, during the war, attempt to build up a substituted goodwill in this country, for they were precluded from trading here at all.

On June 15, 1951, the custodian assigned the registered trade marks to the plaintiffs. It may well be that this assignment in itself would have carried to the plaintiffs the rights at common law to the marks without express mention. Be that as it may, the custodian did, in addition to transferring the registered trade marks, specifically assign the goodwill as well.

In these circumstances it is difficult to see how, at the time of or after the assignment, any common law rights to the marks remained vested in the defendants, let alone the "exclusive" rights on which the invalidating provisions of s. 22 (4) of the Act of 1938 are based. Throughout the war and down to the date of the assignment, the defendants possessed no legal rights in relation either to the registered trade marks or in relation to the goodwill of the business which they had formerly carried on here. All that the defendants did possess was the suspended beneficial interest to which I have already referred, and if the custodian had the power to sell the trade marks and goodwill, as, in my judgment, he had, even this somewhat shadowy interest was automatically destroyed by the exercise of that power, and nothing survived to the defendants.

Inasmuch as the assignment was executed before the defendants became released from their enemy status, I am not sure how, on any view, the "result" (which presumably means immediate result) envisaged by s. 22 (4) of the Act could be said to have arisen in the present case; but, apart altogether from that, I am of opinion that the sub-section has no application, on the short ground that the common law rights on which the defendants rely formed part of the goodwill of their former business in this country and that this goodwill constituted an asset which was capable of being and was vested in the custodian and validly assigned by him to the plaintiffs. It appears to me, in truth, that the essential basis of the appellant's argument to the contrary must be that the business which the defendants carried on in this country before the war had no separate or distinct goodwill of its own, and that the only relevant goodwill was a manufacturers' goodwill which was situate exclusively in Germany and was inalienable except with the defendants' business as a whole or was an indivisible goodwill situate in all of the countries in which the defendants traded. Once those conceptions of the position are rejected, as, in my opinion, they should be, I think that the results which I have indicated must logically follow on.

In conclusion, on the bearing which s. 22 (4) of the Act of 1938 has on the position, I would like to express my agreement with the observations of the Master of the Rolls in his judgment with regard to the decision of CLAUSON, J. (much relied on before us by the defendants) in the *Lacteosote* case (7). For the reasons which, and to the extent to which, my Lord has indicated, it appears to me that the earlier principles of trade mark law, which were so relevant to the decision of CLAUSON, J., have been abrogated by the Act of 1938.

On the question whether the opening words of the Trading with the Enemy Act, 1939, s. 7, have any, and if so what, operational effect, I should prefer myself to express no concluded opinion. I entirely agree, however, with SIR RAYMOND EVERSLED, M.R., that the argument which the defendant sought to found on that section is fully answered by the Distribution of German Enemy Property Act, 1949, and the general order made thereunder. In any event, I do not accept the contention of counsel for the defendant that, on the true construction of s. 7 of the Act of 1939, the Board of Trade could not authorise the custodian to sell any enemy property that had become vested in him unless such property was of a perishable or wasting nature.

On all other points which were argued before us, I am in full accord with the reasoning and conclusions which SIR RAYMOND EVERSLED, M.R., has expressed and there is nothing that I wish to add. I agree that the appeal should be dismissed.

Appeal and cross-appeal dismissed.

Solicitors: *Faithfull, Owen & Fraser* (for the defendant); *Slaughter & May* (for the plaintiffs); *Solicitor, Board of Trade*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THOMSON v. CREMIN AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Wright, Lord Romer, and Lord Porter), July 14, 15, 17, 18, 22, 23, 24, October 20, 1941.]

Invitee—Negligence—Injury to invitee—Liability of invitor for negligence of third party—Stevedore's labourer injured by "shore" while unloading cargo from ship—"Shore" fixed by independent contractor.

Ship—Negligence—Stevedore's labourer injured by "shore" while unloading cargo—Duty of stevedores to inspect ship before unloading cargo.

On Apr. 29, 1938, the first respondent, who was employed by the second respondents as a stevedore's labourer, was injured while engaged in discharging bulk grain from the hold of the appellant's ship, when a heavy wooden shore stretching from the ship's side to the shifting-board fell on his head. This shore had been fixed by a firm of shipwrights in Australia in accordance with regulations made under the Navigation Act, 1912-1926, of the Commonwealth of Australia, and the Australian government had issued a certificate that these regulations had been complied with. The appellant contended that the shore had been securely fixed in Australia, that compliance with the regulations was the full extent of his duty, and that the fall of the shore was not due to any default in him, but was caused by the negligence of the second respondents.

HELD: (i) the appellant owed a duty to the first respondent as an invitee to take reasonable care; the duty of an invitor to an invitee was a duty personal to the invitor, and, while he was not an insurer, he warranted that due care and skill to make the premises reasonably safe for the invitee had been exercised by himself, his servants or agents, or an independent contractor, he was not excused for a failure to perform that duty merely because he had entrusted performance of it to an independent contractor, however reputable and competent, nor by the fact that the Australian government had certified that the local regulations as to shifting boards had been complied with; and, therefore, the appellant was liable to the first respondent.

Wilkinson v. Rea, Ltd. ([1941] 2 All E.R. 50), approved.

(ii) the shifting-board, including the shore, was part of the fittings of the ship; the second respondents were on board for the special and limited purpose of unloading the cargo, and there was no duty on their part, in the absence of special circumstances of suspicion, to inspect the structure of the ship, whether permanent or temporary; there was no evidence that the operation of discharging the cargo caused the shore to collapse; and, accordingly, no negligence on the part of the second respondents had been shown.

AS TO INDEPENDENT CONTRACTOR, see HALSBURY, Hailsham Edn., Vol. 23, pp. 710-715, paras. 1002-1005; and FOR CASES, see DIGEST, Vol. 36, pp. 98, 99, Nos. 655-659.

Cases referred to:

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; 36 Digest 35, 208.
- (2) *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.
- (3) *Simpson v. Paton*, (1896), 23 R. (Ct. of Sess.) 590; 33 Sc. L.R. 413; 3 S.L.T. 309; 34 Digest 198, *h*.
- (4) *M'Lachlan v. The Peverill S.S. Co., Ltd. & Macgregor & Ferguson*, (1896), 23 R. (Ct. of Sess.) 753; 33 Sc. L.R. 634; 4 S.L.T. 19; Digest Supp.
- (5) *Pickard v. Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest 51, 312.

- (6) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.
- (7) *Hughes v. Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 42 Digest 982, 124.
- (8) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

APPEAL by the first defender against an interlocutor pronounced by the Second Division of the Court of Session, dated July 26, 1940, upholding an interlocutor of the Lord Ordinary (LORD ROBERTSON) who held the first defender solely liable for damages for personal injuries sustained by the first respondent.

Duffes, K.C., and *G. S. Reid* (both of the Scottish Bar) for the appellant.

John Wheatley and *G. G. Stott* (both of the Scottish Bar) for the first respondent, the pursuer.

G. R. Thomson, K.C., and *John Bassett* (both of the Scottish Bar) for the second respondents, the master stevedores.

The House took time for consideration.

Oct. 20. The following opinions were read.

VISCOUNT SIMON, L.C.: My Lords, on Apr. 29, 1938, the first respondent, Joseph Cremin, who was pursuer in the action, received serious injuries while employed by the second-named respondents as a stevedore's labourer in discharging bulk grain from No. 2 hold of the s.s. *Sithonia*, belonging to the appellant, which was lying in Princes Dock, Glasgow, after a voyage from Fremantle in Western Australia. A heavy wooden "shore" which stretched from the ship's side to the "shifting-board" fell on the pursuer's head while he was below propelling a grain "plough", which was being used for feeding the buckets of an elevator working from No. 2 hold to the main deck. The pursuer in the first instance brought his action against the appellant alone, alleging that, owing to the negligence of the appellant, the shore was insecurely attached to the shifting-board. On the appellant attributing the accident to the negligence of the second-named respondents, the pursuer added them as defenders in the action and sued the appellant and the second-named respondents jointly and severally for damages in respect of the injuries which he had sustained. The Lord Ordinary (LORD ROBERTSON) reached the conclusion that the appellant's negligence was established, and that he was liable to compensate the pursuer in the sum of £1,350. As against the master stevedores, the Lord Ordinary held that negligence was not proved and he, accordingly, assoilzied the second-named respondents. The present appellant appealed to the Second Division of the Court of Session, contending either that the second-named respondents were solely responsible, or, at any rate, that the responsibility should be shared between them. The Inner House affirmed the interlocutor of the Lord Ordinary. LORD MACKAY, however, would have preferred a finding of joint responsibility, and there are indications that other of the judges composing the court did not in all respects agree with the mode of reasoning by which the Lord Ordinary reached his conclusion.

The case for the appellant before this House was again stated alternatively, his contentions being (a) that there was no failure of duty by him towards the injured man, but that the sole responsibility lay on the second-named respondents; (b) that, in any event, if liability was established against the appellant, fault causing the accident was also proved against the second-named respondents. This double-barrelled case was presented to us in an argument which thoroughly examined every detail of the evidence, but the House intimated that the decision already reached by the courts in Scotland must stand, for reasons which would be given later. I have now to state, with such brevity as the subject-matter permits, what are the reasons why I consider that the appeal should be dismissed.

The holds of a vessel which is about to undertake a voyage with grain in bulk as its cargo require to be fitted with shifting-boards, i.e., wooden partitions running fore and aft from bulkhead to bulkhead in the centre line of the ship, so as to obviate the danger of the grain shifting in heavy weather from one side to the other. These shifting-boards are, for the most part, supported in position by attachment to the permanent iron pillars which are fixed at intervals inside the holds; but, in the way of the hatch, lateral support for the shifting-board is provided by shores—short shores stretching from the hatch coamings (with these we are not in this case directly concerned), and long shores stretching from either side of the ship at a rising angle of about ten degrees from the horizontal. These long shores, in the case of the *Sithonia*, were about twenty-seven feet long with a scantling of six inches by eight inches, and these dimensions were not challenged as inadequate. Since the long shores meet the uprights of the shifting-boards at a slope, it is important that their midship ends should be cut at such an angle as will present a flat surface for making contact with the perpendicular. The Lord Ordinary held, and the fact may be accepted, that this was done in the case of the *Sithonia*. But it is not enough that the midship ends of the long shores should be suitably shaped, or even that the shores should be pressed down so as to make solid contact; they must be so held in position as to make sure that they will remain firm. There was some difference of view as to what additional precautions were needed, but the evidence fully warranted the Lord Ordinary's conclusion that a safe construction would be provided by (i) securely nailing the midships end of a shore to the upright against which it pressed, and (ii) fitting a "chock" or "cleat" of wood above the midships end of the shore by nailing it with five-inch nails of No. 5 gauge driven through it into the upright, and thus counteracting any upward thrust of the midships end of the shore. Indeed, I understand the appellant to accept this standard. His argument on the facts was directed to establishing (a) that the shore which fell on the pursuer was securely fixed in Australia in accordance with the above construction; (b) that its fall was not due to any default in the shipowner, but was caused by the negligent operations of the second-named respondents while discharging the cargo under contract with the appellant.

As regards (a), the testimony was conflicting. The appellant relies on the evidence of three witnesses taken in Australia, where Messrs. Petterson & Co., a firm of shipwrights with a large experience of fitting grain ships with shifting-boards, were employed for this purpose in the *Sithonia* in preparation for her taking on board her cargo. The partner in this firm who supervised the work gave evidence that the construction above described was duly carried out: a marine surveyor who inspected and certified the work for an underwriting association testified that the structure was properly executed—(the Lord Ordinary notes that he did not state that the inboard ends of the shores were secured by nails, but, on the other hand, he declared that he would not expect the shore to be dislodged by less than repeated blows with a sledge-hammer)—and a government inspector who gave the official certificate spoke more generally of the shifting-boards being efficiently fitted. As against this, there is the fact that, after the shore was exposed by the removal of the grain in which it was embedded during the voyage, the shore fell, and fell without the application of any violence corresponding to sledge-hammer blows; and, according to the evidence of three fellow-workmen of the pursuer who were in the hold when it fell, the chock which should have helped to keep the shore in position became detached and fell also, when it was observed that the nails in it, instead of being five inches long, were short nails of about two and a half inches. The details of Messrs. Petterson's bill show that a quantity of three-inch nails were charged for in the course of the work, but no evidence was given as to the purpose for which they were used. The erection of the shifting-boards,

and the fitting of shores to support them, were required by regulations made under the Navigation Act, 1912-1926, of the Commonwealth of Australia, and the *Sithonia* could not have left the port of Fremantle with her cargo of bulk grain without the official certificate that these regulations had been complied with. The appellant's counsel contended that compliance with the regulations was the full extent of the shipowner's duty. This is plainly not the case. The regulations are for the purpose of securing that ship and cargo can safely face the dangers of the voyage, but the shipowners have undertaken, not only to carry the cargo to its destination, but to unload it there, and must have contemplated that stevedores would be employed for this purpose. As between the shipowner and the pursuer, the former must be regarded as the occupier and the latter as an invitee who comes to work in the hold in consequence of the contract made between the shipowner and the pursuer's employers. The shipowner's responsibility for the safety of the structure is not, indeed, absolute, but, on the principle of *Indermaur v. Dames* (1), he owes to the invitee a duty of adequate care. If adequate care was not exercised in fitting and securing the shore, it would be no answer (as the appellant's counsel candidly admitted) to say that the shipowner employed an independent contractor at Fremantle to do the work. For this last proposition, reference may usefully be made to a recent decision of the Court of Appeal in *Wilkinson v. Rea, Ltd.* (2), and especially to the observations of LUXMOORE, L.J. ([1941] 2 All E.R. 60). I can see no ground for drawing a distinction between the permanent structure of the ship and the temporary erections put up in her holds for the purpose of the special cargo she was carrying.

The first, and crucial, question, therefore, is whether the fixing and securing of the shore at Fremantle were done with adequate care. This, in turn, largely depends on whether the chock was fastened by nails of adequate length, or whether the evidence as to shorter nails is to be believed. It would be difficult to imagine an issue in which the decision more completely depends on the view of the trial judge as to the trustworthiness of the testimony given in his presence by the witnesses who asserted that the chock became detached by the accident, and that they found it had only been fastened with short nails. The Lord Ordinary, who alone had the opportunity of judging of their veracity at first hand, has believed what they said. It is unfortunate that neither the chock nor the shore were preserved after the accident so that they could be produced at the trial, but I am not satisfied that their absence helps the shipowner to whom the pieces of wood belonged. Without throwing any doubt on the sincerity of the Australian witnesses, it is fair to observe that they were testifying some fifteen months after the accident and eighteen months after the work was done. If small nails were improperly used to fasten the chock, this must have escaped their attention, and, once the mistake was made, it may well be that inspection would not detect it. The four judges of the Second Division did not differ from the Lord Ordinary's view that short nails were employed and, in such a case as this and in view of the evidence given, the House could not, in my opinion, properly set aside this concurrent finding of fact.

As regards (b), the appellant made a series of allegations of fault against the second-named respondents and contended that the approximate cause of the accident was to be found in one or other of these alleged shortcomings. First, he contended that it was the duty of master stevedores, as soon as the unloading of the cargo had proceeded far enough to expose the shores which had been buried in the grain, to remove the shores altogether, and thus obviate the possibility of their falling at a later stage on those who were working below them. The appellant's evidence in support of this view largely related to practice in a particular line of vessels where the company does its own stevedoring, and where the removal of shores might be explained because they would

otherwise impede the work of discharge, or because the holds were being cleared for a return cargo other than bulk grain. I agree with the view of the Lord Ordinary that the evidence did not establish any practice of removing shores for reasons of safety or security, and, indeed, if shores are securely and properly fixed, there would seem to be no need to remove them for such reasons. The *Sithonia* met with no exceptionally severe weather on her voyage and it is a striking fact that the fall of a shore in circumstances like the present is so unusual

A an event that none of the witnesses called in the case could speak to it ever having happened before. This circumstance, to my mind, strongly confirms the view that there was something faulty in the fixing of this particular shore that was the cause of the accident. Next, the appellant contended that the second-named respondents were liable for failure to inspect the shores and to detect the weakness of this particular shore before it fell. Here, again, I agree

B with the view of the Scottish courts that it was not proved to be part of the regular practice or course of duty of stevedoring firms to make such inspection. Of course, if they observed that a particular shore was loose, their duty would be to take immediate precautions, but, in the present case, there seems no reason to think, and it certainly was not proved, that the shore which collapsed gave any appearance, before its fall, of being dangerous. The appellant

C further urged that an explanation of the collapse might be found in the vibration set up by the working of the two elevators used for discharging the grain, or by a portion of this apparatus getting into actual contact with the shore, or by the wires which hauled the "ploughs" in the hold fouling the shore in some way. These arguments were developed before us at considerable length, but the short answer to them is that, though it is conceivable that one or other

D of these matters might bring about the accident, there is no sufficient evidence that any of them did. The method of discharging grain cargoes at Princes Dock, Glasgow, is exceptional; for the more modern and customary use of suction is not employed. But the evidence does not at all justify the conclusion that the methods of unloading employed at Princes Dock are not proper, and, as I have said, no one was able to say that an accident of this sort had happened

E there before. The appellant went so far as to argue that, since Glasgow was not named in his contract as the port of discharge, he was not required to provide against the special circumstances of unloading at that port. The answer, of course, is that Glasgow was within the range of ports at which he might be required to discharge, and that, in any event, it is not proved that the methods employed at Princes Dock caused the shore to fall when it would not have fallen had the unloading taken place elsewhere.

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My Lords, the decision in this case turns almost entirely on questions of fact, as to which the courts in Scotland have given the fullest attention and have reached the unanimous conclusion that the appellant, and the appellant alone, is liable for this deplorable accident. There are no adequate grounds on which that conclusion could be disturbed, and I, accordingly, move that the

G appeal be dismissed with costs.

My Lords, my noble and learned friend, **LORD ROMER**, authorises me to say that he has read the opinion which I have just delivered and concurs in it.

LORD THANKERTON: My Lords, in this action the first respondent seeks to recover damages for injuries sustained by him on Apr. 29, 1938, while

H employed as a stevedore's labourer by the second respondents in the discharge of bulk grain from No. 2 hold of the s.s. *Sithonia* which belonged to the appellant and was then lying alongside in Princes Dock, Glasgow. The first respondent originally raised the action against the appellant, but, in view of the defence stated by the appellant, he convened the second respondents as defenders, and now sues the appellant and the second respondents jointly and severally or severally for the damages claimed. After proof led before him, the Lord Ordinary (**LORD ROBERTSON**) decerned against the present appellant for payment to the

pursuer of £1,350 in the name of damages, and assolizied the present second respondents. On a reclaiming motion by the appellant, who did not challenge the quantum of damages awarded, the decision of the Lord Ordinary was affirmed by the Second Division of the Court of Session. The present appeal is taken against these decisions.

As in the Inner House, the appellant maintained in this House that he was entitled to absolvitor and alternatively that the appellant's injuries were jointly caused by his fault and that of the second respondents, who were thus jointly liable with him. Again, no question was raised as to the quantum of damages, if liability was established. There is no doubt that the serious injuries sustained by the first respondent were caused by a heavy timber shore which fell on his head while he was operating a grain plough, which gathered the grain so as to feed the elevator, which raised it to the main deck. The Lord Ordinary has fully described the position and purpose of the shore in relation to the shifting-boards, and the construction of the shifting-boards, as also the way in which the discharge of the grain was being conducted by the second respondents, who were employed by the appellant for that purpose. The shifting-boards are a necessary precaution in the case of cargoes of grain in bulk, so as to obviate the risk of the grain shifting during the voyage in heavy weather; the province of the shores is to maintain the shifting-boards in position. While the shifting-boards serve no purpose after the cargo has reached its destination, it is not really practicable to remove the shores until at least a substantial portion of the grain in the particular hold has been removed. The Lord Ordinary held it proved that the amidships end of the shore in question had not been properly secured at Fremantle, in respect that the wooden chock, which was designed to prevent the shore from springing upwards, had been nailed to the shifting-board by nails of an inadequate length, and that this was the cause of the accident; he held that the appellant was therein negligent, and that such negligence was a breach of the duty owed by the appellant to the first respondent. This view was affirmed by the Inner House. As regards the crucial finding of fact as to the failure of the appellant to have the shore properly secured at Fremantle, I may express my concurrence in the view of my noble and learned friend on the Woolsack in the speech which he has just delivered, which I have had the opportunity of considering, and I agree that this finding must stand.

There remains the question whether such failure of the appellant constituted a breach of any duty owed by him to the first respondent, and, if so, whether it can be causally connected with the accident. My Lords, I have no doubt that the shifting-boards, including the shores, were part of the fittings of the ship, and, contrary to the view of LORD MACKAY, I am of opinion that *Simpson v. Paton* (3) and *M'Lachlan v. The Peverill S.S. Co., Ltd.* (4) are directly relevant, and that, unless the appellant can show special circumstances which would impose the duty of inspection on the stevedore, he is liable for the results of the unsafe condition of the shore to the first respondent, to whom he owed a duty to take reasonable care under the well-known principle of *Indermaur v. Dames* (1). While the certificate of the Australian surveyors, given under the statutory regulations of Australia, may be of some evidential value, in a case such as the present one, as to the steps taken by the appellant to secure the proper construction of the shifting-board, it cannot absolve the appellant of his duty to the first respondent; further, the ship undertook not only the carriage of the grain during the voyage, but the discharge of the grain at any port at which it undertook the discharge had a contract of carriage or by subsequent agreement. Counsel for the appellant submitted that this would place an unreasonable burden on the ship, the ultimate port of discharge might not be in view at the time of the contract on the shifting-boards, but the answer is simple, viz., either secure

A adequately the shifting-boards, or take steps to remove them or make sure of their adequacy by inspection at the port of discharge by the ship itself or by arrangement with the stevedores. Of course, it might be that the practice of a particular port was so inveterate that the ship was entitled to rely, as part of their arrangement for employment of the stevedore, on the discharge of such duty of inspection by the latter, and it may be that the employees of the stevedore would be affected by such transfer of the duty of inspection, but that question does not arise for consideration in this appeal, for I am clearly of opinion that the evidence in this case falls far short of proving any such inveterate practice. If it proves anything it proves a variety of practice, and is inconsistent with the appellant's case. The same is true of the alleged practice of removal of the shores by the stevedore.

B The appellant maintained that the second respondents were negligent in three respects, viz., (i) in putting in an apparatus which might foul the shore in course of the operations, (ii) in the amount of vibration caused during the operation, and (iii) in the operation of the ploughs, any of which caused, or might tend to cause, the loosening of the shore. But, in my opinion, these contentions are excluded by the admission of the appellant's counsel, made in answer to a question by one of your Lordships, that nothing that was done in C the present case was unusual, and that this is the first time that a shore has fallen as this one did. It is not suggested that, in the present case, the second respondents, or any of their employees, observed, or should have observed, prior to the falling of the shore, anything which would have warned them that the shore was loose or dangerous. The appellant's case against the second D respondents fails, and it follows, in my opinion, that the courts below were well justified in holding that the appellant's negligence in construction of the shifting-boards was the cause of the accident and was in breach of the duty owed by him to the first respondent, and that he alone is liable to the first respondent. I, therefore, agree with the motion proposed by my noble and learned friend.

E LORD WRIGHT: My Lords, I have had the advantage of considering in print the speech which my noble and learned friend, the Lord Chancellor, has just delivered. I agree with it and merely add a few supplementary observations on some general matters of principle which seem to me to be involved.

F That the first respondent was working on the appellant's premises, the steamship *Sithonia*, as an "invitee" and not as a mere licensee has not been questioned. Thus, the case fell within the general rule enunciated in *Indermaur v. Dames* (1). The rule there laid down as to the duty of the "invitor" to the "invitee" has been affirmed in several decisions of this House, whether the particular case was held to fall within or without the rule. In the present appeal, however, the failure to exercise due care for the safety of the invitee which has been found was due, not to the negligence of the appellant or his G servants, but to that of independent contractors, the Australian shipwrights who constructed the shifting-boards before the grain was loaded. I agree with the Lord Chancellor in his approval of the decision of the Court of Appeal in *Wilkinson v. Rea, Ltd.* (2), where it was held by LUXMOORE, L.J., with whom MACKINNON, L.J., concurred, that the invitor was not excused for a failure to perform his duty to the invitee merely because he had entrusted performance to another. LUXMOORE, L.J., adopted the view of WILLIAMS, J., in H *Pickard v. Smith* (5). The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty

merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by LORD BLACKBURN in another connection in *Dalton v. Angus* (6) (6 App. Cas. 829), where he distinguished the case of what has been called the collateral negligence of a sub-contractor from their negligence in failing to perform a duty resting on the principal himself

“who cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor.”

LORD BLACKBURN again enunciated the same principle in *Hughes v. Percival* (7) (8 App. Cas. 446). More recently this House, again in a different context of fact, applied this rule in *Wilsons & Clyde Coal Co., Ltd. v. English* (8). It is always a question of the extent of the duty incurred. In the present case, the invitee is not concerned with the course which the invitor adopts by way of discharging the duty. He is entitled, when he comes on the invitor's premises, to rely on the warranty that the invitor's duty to him has been performed and to complain if he is injured because the duty has not been properly performed.

Counsel for the appellant, when this question was raised in the argument before this House, said that he did not rely on the fact that the neglect was that of the sub-contractor, first, because the point was not pleaded, and, secondly, because he was not optimistic of success in arguing it. I feel that the fairness and candour of counsel deserve a recognition on my part that he was justified in his want of optimism. On the facts found and admitted the question raised by the employment of the independent contractors hits one in the face. Speaking for myself, I should be unwilling to decide against the appellant if I did not think, as I do, that the employment by the appellant of the Australian shipwrights, though a competent firm of good repute, afforded him no defence in this action. Nor do I think that the appellant can, in this action, rely on the Commonwealth government certificate that the regulations as to shifting-boards had been complied with, or claim that it constitutes sufficient evidence that he had fulfilled his duty to the first respondent. These regulations are for the purpose of satisfying the requirements of the public policy of the Commonwealth, and do not, in general, affect private and personal duties and rights, whether contractual or such as those arising in this case from the relationship between the appellant and the first respondent.

With the greatest respect to LORD MACKAY, I cannot see any reason to hold the second respondents responsible to the first respondent either solely or conjunctly with the appellant. To hold a master stevedore, in the absence of special circumstances of suspicion, subject to a general duty towards his men to inspect the structure of the vessel, whether permanent or temporary, whether shifting-boards, stanchions or the like, would, I think, be contrary to practice and inconsistent with the exigencies of the case. He comes on board the vessel, the shipowner's premises, to carry out the loading or discharging, and, unless there are special stipulations in the contract, is *prima facie* entitled to assume that the shipowner has discharged his duty of care in regard to the safety of the premises. He is on board the ship for a special and limited purpose and has in the ordinary course no right to interfere with the structure, temporary or permanent, of the vessel. No doubt, if there are apparent indications which he observes, or ought to observe, that the structure is defective, he owes a duty to take reasonable measures for the protection of his men. But there was nothing of the sort in the present case. I agree generally with what was said on this question by the Lord Justice-Clerk (RT. HON. J. H. A. MACDONALD) in *M'Lachlan v. The Peverill S.S. Co., Ltd.* (4) (23 R. (Ct. of Sess.) 757), though, if there was something manifestly wrong and dangerous, I think the stevedore should refuse to go on with the work until the defect was remedied. I cannot, however, see what purpose would be served by a slight inspection of the

structure by the master stevedore where there was no special ground of suspicion, while to require it would place an unwarranted and unbusinesslike burden on the stevedore.

A I do not find in this case any occasion for invoking the formula generally described as "*res ipsa loquitur*". That is little more than a *prima facie* presumption of evidence of very limited use; where it exists, it can always be rebutted. It does not arise at all in the present case. Though the structure was throughout in the possession and control of the shipowner, it was exposed to many external influences not involving negligence of the appellant from the date when it was erected until the time when the shore fell, such as perils of the seas, and possible damage in the course of the unloading operations; in addition the risk of a latent defect cannot be ignored. Hence the occurrence of the accident is not, in itself, any evidence, even *prima facie*, of breach of duty by the appellant. Some evidence pointing to a specific fault is, in my opinion, here necessary to satisfy the onus which rests on the first respondent to establish negligence. It is on the specific evidence of defective workmanship that the decision is to be justified in this case. The various observations which I have made are merely supplementary to the reasoning of the Lord Chancellor, with which, as I have already stated, I agree. I concur in the motion proposed.

C LORD PORTER: My Lords, the question to be considered in the present case is, I think, one of fact rather than of law, and ultimately turns on whether the view of the Lord Ordinary and his method of solving the problem can be supported. The first respondent, Joseph Cremin, was injured by the fall of a shore in No. 2 hold of the s.s. *Sithonia* when he was engaged in discharging her at Princes Dock, Glasgow. He was a docker in the service of the second respondents, Andrew Main and Sons, who were the stevedores employed by the appellant to effect that discharge. The shore was erected to support certain shifting-boards placed below the hatch in accordance with the provisions of statutory rules made under the Navigation Act, 1912-1926, of the Commonwealth of Australia. By Part III, r. 9, of those rules it was provided:

E " (1) Where bulk grain is loaded in any ship shifting-boards shall be erected in the ship to the satisfaction of the surveyor . . . (2) Shifting-boards where fitted . . . (b) shall be properly secured to the satisfaction of the surveyor . . . between uprights and shored or stayed in position."

In the *Sithonia* the shifting-boards in way of the hatchway did not extend to the bottom of the hold: they were supported by stilts and by vertical wooden uprights nailed on each side of the shifting-boards. They received lateral support from the shores, which were made fast at the skin of the ship and ran thence at an upward angle of ten to fifteen degrees to the shifting-boards in the centre of the hold where they were kept in position by being driven down on the vertical wooden uprights and fastened with nails; a wooden chock was then fastened above the inboard end of the shore, also with nails, in order to prevent upward thrust. It was found by the Lord Ordinary that, had nails of an adequate size been used, this was a proper and usual method of securing the shore, its lateral movement being prevented by the nails fastening it to the uprights, whilst the upward thrust, which was the chief force exercised on it, was checked by the chock nailed above. The nails, however, in each case should have been five inches long by five-inch gauge, and the Lord Ordinary has found that, whereas those used to prevent lateral movement were of the right kind, those used to secure the chock were only two and a half or at most three inches in length, with the result that the chock and shore came away and fell, injuring the first respondent. This finding was strongly controverted by the appellant on the grounds that: (i) It was not relied on in the condescendence. (ii) It was not put, or at any rate not adequately put, to the witnesses in Australia who were responsible for the erection. (iii) That it was against the weight of evidence.

(i) and (ii). The allegation in the condescendence is that the shore rested on a light piece of wood about one inch thick secured to the shifting-board by means of small nails, and by cross-interrogatories the Australian witnesses were asked whether such a construction was a proper one. It is quite true that the suggested defence might have been put more clearly and definitely. The statement, as made, contains, I think, three separate grounds of complaint not differentiated one from the other, viz.: (a) that the chock was too narrow, (b) that it was placed below the shore instead of above it, and (c) that both chock and shore were secured by small nails. But I think the condescendence does give sufficient warning that one ground on which reliance was placed was that improper nails were used in the chock as well as the shore. In the case of the cross-interrogatories the same case was put to the Australian witnesses and the same warning given. The method of obtaining evidence from abroad by means of interrogatories and cross-interrogatories has the advantage of cheapness and often saves time. No doubt, it is fully justified for these reasons, but in a case where the facts are seriously in dispute and a careful inquiry into the observation and recollection of witnesses is called for it necessarily fails to achieve the best results. Even a direct inquiry whether short nails were not used would be an inadequate test since it would not probe the grounds on which the witness based his answer. The court, which has to decide the question, must in such circumstances do the best it can on the material before it, acting on the general impression created by the answers to the interrogatories in conjunction with the viva voce evidence given in Scotland. (iii) The Lord Ordinary was able to form a view of the witnesses he saw and of their evidence, and if he thought it more reliable than that from Australia to accept it as against the other. Indeed, speaking for myself, I should say that there is a good reason for thinking that the Australian witnesses were not recollecting exactly what was done in the particular ship, but speaking to a general practice. I recognise that Mr. Heron, who was in charge of the work on behalf of the contractors, does say that five-inch nails of five-inch gauge were used in this ship in fastening both shore and the chock, but as his evidence had to be obtained by means of interrogatories he could not be subjected to close cross-examination and the Scottish witnesses may well have been more accurate. If, then, five-inch nails were required to make the structure secure and were usually inserted and if only three-inch nails were used, the shipowner, subject to certain considerations which I deal with below, would be guilty of negligence and would be liable to the injured man.

The first consideration urged against his liability was that the only duty which the shipowner owed in respect of the shifting-boards and any shores erected to secure them was that the requirements of the surveyor in Australia should be complied with. Admittedly, this had been done and the appropriate certificate secured. Primarily, shifting-boards are erected for the safety of the ship to prevent the grain shifting and to make her seaworthy for the voyage she is undertaking. Even for that purpose the certificate of the surveyor would, I think, only be effective provided the obligation was merely to take due care to make the ship seaworthy, not if the obligation were absolute to make her so. To comply with the regulations is to fulfil an obligation towards the Commonwealth and to avoid the guilt of breaking a statutory obligation. Its fulfilment would protect the shipowner from criminal liability for such a breach, but would not insure him against all claims for negligence by a third party. I cannot accept the argument as having any bearing on the liability of the ship to a docker working in her holds. Toward him the duty is at least to refrain from negligently erecting anything likely to do him injury, or, to put it more broadly, as a minimum to take due care to make the structures in the hold secure against causing injury to any one required to work in the hold for the ship's purposes. But, said the shipowner, this shore was not likely to injure

A the man because it should have been removed by the master stevedore before the docker worked under the place where it was, and even if its removal was not obligatory it should have been carefully inspected on behalf of the stevedore as soon as the discharge of the grain which surrounded its fastenings made this course possible. Accordingly, the stevedore, it was contended, was either solely responsible for the accident, or, at any rate, his negligence contributed to its incidence, and, if so, by Scottish law, each of the defenders, the ship and the stevedore, would be under a conjunct and several liability to the injured man under which he could recover the whole sum awarded from either or both, but each would be liable to indemnify the other if that other should pay more than half.

In my opinion, this argument fails on the evidence given and facts as found.

B No general practice of removing shores was proved except in a case where they interfered with the work being done in the hold. Indeed, the general effect of the evidence was to the contrary. It is true that some of the witnesses from amongst the dockers and their representatives speak to the practice of removing shores, as does one of the ship's officers, but the former base themselves largely on the practice of the Donaldson Atlantic Line, who do their own stevedoring and, therefore, are authorised by the ship itself to remove the shores from their own ship without requiring special permission, and the latter has a very slight acquaintance with the carriage of grain in bulk. Moreover, the stevedores employed on the Donaldson Atlantic Line themselves stated the object of removing the shores to be, not the safety of the men engaged, but the due performance of the work, which would be impeded by leaving the shores in position. In the case of their line, bulk grain is generally carried in the bottom of the hold only. Where this occurs, the shifting-boards must extend to the bottom of the hold and if not removed would interfere with the discharge of the grain. They are not erected, as in the case of the *Sithonia*, at the top of the hold only, where they do not get in the way of men working below. Nor can I put much reliance on the allegation of dockers who say after an accident has occurred, that the removal is for their safety. The administrative staff, not the workers, know the object of the removal and it is illuminating to remember that the occurrence of such an accident was unprecedented and even after it had occurred the men discharging the *Sithonia* continued to work below the long shores without demur, though some shorter shores across the mouth of the hatch, which have no bearing on the matters discussed before your Lordships, but appear to have been loose, were first made secure on the orders of the ship's officer left on board.

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But the appellant argues that there was another circumstance to which the loosening of the shore should be attributed. It is common ground that two elevators were used in discharging the hold and it was said that to use two and not one would result in greatly increased vibration and would naturally shake the shore from its fastenings. Some vibration, no doubt, there was and it may well have had some effect on loosening a shore which was insufficiently secured, but it was not proved to be unusual to use two elevators and the Lord Ordinary did not accept the contention that any undue vibration had occurred. A further argument, however, was put forward on behalf of the ship. It was said that the normal method of discharge of a bulk grain cargo is by suction, that that method does not require the presence of dockers in the hold, and that the shipowner was not obliged to make himself acquainted with unusual means of discharging which are confined to an individual port. It was further said that the ship was sent to discharge part of her cargo at Southampton, and that it was not until that port was reached that she received orders to proceed to Glasgow for final discharge. Therefore, her owners, when erecting the shifting-boards, did not know that the method of discharge adopted at Princes Dock, Glasgow, would be used or that the dockers would be exposed

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to the risk of a falling shore. The simplest answer to this argument is, I think, that a shipowner chartering a ship or carrying a cargo to a range of ports, even though the choice of the individual port be postponed until a later date, knows, when loading, to what ports or range of ports he may be ordered and must make himself familiar with the normal incidents of discharge at those ports. To fulfil his contract, he requires stevedores to put out the cargo and he must safeguard them against risks of which he knows or ought to know and they do not. In the present case, such an obligation casts no great burden on him when it is remembered how important a grain port Glasgow is and that even Princes Dock receives a considerable number of cargoes of bulk grain. If, then, the ship be responsible at least for taking all reasonable precaution that the structures in her hold, whether permanent or temporary, be erected with care sufficient to ensure that no danger shall exist which is likely to cause injury to men employed to work in her holds, she is liable in the present instance unless some intervening negligence of another, in this case of the stevedores, is also a cause of the accident, and is solely liable unless that negligence contributed to the accident.

In the present case I agree with the Lord Ordinary and the Lower House in thinking that no negligence has been shown on the part of the stevedores. If the shore had been obviously loose, and if any casual observation would have shown this state of affairs, the stevedore might have had to share the blame. But no general practice of examination was proved to exist, no severity of weather in the course of the voyage gave rise to any suspicion of damage, and no such accident had been known to occur before.

In *M'Lachlan v. The Peveril S.S. Co., Ltd.* (4) the pursuer was injured by the fall of a stanchion which was said to be insufficiently fastened so that the slight touch of a sling in the course of the discharge caused it to fall and injure him. He sued both ship and stevedores and against the latter his allegation was that their foreman knew or ought to have known that the stanchion was practically unfastened and unsupported. Yet the Inner House held that no relevant plea had been averred against the stevedores. The Lord Justice-Clerk, with whom LORDS TRAYNER and MONCRIEFF agreed, in the course of his judgment assented to the proposition that a stevedore is not called on to look to the fastenings on board a ship on which he has to work. He adds (23 R. (Ct. of Sess.) 757):

"Of course a stevedore who happened to notice anything which was seriously wrong should point it out, but he could not have any power in the management of the ship; and if the people on board the ship—the master or owner—to whom he made a complaint were to say to him, 'Attend to your own business, we will attend to ours; we are quite satisfied with it,' I do not think he could have refused to carry on his work to the best of his ability."

Even LORD YOUNG who dissented said (*ibid.*, 758):

"I think there is authority to the effect that a very slight supervision will be sufficient on the part of the stevedore to exempt him from responsibility, and that he may assume that this, that, and the other thing are all right in a ship without making a special examination."

In dealing with the present case it is not necessary to go so far as the Lord Justice-Clerk. If LORD YOUNG be right, and I think he is, the stevedores are not liable. There is nothing to suggest that the shore was so obviously loose that it must have been seen by anyone making a casual inspection and no circumstances which would fasten an accusation of negligence on those to whom the discharge was entrusted. It was urged, however, that the Lord Ordinary had approached the subject in the wrong way—he had relied on the argument that the shore had fallen, that shores do not normally fall without some negligence on the part of those who set them up, and that the shipowner was in

control of the ship's hold from the time of the erection until the finish of the discharge. He, accordingly, applied the doctrine which is commonly referred to as *res ipsa loquitur*. Even if the first two assumptions were conceded it was contended that the third was not justified since the stevedore and not the ship was in charge of the unloading. I doubt if this criticism is justified. It is true, I think, to say that the doctrine cannot strictly apply inasmuch as the shore might have been displaced by the activities of the stevedore or his men. Had there been no evidence except that the shore fell the argument that the shipowner had not been proved to be in fault would have had considerable weight. But the method of discharging, the events which happened during its incidence, and the possibility of negligence on the part of the stevedore and of danger from vibration were all thoroughly canvassed. The Lord Ordinary, after hearing this evidence, came to the conclusion that no act of the stevedore or his men caused or contributed to the accident and there was ample evidence to support his finding. If all causes, except improper fastening in Australia, be eliminated, the blame may rightly be attributed to those responsible for failure to make the shore fast there and in a somewhat loose sense it may be said that the mere fall of something which should not have fallen shows negligence in those who erected it. I agree that the shipowner was solely to blame and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.*, agents for *Boyd, Jameson & Young, W.S.*, Edinburgh (for the appellant, the shipowner); *Landons*, agents for *William Thornton*, Glasgow, and *Thos. J. Addy, S.S.C.*, Edinburgh (for the first respondent, the pursuer); *Lawrence Jones & Co.*, agents for *Niven, Macniven & Co.*, Edinburgh, and *Macpherson & Mackay, W.S.*, Glasgow (for the second respondents, the master stevedores).

NOTE.

PADLEY v. PADLEY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), October 13, 1953.]

Justices—Husband and wife—Appeal—Notes of evidence and reasons—Need to supply before appeal set down—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3).

AS TO NOTES OF PROCEEDINGS BEFORE MAGISTRATES, see HALSBURY, Hailsham Edn., Vol. 10, p. 850, para. 1359; and FOR CASES, see DIGEST, Replacement Vol. 27, p. 734, Nos. 7014-7023.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 71 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 231.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, see *ibid.*, Vol. 5, pp. 202-220.

APPEAL by the husband from an order made by Nottingham city justices on Mar. 18, 1953, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. The justices found the husband guilty of desertion and of wilful neglect to provide reasonable maintenance for the wife and the infant child of the marriage, but not guilty of persistent cruelty to the wife.

R. L. Bayne-Powell (John Latey with him) for the husband.

K. B. Campbell for the wife.

LORD MERRIMAN, P.: The justices have expressed a hope that we would give them some guidance on a technical matter. The appeal was out of time, due, partly, to delay in obtaining the reasons of the justices for their

decision. This, I gather, was because, through their clerk, they expressed the view that they would prefer to wait for the appeal to be set down and become effective before they went to the trouble of stating their reasons. They wish to know whether that was correct or not. I shall answer that question in two ways. Looked at from a strictly technical point of view, it was certainly wrong, because the Matrimonial Causes Rules, 1950, r. 71 (3), governing appeals from courts of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, provides that, at the time of lodging the notice of motion stating the grounds of appeal, the appellant must file

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“ . . . two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision.”

That sub-rule cannot be complied with if justices withhold their reasons until the case is set down. But, apart from the question of a strict compliance with r. 71 (3), there is, in my opinion, a good reason for obtaining at the earliest possible moment from justices, not only the notes of the evidence, but also the reasons for their decision. It is a matter of common knowledge that some legal aid certifying committees, when asked to give a certificate to an appellant from a decision under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, prefer, in the first instance, to give a limited certificate to enable the appellant to take up the notes of evidence and the statement of reasons, so that the committee can then consider for themselves whether there is any likelihood of the appeal being successful. I am not laying down any rule that that ought to be done. Suffice it to say that many people take the view that it would be desirable if that practice were more frequently followed, and, of course, it could not be followed if justices were to refuse to give their reasons until the appeal had become effective. There is no provision in the Legal Aid (General) Regulations, 1950, whereby any costs can be recovered which have been incurred before the period covered by the certificate,* and, therefore, if parties have to take up the notes and the statement of the justices' reasons at their own expense, it might conceivably result in a denial of justice.

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PEARCE, J.: I agree. Quite apart from the requirement of the Matrimonial Causes Rules, 1950, r. 71 (3), it is not satisfactory to compel a would-be appellant to incur the expense of starting an appeal before he can obtain the notes and reasons, which alone will show him whether there is the faintest prospect of success. To do so would merely multiply the number of hopeless appeals, as one knows from experience that, once an appeal is launched, even if it later appears to have little hope of success, it tends to go forward of its own momentum. As so many appellants in this court have legal aid, that is a matter of which one must take particular note.

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[The court then dealt with the appeal on its merits.]

Solicitors: *Gibson & Weldon*, agents for *Crockford & Anderson*, Nottingham (for the husband); *S. C. Elphick*, agent for *Clayton, Ellis & Massey*, Nottingham (for the wife).

A.T.H.

* See *Hatch v. Hatch*, [1951] W.N. 235; 27 Digest, Replacement, 729, 6955.

BAKER v. BAKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), October 13, 14, 1953.]

Justices—Husband and wife—Summons for maintenance on ground of desertion—Expulsion from matrimonial home—Reasonable belief in husband's adultery induced by his conduct.

A *Divorce—Desertion—Constructive desertion—Expulsion of wife from matrimonial home—Reasonable belief in husband's adultery induced by his conduct.*

B A wife's belief, induced by her husband's conduct, that he has committed adultery justifies her, until that belief is proved to be without foundation, in leaving the matrimonial home and living apart from him, and entitles her to succeed in a claim against the husband for maintenance on the ground of his desertion.

Glenister v. Glenister ([1945] 1 All E.R. 513) and observations of LORD MERRIMAN, P., in *Everitt v. Everitt* ([1949] 1 All E.R. 913), applied.

C AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 655, para. 964; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

Cases referred to:

- D (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest, Replacement, 367, 3040.
 (2) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; Digest Supp.
 (3) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 27 Digest, Replacement, 320, 2667.
 (4) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 27 Digest, Replacement, 348, 2881.
 (5) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229; 27 Digest, Replacement, 84, 633.

E APPEAL by the husband against a decision of a metropolitan magistrate sitting at the South Western Magistrate's Court on Feb. 20, 1953, whereby he found that the husband had deserted the wife.

F The parties were married on Feb. 15, 1947. On Apr. 29, 1952, the wife left the husband, and on Jan. 29, 1953, she issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her on Apr. 29, 1952, and that he had wilfully neglected to provide reasonable maintenance for her. On Feb. 18, 1953, the wife caused a notice to be served by her solicitors on the husband as follows:

G "Take notice that in compliance with the recent ruling of the High Court, we are now intimating to you that it may be necessary to produce evidence of adultery between yourself and a Mrs. [S.] . . . between January, 1951, and Apr. 29, 1952, in the forthcoming proceedings for desertion between your wife and yourself in the South Western Magistrate's Court."

H At the hearing of the summons the wife stated in evidence that the marriage had been happy until about February, 1951; that in April, 1951, she suspected that the husband was associating with another woman; that they had had no sexual relations for a long while and he smelt of scent when he came home at night; that she questioned him about it and he said she was imagining things; that in August, 1951, she again noticed the same perfume and that the husband had again said she was imagining things and that he would have her in a mental home; that on Aug. 25, 1951, she arranged to meet the husband at a club after he had made a journey and that the speedometer of his car showed

ten miles more than the journey he had described and she again noticed the same perfume; that in October, 1951, she asked the husband about a Mrs. S. and he said he knew no one of that name; that between October, 1951, and April, 1952, they had had no sexual relations and that when she had asked him he said he was not feeling well; that in April, 1952, he had said he would soon have her in a mental home, and that she should "take the lot" of a bottle of sleeping tablets; that on Apr. 29, 1952, she, accompanied by a friend, found the husband and Mrs. S. sitting together in the front of the car; and that she believed the husband had committed adultery. The husband denied that he had been intimate with Mrs. S., and said that he destroyed the sleeping tablets because he thought his wife "might overdo it"; that once he told her she was going mad; that he believed her aunt committed suicide; and that he did not think it would not distress her, the wife, to tell her that she was "going the same way as her mother and aunt." The magistrate found:

"Adultery not proved, but satisfied wife had reasonable grounds for suspecting he had committed adultery. *Glenister v. Glenister* (1)."

He, accordingly, found the husband guilty of desertion, and the husband now appealed against that finding.

Miss M. Morgan Gibbon for the husband.

K. B. Campbell for the wife.

LORD MERRIMAN, P., stated the facts and continued: The legal question is: Who broke up the matrimonial home? The magistrate has found that the husband did, and the reasons he gives for his decision are:

"Adultery not proved, but satisfied wife had reasonable grounds for suspecting [husband] had committed adultery. *Glenister v. Glenister* (1)."

In order to make that statement of the reasons intelligible, it is necessary to point out that the wife, although charging her husband with, in effect, constructive desertion, on the ground that she had been driven from the matrimonial home had, a few days before the hearing, given notice to the husband by her solicitors

"that in compliance with the recent ruling of the High Court, we are now intimating to you that it may be necessary to produce evidence of adultery between yourself and a [Mrs. S.] . . . between January, 1951, and Apr. 29, 1952, in the forthcoming proceedings for desertion between your wife and yourself in the South Western Magistrate's Court."

There was evidence that the wife had objected to what she believed was an improper association between her husband and this woman, and when it had been persisted in and lied about, as she asserted, she had withdrawn from cohabitation, as being, it was suggested, the only thing a decent woman could do. In my opinion, the magistrate was justified in saying, hypothetically and as a matter of law, that, if a man deliberately induces the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery.

I myself should have thought that the simplest method of approaching this case was to find that the wife's story was true and the husband's story untrue, not only in relation to the association with this woman, but generally, and that the facts as a whole amply warranted holding that the wife had been expelled from the home. [His LORDSHIP considered the evidence and continued:] I should be prepared, on the evidence as a whole, to draw the inference which the learned magistrate has not directly expressed, that the husband had been guilty of conduct which could fairly be held to have expelled his wife from the home. But I must also deal with the specific point on which he

decided this case, namely, that, although he was not satisfied that adultery had been proved, the wife had reasonable ground for suspecting that her husband had committed adultery. He founded his decision on *Glenister v. Glenister* (1). In that case a wife had charged her husband with desertion in a court of summary jurisdiction, and the husband's answer was: "She convinced me by her conduct that she was committing adultery, and in those circumstances I could not be expected to stay. Therefore, I am not a deserter". That view was supported by this court, in spite of the fact that the husband was not able to give in evidence one of the essential ingredients in his belief that she had committed adultery because the rule in *Russell v. Russell* (2) was still in force. Without going into unnecessary detail, he tried to get round that difficulty by a circumstantial inference from an alleged communication of a venereal disease. But the point is that this court decided, as a matter of principle that, although a husband may not be able to prove by admissible evidence that his wife has committed adultery, yet, if the conduct of the wife has been such as to create in the mind of the husband a reasonable belief that she has been guilty of a matrimonial offence, he has a sufficient defence to proceedings based on desertion.

In *Wood v. Wood* (3) I gave as an illustration of such conduct on the part of the wife the hypothetical case of a circumstantial confession by her of adultery which afterwards might be proved to be a lie, but which, so long as it held the field, justified the husband in withdrawing from cohabitation. That view of the matter was upheld in *Everitt v. Everitt* (4) by a Division of the Court of Appeal in which I was presiding, and it was approved by another Division of the Court of Appeal in *Allen v. Allen* (5). The point of the last case was that there was, at one time, reasonable belief, induced by the wife's conduct, that she had committed adultery, but that the issue had subsequently been tried and it was then held that she had not committed adultery. HODSON, L.J., who was sitting with SIR RAYMOND EVERSLED, M.R., and JENKINS, L.J., and gave the leading judgment, adopted ([1951] 1 All E.R. 728) the following passage from my judgment in *Everitt v. Everitt* (4) ([1949] 1 All E.R. 913):

"On this hypothesis the facts, at the earliest, were ascertained at the moment when the learned judge gave judgment. In *Wood v. Wood* (3) I called attention ([1947] 2 All E.R. 97) to this sort of position—a confession by the wife of adultery with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation, but there might come a moment when, in spite of her confession, or, indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief, but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible."

In another passage in his judgment ([1951] 1 All E.R. 728) HODSON, L.J., emphasised what he described as the temporary nature of this defence. It subsists only until it is displaced by the facts being found in the sense opposite to the belief.

The learned magistrate has used the decision that in such circumstances a husband cannot be held guilty of desertion so long as the belief holds the field, so to speak, in reverse, to justify the proposition that the wife's charge against her husband of desertion cannot be displaced so long as a belief, induced by her

husband's conduct, that he was committing adultery, held the field. In other words, he was saying that their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, a proposition which has twice been held by the Court of Appeal to be right.

In those circumstances, in my opinion, this appeal fails and should be dismissed.

PEARCE, J.: I agree.

Appeal dismissed.

Solicitors: *Lees, Smith & Matthew*, Croydon (for the husband); *S. C. Elphick* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

R. v. POWELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Havers and Glyn-Jones, J.J.), October 28, 1953.]

Criminal Law—Sentence—Preventive detention—When an appropriate sentence.

Criminal Law—Committal for trial—Chairman of examining magistrates also deputy chairman of quarter sessions—Validity of committal—Course desirable to be followed at quarter sessions.

The chairman of the examining magistrates who committed the applicant for trial was also deputy-chairman of quarter sessions and there sentenced the applicant.

HELD: where a case was committed by a court of summary jurisdiction of which either the chairman or the deputy chairman of quarter sessions was the chairman it was desirable that neither of those persons should sit in the court of quarter sessions before whom came the person committed, but there was no reason in law why they should not so sit, and, if they did, it was not a ground on which the Court of Criminal Appeal could interfere with the conviction or sentence at quarter sessions.

Per curiam: the mere fact that a prisoner was over thirty years of age and had three previous convictions should not, ipso facto, render him liable to preventive detention which was intended for prisoners who had shown by their previous history and conduct that they could not be trusted to abstain from crime.

Cases referred to:

- (1) *R. v. Askew*, [1949] 2 All E.R. 687; 113 J.P. 511; 2nd Digest Supp.
- (2) *R. v. Gardner*, (1952), unreported.

APPLICATION for leave to appeal against sentence.

The applicant, William Alfred Powell, was convicted at Monmouthshire Quarter Sessions on July 4, 1953, of the larceny of a quantity of copper cable and of carrying an offensive weapon, contrary to the Prevention of Crime Act, 1953, s. 1 (1), and was sentenced to five years' imprisonment for the larceny and two months' imprisonment concurrently for the offence under the Prevention of Crime Act, 1953.

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. The applicant pleaded Guilty at the Monmouthshire Quarter Sessions to the larceny of a quantity of copper cable, and to carrying an offensive weapon, contrary to s. 1 (1) of the Prevention of Crime Act, 1953. He was sentenced to five years' imprisonment for the larceny and two months' imprisonment concurrently for the offence under the Prevention of Crime Act. He applies for leave to appeal against his sentence on the ground that the deputy chairman who sentenced him was also chairman of the examining magistrates who

A committed him for trial. We cannot say that there is any reason in law why the chairman of committing magistrates, who happens to be a chairman or deputy chairman of quarter sessions, should not sit to deal with the case at quarter sessions, though, no doubt, it is not altogether desirable that that should take place, and, as a general rule, if it happens that a case has been committed to quarter sessions by a bench of which either the chairman or the deputy chairman of quarter sessions was a member, it should be arranged that the prisoner, when tried on indictment at quarter sessions, should be brought before a court in which the chairman or deputy chairman is not sitting. But it is not a ground in law on which we could interfere with the sentence, and there is no question about the conviction because the applicant pleaded Guilty.

B There is one other matter the court thinks it necessary to point out for the guidance of this particular deputy chairman, who, apparently, does not understand, or has not read, what the court has said on previous occasions on appeals from him. This was a case in which quarter sessions appear to have considered that it would have been proper to have passed a sentence of preventive detention. The applicant has a very bad record, and it is just the sort of case for which Parliament has provided preventive detention. The deputy chairman said the bench would have given preventive detention but for the decisions of this court, which he seems to have thought prevented him from doing so. It is perfectly true that, soon after the Criminal Justice Act, 1948, came into force, this court did, in *R. v. Askew* (1), say that preventive detention should be kept for habitual criminals and that it was not every person who had the statutory number of convictions, which are three, who should be sent to preventive detention. The learned deputy chairman seems to have thought that the court was laying down that, unless the prisoner was one who could have been convicted under the Prevention of Crimes Act, 1908, as an habitual criminal, it was not right to give a sentence of preventive detention. That was not what the court meant, and I do not think it was what the court said. What we meant was that a case where a prisoner has shown by his conduct that he is a recidivist in crime is one in which preventive detention should be given, but that it was not necessary to give preventive detention every time it was brought to the notice of the court that the prisoner had three previous convictions. That was pointed out emphatically by this court, consisting of HILBERY, STREATFIELD, and McNAIR, JJ., in *R. v. Gardner* (2), an appeal from this learned deputy chairman in November, 1952, and I hope the learned deputy chairman will now understand that the court is not attempting to put any limit on the provisions Parliament has made, save that they have indicated that the mere fact that a man has three previous convictions and is over thirty years of age should not, ipso facto, render him liable to preventive detention. Preventive detention ought to be kept for men who have shown by their conduct and previous history that they cannot be trusted to abstain from crime, though they may do spells of honest work between convictions.

Application dismissed.

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

SOUTHPORT CORPORATION v. ESSO PETROLEUM CO., LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Devlin, J.), June 23-27, October 21, 1953.]

Nuisance—Ship—Discharge of oil to lighten vessel stranded in river—Damage to adjoining foreshore—Need to prove negligence.

The plaintiffs were owners of a certain area of foreshore; the first defendants were the owners and the second defendant was the master of an oil tanker. At 11.45 on Dec. 3, 1950, the vessel was bound from Liverpool to Preston and on approaching the Ribble estuary in rough weather developed a steering fault. In view of the weather and the danger of turning round the master decided to continue into the channel. At 15.15 the vessel took an uncontrollable sheer to starboard and ran aground on an underwater revetment wall. There the vessel and the lives of the crew were in a position of grave danger, and in order to lighten her the master started to jettison his cargo of fuel oil. After he had jettisoned over four hundred tons the vessel came off the wall and grounded on some sand. A great deal of the oil became deposited on the foreshore of the plaintiffs and they suffered damage. In an action for trespass and/or nuisance and/or negligence,

HELD: as to private nuisance there was no prerequisite that the nuisance should emanate from neighbouring property of the defendant; as to public nuisance the estuary in question was a public navigable river and analogous to a highway; though the plaintiffs' foreshore was not contiguous to the river, it was sufficiently proximate to it to be affected by the misuse of it by the discharge of oil; and, therefore, the plaintiffs had a good cause of action in nuisance, either public or private; the principles relating to nuisance on a highway applied to damage (either direct or indirect) done by a ship in a public navigable river to adjoining property; and, consequently, to succeed the plaintiffs had to prove negligence on the part of the defendants: dicta of LORD BLACKBURN in *Fletcher v. Rylands* (1866) (L.R. 1 Exch. 286) and *River Wear Comrs. v. Adamson* (1877) (2 App. Cas. 767), applied; on the facts the defendants had not been negligent, and, therefore, the action failed.

Per curiam: the burden of proving negligence was on the plaintiffs, and the defendants merely had to satisfy the court that they had not been negligent and had not to prove inevitable accident: *The Merchant Prince* ([1892] P. 179), discussed.

AS TO DISCHARGE OF OIL IN NAVIGABLE WATERS, see HALSBURY, Hails-
ham Edn., Vol. 33, pp. 603-605, paras. 1060-1065.

Cases referred to:

- (1) *Waddle v. Wallsend Shipping Co.*, [1952] 2 Lloyd's Rep. 105.
- (2) *Cunard v. Antifyre, Ltd.*, [1933] 1 K.B. 551; 103 L.J.K.B. 321; 148 G
L.T. 287; Digest Supp.
- (3) *Smith v. Great Western Ry. Co.*, (1926), 135 L.T. 112; 36 Digest 198,
384.
- (4) *Benjamin v. Storr*, (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T.
362; 36 Digest 212, 550.
- (5) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 H
L.T. 751; 75 J.P. 68; 36 Digest 190, 320.
- (6) *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. 84; 100 L.J.Ch. 259; 145
L.T. 113; Digest Supp.
- (7) *Goodwyn (Goodwin) v. Cheveley*, (1859), 4 H. & N. 631; 28 L.J.Ex. 298;
33 L.T.O.S. 284; 23 J.P. 487; 157 E.R. 989; 2 Digest 226, 182.
- (8) *Tillett v. Ward*, (1882), 10 Q.B.D. 17; 52 L.J.Q.B. 61; 47 L.T. 546;
47 J.P. 438; 2 Digest 224, 167.

- (9) *Gayler & Pope, Ltd. v. Davies (B.) & Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 36 Digest 64, 414.
- (10) *Holmes v. Mather*, (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 2 Digest 232, 216.
- (11) *The Swift*, [1901] P. 168; 70 L.J.P. 47; 85 L.T. 346; 41 Digest 260, 1028a.
- A (12) *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* H.L., *sub nom.* *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 2 Digest 228, 195.
- (13) *River Wear Comrs. v. Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 36 Digest 105, 705.
- B (14) *Mouse's Case*, (1608), 12 Co. Rep. 63; 77 E.R. 1341; *sub nom.* *Gravesend Barge Case*, 1 Roll. Rep. 79; 81 E.R. 341; 24 Digest 976, 97.
- (15) *The Merchant Prince*, [1892] P. 179; 67 L.T. 251; 36 Digest 102, 681.
- (16) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 34 L.J.Ex. 220; 13 L.T. 148; 159 E.R. 665; 36 Digest 91, 601.
- (17) *Hall v. Fearnley*, (1842), 3 Q.B. 919; 12 L.J.Q.B. 22; 114 E.R. 761; 36 Digest 106, 707.
- C (18) *Rumbold v. London County Council*, (1909), 25 T.L.R. 541; 36 Digest 106, 709.
- (19) *The Kite*, [1933] P. 154; 102 L.J.P. 101; 149 L.T. 498; Digest Supp.
- (20) *Imperial Smelting Corpn., Ltd. v. Joseph Constantine S.S. Line, Ltd.*, [1940] 2 All E.R. 46; [1940] 1 K.B. 812; 162 L.T. 267; *revsd.* C.A., [1940] 3 All E.R. 211; [1940] 2 K.B. 430; 109 L.J.K.B. 968; 163 L.T. 168; *revsd.* H.L., *sub nom.* *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest, Replacement, 436, 3333.
- D (21) *The Dageid*, (1947), 80 Lloyd's Rep. 517.
- E (22) *Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420, n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 2nd Digest Supp.

ACTION for trespass and/or nuisance and/or negligence.

F The first defendants were the owners of a tanker of 680 tons called the Inverpool and the second defendant was the master of the vessel. On Dec. 3, 1950, the Inverpool was proceeding from Liverpool to Preston with a cargo of 736 tons of heavy fuel oil. At 14.45 when she was between the Gut Buoy and Wall End Buoy in the approaches to the Ribble estuary with the weather clear and the wind force 7/8 she shipped two or three heavy seas over the port quarter, immediately afterwards the steering of the ship became erratic without any apparent cause, and she started sheering four or five points to port and starboard.

G The master ordered the engineer to increase the pressure to the steering. At 15.05 the engineer felt two violent blows on the propeller (sounding like metal hitting metal) which he reported to the master. The ship had then entered the channel and was in mid-channel. On the south side of the channel there was a revetment wall about seven to eight feet in width, and over it, at the state of the tide at the material time, there was eight to twelve feet of water. At 15.15 the

H Inverpool took a heavy sheer to starboard which could not be corrected and ran aground on the revetment wall, thirty feet of her bows passing over the wall while the remainder of the hull was afloat in the channel. The master immediately ordered the engines full astern, but it was found that the propeller was fouling some object and the vibration was so great that the engineer feared that the main steam pipe would fracture. The vessel remained aground on the wall and her position became precarious as the hull was pounding on the wall under the pressure of wind and tide and there was serious danger of the vessel breaking

her back with probable loss of life and of the ship as well. At 15.25 the master began to discharge the oil tanks in order to lighten the ship, and at 17.30, when he had discharged over four hundred tons of oil and raised the ship three and a half feet, she bounced along the wall and off it, coming to rest on a bank of sand. The oil discharged by the Inverpool became deposited on the foreshore which belonged to the plaintiffs, the deposit extending for about $7\frac{1}{2}$ miles and varying in thickness from one to three inches and in width from three to twenty feet. It became necessary for the plaintiffs to close the Marine Lake at Southport and also parts of the foreshore and they suffered considerable damage. A survey report of the Inverpool showed that there was considerable damage to the hull, that the stern frame was badly bent and fractured in two places, and that one blade of the propeller was completely broken off and the other three were broken at the tips. A

HIS LORDSHIP found on the facts (i) that the decision of the master to enter the channel in spite of the defect of steering was right in view of the impossibility of anchoring in the weather prevailing at the time and of the danger of turning round; (ii) that in the situation of grave peril in which the master found himself and of the danger of loss of life his decision to jettison some of his cargo of fuel oil could not be criticised; (iii) that the stern frame was fractured before the vessel stranded (though there was no proof of the cause of fracture); and (iv) that the fractured stern frame was the cause of the vessel getting out of control. B C

Carpmael, Q.C., and *Baucher* for the plaintiffs.

Nelson, Q.C., and *G. B. H. Currie* for both defendants.

Cur. adv. vult. D

Oct. 21. **DEVLIN, J.**, delivered the following judgment. In this case questions of seamanship and navigation arise and acting under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 98, and R.S.C., Ord. 36, r. 43, I have appointed one of the Elder Brethren of Trinity House to act as an assessor and advise me on them. In *Waddle v. Wallsend Shipping Co.* (1) ([1952] 2 Lloyd's Rep. 131) I called attention to what seemed to me to be the undesirability of having questions of this sort tried by a judge of the Queen's Bench Division sitting without assistance. The practice of sitting with the Elder Brethren is always followed in the Admiralty Division, and, if it is not followed in this Division as well, it is bound to lead to the belief that the result will not be as satisfactory as it should be. I have, therefore, been advised by an Elder Brother, Commodore Hubbard, R.D., R.N.R., before arriving at my conclusions in this case, but I have not had his assistance during the hearing. I hesitated in this case, as I did in *Waddle v. Wallsend Shipping Co.* (1), to adjourn the trial so that an assessor might be present because of the inconvenience to the parties and their solicitors and counsel. But I doubt whether I shall in any similar case in the future allow these considerations to deter me again. E F

The case concerns a small tanker called the Inverpool belonging to the defendant company which stranded in the Ribble estuary on Dec. 3, 1950, and the master, in order to float her, discharged about four hundred tons of fuel oil. The oil became deposited on the foreshore which belongs to the plaintiffs, the Southport Corporation, and entered the Marine Lake, a feature of the foreshore. The deposit extended for a distance of about $7\frac{1}{2}$ miles and varied in thickness from one inch to three inches and in width from three feet to twenty feet, at one point amounting to one hundred feet. It became necessary to close the Marine Lake for a time and also parts of the foreshore, and it has cost, or will cost, the corporation a substantial sum to make good the damage. G H

The deposit of oil around the coast is, it is admitted, causing considerable anxiety, and it is satisfactory to know that the authorities are not being inactive. At first sight it may appear to be unreasonable that shipowners

whose servants cause such damage in order to save their own property should not automatically have to pay for it, but counsel for the defendants submits that at common law there is no duty at all on ships to avoid this type of damage. If Parliament considers that further legislation is necessary for the protection of the public, no doubt such legislation will be enacted. My duty is to apply the common law, and to examine, therefore, the causes of action on which the plaintiffs rely. These are trespass, nuisance and negligence. The trespass, alternatively the nuisance, is said to arise from the bare fact that oil was discharged on to the plaintiffs' property. The negligence is put under two heads: (i) that there was negligent navigation resulting in the stranding, and (ii) that it was unreasonable and unnecessary after the stranding to jettison cargo. The charge of negligent navigation rests in the first instance on the fact of stranding, which obviously calls for an explanation. The master's explanation is that it was due to a defect in the steering. The plaintiffs contend that if this is true the defendants must show that the defect in steering was not their fault, and, further, they say that with defective steering the vessel ought not to have entered the estuary. Counsel for the defendants, as I have said, disputes that there is any cause of action at all. It is not trespass, he says, because there is no direct physical interference with the property of the plaintiffs. It is not a public nuisance because the plaintiffs have suffered, not as members of the public, but as owners of property. It is not a private nuisance because the oil did not emanate from an adjoining property. It is not negligence because no duty was owed to the plaintiffs. If it was careless on the part of the Inverpool to enter the estuary of the Ribble, it was not a foreseeable consequence of that carelessness that she might strand and have to discharge oil which would be carried by the wind and tide to the Southport foreshore. Thus, counsel for the defendants argues that the plaintiffs have not on any possible view of the facts any case at all. If they have a case in trespass or nuisance, he submits a twofold defence. The first is that the plaintiffs enjoy their property subject to the right of members of the public to navigate on the seas, and they cannot, therefore, complain of damage which is done to their property in the exercise without carelessness of that right. Secondly, he relies on the defence of necessity—in discharging the cargo the ship, he contends, was doing no more than was reasonably necessary for the safety of the crew and of the ship and cargo.

I think it is convenient to begin by considering whether there is a cause of action in nuisance. It is clear that to give a cause of action for private nuisance the matter complained of must affect the property of the plaintiffs. But I know of no principle that it must emanate from land belonging to the defendant. Counsel for the defendants cited *Cunard v. Antifyre, Ltd.* (2), and I think that the statement of the principle is put there as clearly and concisely as can be. TALBOT, J., said ([1933] 1 K.B. 557):

"Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property; and it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property."

It is clear from this statement of principle that the nuisance must affect the property of the plaintiff, and it is true that in the vast majority of cases it is likely to emanate from the neighbouring property of the defendant. But no statement of principle has been cited to me to show that the latter is a prerequisite to a cause of action, and I can see no reason why, if land or water belonging to the public or waste land is misused by the defendant, or if the defendant as a licensee or trespasser misuses someone else's land, he should not be liable for a nuisance in the same way as an adjoining occupier would

be. *Smith v. Great Western Ry. Co.* (3) is a case on which the plaintiffs rely as showing that oil emanating from a chattel is sufficient to establish a cause of action in nuisance. It may well be that, if the nuisance emanates from the highway, whether it be a road or a waterway, the action is properly laid for a public nuisance. In *Benjamin v. Storr* (4) the plaintiff was given relief because his light was blocked by vans standing in the highway outside his property and his property affected by offensive smells from their dung. The channel which leads through the Ribble estuary to the port of Preston is, admittedly, a public navigable river and the nuisance in this case emanated from there. I do not think it matters that the navigable river does not adjoin the property of the plaintiffs. An action for a public nuisance of this type cannot in principle depend on contiguity to the highway; it must depend on whether the plaintiffs' property is sufficiently proximate to the highway to be affected by the misuse of it.

I have dealt with nuisance first because it is a wider class than trespass. If there is an unlawful interference with the plaintiffs' property, the question whether it is a trespass or a nuisance depends on whether or not it is a direct physical interference. I incline to the view that in this case it is, but, having regard to the views I have expressed about nuisance, I think it is unnecessary to enter into this matter which is not covered exactly by precedent. It may well be that it is one of those cases which are described in the books as a nuisance of a particular kind analogous to trespass: see *Jones v. Llanrwst Urban Council* (5) ([1911] 1 Ch. 402, per PARKER, J.) and *Nicholls v. Ely Beet Sugar Factory* (6) ([1931] 2 Ch. 87, per FARWELL, J.).

In my judgment, the plaintiffs have a good cause of action in trespass or nuisance subject to the special defences raised by the defendants which I shall next consider.

On the first of these, if one seeks an analogy from traffic on land, it is well established that persons whose property adjoins the highway cannot complain of damage done by persons using the highway unless it is done negligently: *Goodwyn (Goodwin) v. Cheveley* (7), *Tillett v. Ward* (8), and *Gayler & Pope, Ltd. v. B. Davies & Son, Ltd.* (9). These cases amplify the principle in *Holmes v. Mather* (10) which dealt with collisions on the highway itself and which is the foundation of the modern practice whereby a plaintiff in a running-down action sues for negligence and not for trespass to the person. I know of no case in which the same principle has in terms been applied to collisions in public navigable waters, but clearly it is so applied, for a plaintiff would not get very far in an Admiralty action if he sued for trespass to a chattel. This suggests that the amplification of the principle ought likewise to be applied in the case of property adjacent to public navigable waters. Again, I know of no case which on its facts decides that in terms, though there are dicta in *The Swift* (11) ([1901] P. 173)—a rather different type of case—on which counsel for the defendants properly relied.

But there is hardly need to search for exact authority, for the point is covered by two dicta, which may be obiter, but which bear the great authority of LORD BLACKBURN and lay down the same rule on land and water. In *Fletcher v. Rylands* (12) BLACKBURN, J., said (L.R. 1 Exch. 286):

"Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . ."

The learned judge then goes on to say (*ibid.*) that such persons cannot recover

"without proof of want of care or skill occasioning the accident . . ."

In *River Wear Comrs. v. Adamson* (13) LORD BLACKBURN said (2 App. Cas. 767):

"My Lords, the common law is, I think, as follows:—Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good."

LORD BLACKBURN refers to injury by a ship. The principle is not, in my judgment, restricted to direct injury, as when a ship strikes a pier, but is equally applicable to injury which is done indirectly by a ship in the ordinary course of navigation. It covers injury done as the result of the discharge of oil, if the discharge is a prudent measure of safety taken by the master of the ship because of the vessel finding herself in distress without her fault. The Oil in Navigable Waters Act, 1922, is not directly in point because it applies only to criminal offences, but it is interesting to observe the test there laid down.

Prima facie it is an offence under the Act to discharge oil in territorial waters, but it is a good defence if it was necessary to discharge the oil by reason of the happening to the vessel of some accident. I think that the same test is under the common law applicable in the case of civil proceedings; and that owners whose property adjoins the sea, equally with owners whose property adjoins the highway, take the risk of damage being done by users of the sea or of the highway who are exercising with due care their rights of navigation or of passage. To the word "adjoin" I give the interpretation I have already considered, i.e., the test is proximity and not contiguity.

On this view of the law it is unnecessary for me to consider in detail the alternative defence of necessity, which is in some respects only a variant of the defence which I have already considered. One of the earliest cases of necessity, *Mouse's Case* (14), was a case of jettison. But the defence of necessity applies irrespective of the situation of the property damaged and so of the principle I have just considered; on the other hand, I am not satisfied that it applies (as it does under the principle I have just considered) if the only object the salvation of which is at stake is a ship. I am not prepared to hold without further consideration that a man is entitled to damage the property of another without compensating him merely because the infliction of such damage is necessary in order to save his own property. I doubt whether the court in such circumstances can be asked to evaluate the relation of the damage done to the property saved, by inquiring, for example, whether it is permissible to do £5,000 worth of damage to a third party in order to save property worth £10,000.

In the ordinary case of jettison the property which is sacrificed is the property of a person who is interested in the venture, and an equitable adjustment is made by the application of general average. The same considerations may not apply to the property of a third party who has no stake in the venture which is being saved. The defence of necessity would, therefore, have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiffs' rights of ownership in the fore-

shore were unqualified by their proximity to the sea. But, apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity

for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property. I think, therefore, that, if I am wrong in the application of the principle which I have taken from LORD BLACKBURN, the defence in this case can equally well be put on the ground of necessity.

It is, of course, an answer to either of these defences if the predicament in which the ship found herself was due to her own negligence. Indeed, in the principle I am applying it is necessary, as LORD BLACKBURN says, for the plaintiffs to prove negligence, and so my examination of the law results in the conclusion that this action is to be treated in the same way as any running-down or collision case in which the plaintiff alleges negligence. I do not accept counsel for the defendants' submission that if the master was careless, nevertheless he could not have anticipated this form of injury to the plaintiffs' property. The damage and nuisance that is caused to the coast by oil on the water is well known. If done deliberately it is punishable by statute, and I think that it is a matter which should be well in the mind of the master of every coastal tanker. He must be aware that if in an estuary he gets himself into a position where he has to jettison oil, it is very likely to reach some part of the coast. In this case the master accepted the likelihood of the oil reaching the Southport foreshore.

In saying that this is an ordinary case of negligence, I must make one qualification. The plaintiffs allege on the authority of *The Merchant Prince* (15) that the circumstances in which the stranding occurred shift the burden of proof and require the defendants to prove inevitable accident. It will be more convenient to deal with this after the facts have been ascertained. [HIS LORDSHIP stated the facts and continued:] I turn back now to deal with the matters in dispute. The charges that the master ought not to have entered the channel or to have jettisoned after stranding cause me little difficulty, and I can deal with them both broadly by saying that I see no reason to criticise the decisions of the man on the spot and certainly none to condemn them as evidencing his incompetence. The plaintiffs contend that the master, knowing before he entered the channel that there was something wrong with his steering, ought to have anchored or turned about and hove to or put back to sea. The master answered that in the weather at the time, to anchor was impossible and to turn about more dangerous than to proceed. He recognised the danger of proceeding into a narrow channel with defective steering gear; he weighed up the two evils, he said, and considered that the lesser of the two was to attempt to get into sheltered water. I should not without assistance be able to say whether he made the right choice or not, but I should feel able to say that his choice was not a careless or unskilful one, which would be enough to dispose of the charge of negligence. In fact, the Elder Brother advises me that, in his opinion, the master's decision was the right one, and I accept that advice. As to the jettisoning I consider, and the Elder Brother agrees with this, that the master's decision to lighten his vessel cannot fairly be criticised. On the whole, I see no sufficient reason to think that the master did not fix with reasonable accuracy the spot where he went aground. But I do not regard the point as of paramount importance. His course of action was not, in my view, to be determined by an exact calculation of where he was and a close assessment of his chances of safety if he left it to the tide. His ship was, the Elder Brother advises me, in a situation of grave peril with a real and imminent danger that she might break her back with consequent loss of life. In these circumstances, I think the master was right in making sure, even at the risk of making doubly sure, that she got off before the tide turned. I do not say he did make doubly sure. I am impressed with the point that counsel for the defendants made that, since the vessel, even after jettisoning four hundred

tons, did not get off the wall until just at or after high water, it is difficult to criticise the master for being over-cautious.

- The remaining point is much more difficult, because it has not proved possible to arrive at any clear conclusion as to what caused the defect in steering. It remains, the master said, a puzzle and a mystery to him. The plaintiffs say, therefore, that the defendants have failed to prove that they were not responsible for the loss. I approach the problem by considering, first, what relevant damage was found on the ship at her survey. The propeller blades were broken and so was the stern frame. If the stern frame was fractured or even cracked, it would be quite enough to account for the ship's behaviour. Is there sufficient evidence to support the inference that the stern frame was fractured before the vessel stranded? I think on the whole that there is. The damage could, of course, have been done as she was crossing the wall or afterwards on the sand.
- But if I accept, as I do, the engineer's evidence of the propeller fouling on two occasions when the stern was still afloat, first, between Wall End Buoy and Salter's Buoy, and, secondly, just after the stranding, it points to the damage being done earlier. On both occasions it sounded as if the propeller was striking metal. That suggests that in two different places in the channel it was the same sort of metal object that was being struck, and, therefore, that it was a metal object that was travelling with the ship. The defendants' theory that the propeller was fouling a part of the stern frame that was loose or out of alignment fits in with this, and the theory is certainly not weakened by the fact that the stern frame was afterwards found to be fractured. I accept this theory and find as a fact that the stern frame was fractured before 15.05 when the propeller first fouled. I find that the fractured stern frame was the cause of the vessel getting out of control.

- Is there evidence to show how the stern frame was fractured? The defendants' theory is that it was done by the two or three very heavy seas that she shipped at about 14.45. Assuming the stern frame to be sound, I cannot see how heavy seas could by themselves fracture it, and I am advised by the Elder Brother that they could not. They could, of course, if they drove the stern frame up against some hard object. The Elder Brother points out that between the Gut Buoy and the Wall End Buoy just about the bar, there are places where the ship would not have much water under her stern, and suggests as a possibility that the stern frame might have been broken against the bed of the channel. This hypothesis was not advanced at the trial and I feel now that it is too speculative for me to adopt in the absence of any supporting evidence from the master or engineer. The plaintiffs' theory is that the fracture was caused by the vessel striking the revetment wall owing to negligent steering at some point before that at which she grounded. I do not accept this. In the first place I am advised that it is unlikely that she could have struck the wall in such a way as to damage her stern; the plaintiffs' theory was put to the defendants' witness, Mr. Evans, and the Elder Brother considers that Mr. Evans's opinion on this point is correct. In the second place, I do not think it could have happened without the knowledge of the engineer, whose evidence I accept. Thirdly, it certainly could not have happened without the master's knowledge; and while I do not want to decide the matter simply by accepting his evidence, the circumstances do not point to his telling a lie and I do not feel that he was. The evidence of the master of the Clyde Brae, a following ship, for what it is worth, bears out his story. On the evidence I am unable to say how the stern frame fractured. I may add that I do not accept the theory that the vessel's loss of control was due to sea damage done to some part of the steering gear such as the rods and chains along the deck. As in the case of the stern frame, I am advised that it is unlikely that the sea alone could do any serious damage. If it had, I should have expected it to be found in the survey; if there were any signs of it there, my attention was not drawn to them.

In this state of the evidence counsel for the plaintiffs submits that the defendants must prove inevitable accident. To do this they must prove the cause or causes of the accident, and, if they cannot do that, they fail. He relies on *The Merchant Prince* (15). In that case the defendant ship under way ran into the plaintiff ship at anchor. FRY, L.J., said ([1892] P. 189):

"The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided."

If there is a burden on the defendants in the present case to prove inevitable accident they have not, in my opinion, discharged it. They have not shown the ultimate cause or causes: indeed, they have not set about the proof at all. I accept that on the voyage in question the vessel showed no sign of any defect in her steering until 14.45, and I am satisfied that until then the master knew nothing of it. But I cannot exclude the possibility that there was some defect in her stern frame which made it liable to fracture. I think that the proof of inevitable accident in such a case as this requires that the defendants should offer some detailed evidence of the steps they took, by way of surveys and so forth, to make sure that there were no discoverable defects in her structure; in short, they should prove that they had exercised due diligence to make and keep her seaworthy. This they have not done.

I do not find *The Merchant Prince* (15) an easy case to apply. One must distinguish, I think, between a case where inevitable accident has to be proved as a matter of defence and a case of *res ipsa loquitur*. Take, for example, trespass to which inevitable accident may be a defence. When the plaintiff proves the trespass (I am dealing now with the ordinary case and not with trespass arising from use of the highway) his cause of action is complete, and the defendant fails unless he proves his defence. But when the cause of action is negligence, the plaintiff must prove negligence; *res ipsa loquitur* is a principle which helps him to do so. If one looks at the classic statement of the rule by ERLE, C.J., in *Scott v. London Dock Co.* (16) (3 H. & C. 601), one finds that it says no more than that the happening of an accident may in certain circumstances itself be reasonable evidence of negligence; and when there is reasonable evidence of negligence put forward by the plaintiff and no explanation put forward by the defendant, the plaintiff is, of course, entitled to succeed. If the defendant offers a plausible explanation consistent with his diligence, the plaintiff is back where he was before and must show the greater probability of negligence. The distinction is seen at once in pleading. In trespass the defendant must plead inevitable accident: *Hall v. Fearnley* (17). In negligence he need only plead a denial: *Rumbold v. London County Council* (18). The cases in which the *res ipsa loquitur* rule is elaborated were cited and applied by LANGTON, J., in *The Kite* (19), and more of them will be found in the judgment of ATKINSON, J., in *Imperial Smelting Corpn., Ltd. v. Joseph Constantine S.S. Line, Ltd.* (20). The rule as there stated does not require from the defendant the sort of proof demanded by FRY, L.J. *The Merchant Prince* (15) was not a case of trespass or anything of that sort, but one in which the plaintiff alleged negligence and sought to prove it by offering the circumstances of the collision as *prima facie* evidence. The case embodies a rule of long standing in Admiralty matters involving a collision with a ship at anchor. It may be that it is properly to be regarded as a rule of limited application. If I had to rely on my own judgment, I should not be able to appreciate the distinction that has been drawn between *The Merchant Prince* (15) and *The Kite* (19) in later cases such as *The Dageid* (21) (80 Lloyd's Rep., 522). But I need not pursue these difficulties,

because in relation to a decision of the Court of Appeal they are impertinent and because I think that I can without directly meeting them give to the decision in *The Merchant Prince* (15) all the effect that I am bound to give to it. That decision does not enable the plaintiffs to succeed otherwise than on a charge of negligence which they have pleaded. The only negligence alleged in this case is against the master, who is the second defendant, in respect of his navigation and management of the Inverpool in relation to this voyage; the owners of the ship, the first defendants, are sued only as answerable for the master's wrongdoing. I am satisfied that the master was not personally negligent and that he had not before 14.45 any reason to apprehend that there was any defect in his ship. If the rule in *The Merchant Prince* (15) requires him personally to prove what the cause of the defect in the steering was, and I doubt that it does, then it cannot stand against the decision of the House of Lords in *Woods v. Duncan* (22), which lays it down that, if a defendant can satisfy the court that he personally was not negligent, he does not have to explain how the accident occurred.

There can be no doubt that, apart from any principle that may be derived from *The Merchant Prince* (15), the rule laid down by LORD BLACKBURN which I am applying, requires the plaintiff to prove negligence and not the defendants to prove inevitable accident. For the reasons which I have given the plaintiffs have failed to prove negligence and, accordingly, there must be judgment for the defendants.

Judgment for defendants.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. E. Perrins*, town clerk, Southport (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

THE WAZIRISTAN. THE SEIRSTAD (OWNERS) v. HINDUSTAN SHIPPING CO., LTD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 18, October 14, 15, 16, 19, 1953.]

Harbour—Pilot—Compulsory pilot—Collision in foreign territorial waters—Iraq—Ship under jurisdiction of local port authority—Defence of “compulsory pilotage” under Iraq law—Effect of incorporation in port bye-laws of note similar, in substance, to Regulations for Preventing Collisions at Sea (Sea Regulations, 1910 (S.R. & O., 1910, No. 1113)), art. 29.

The Waziristan, a motor vessel owned by the defendants, was proceeding down the Shatt-al-Arab river, within the territorial jurisdiction of Iraq, when she grounded, thereby blocking the navigable channel. The plaintiffs' motor vessel, the Seirstad, which had been following astern of the Waziristan, was forced by the effect of wind and tide to ground herself and salvage services were required to re-float her. The Shatt-al-Arab river was under the Basrah port authority, by whose bye-laws pilotage for the two vessels was compulsory. Incorporated in the bye-laws was a note which was, in substance, in the same terms as art. 29 of the Regulations for Preventing Collisions at Sea.

In an action for damages against the defendants, the plaintiffs claimed that the damage suffered by the Seirstad was due to the negligent navigation of the Waziristan. The defendants raised the defence, inter alia, of “compulsory pilotage”. A former judge in Iraq gave evidence that by the law of Iraq a shipowner was not civilly liable for the negligence of a compulsory pilot. The plaintiffs contended, inter alia, that the effect of the incorporation of the note in the bye-laws was to reserve the ultimate control to the master of a ship so as to leave the pilot only as an adviser.

The court found that there was no negligence on the part of the master of the Waziristan or of any other servant of the defendants. On the question of the defendants' liability for negligence on the part of the pilot,

HELD: pilotage being compulsory, the pilot was entitled, and the master was bound to permit him, to conduct the ship, i.e., to take charge of the navigation of the ship: observations of HILL, J., in *The Andoni* ([1918] P. 18), applied; and the incorporation in the bye-laws of the note similar to art. 29 of the collision regulations did not have the effect of leaving the control of the ship with the master; if the owners of the Waziristan had been sued in respect of the collision in the courts of Iraq, there would have been no answer to the defence that the collision was caused by the negligence of a person who was not their servant, and such a defence, if made good, would be an answer to an action in an English court for negligence committed in Iraq waters: observations of HILL, J., in *The Arum* ([1921] P. 20), applied; and, therefore, assuming that there was negligence on the part of the pilot, the defendants were not liable, but, on the facts, there was no negligence on the part of the pilot.

AS TO LIABILITY FOR COLLISIONS IN CASE OF COMPULSORY PILOTAGE, see HALSBURY, Hailsham Edn., Vol. 30, p. 849, para. 1117; and FOR CASES, see DIGEST, Vol. 41, p. 795, Nos. 6548, 6549.

FOR THE REGULATIONS FOR PREVENTING COLLISIONS AT SEA, art. 29, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 20, p. 96.

Cases referred to:

- (1) *The Augusta*, (1887), 57 L.T. 326; 41 Digest 909, 8020.
- (2) *The Guy Mannering*, (1882), 7 P.D. 132; 51 L.J.P. 57; 46 L.T. 905; 41 Digest 763, 6165.
- (3) *The Andoni*, [1918] P. 14; 87 L.J.P. 28; 119 L.T. 154; 41 Digest 906, 7996.
- (4) *The Benue*, [1916] P. 88; 85 L.J.P. 161; 116 L.T. 220.
- (5) *The Arum*, [1921] P. 12; 90 L.J.P. 166; 41 Digest 795, 6549.

ACTION for damages for negligence.

On June 10, 1950, m.v. Seirstad, owned by the plaintiffs, and m.v. Waziristan, owned by the defendants, were among a number of vessels proceeding down the Shatt-al-Arab river from Abadan within the territorial waters of Iraq, the Seirstad lying astern of the Waziristan. Both ships were carrying pilots. At about 8.22 a.m. the Waziristan grounded, thereby blocking the navigable channel. Owing to the effect of wind and tide the Seirstad was also forced to take the ground and had to engage salvage services to re-float her. The plaintiffs claimed damages from the defendants for the damage sustained and expense incurred on the ground of the defendants' negligence in that they, their servants or agents, inter alia, caused or allowed the Waziristan to go and/or to remain aground so as to obstruct the navigable channel. By their defence, the defendants denied negligence. Alternatively, they contended (a) that, if there were any negligence, it was solely that of the pilot compulsorily on board the Waziristan, and (b) that, in any event, the grounding of the Seirstad was caused solely by the negligence of the plaintiffs, their servants or agents. This report deals only with the defence of compulsory pilotage.

Porges, Q.C., and *H. E. G. Browning* for the plaintiffs.

Naisby, Q.C., and *J. B. Hewson* for the defendants.

WILLMER, J., stated the facts, dealt with the issue of negligence, and continued: Having come to the conclusion that the Waziristan was not at fault for taking the ground, I have disposed of the case, and, on that basis, the defendants are entitled to judgment. But, in case I am wrong, and as the question of compulsory pilotage has been argued before me, I think that I

- should state my views on that question. This casualty took place in Iraq territorial waters. The whole of the Shatt-al-Arab river is under the jurisdiction of the Port of Basrah Authority. Navigation in the river is governed by a code of port rules and bye-laws, under which pilotage for vessels such as the Seirstad and Waziristan is compulsory. Pilots are licensed and supplied by the Basrah port authority. It is common ground that in Iraq there is no equivalent of the Pilotage Act, 1913, s. 15 (1), which makes a shipowner in this country responsible for the negligence of a compulsory pilot. In those circumstances, the question was raised whether the presence of a compulsory pilot on board the Waziristan would constitute a defence for the defendants. It would not, of course, constitute any defence for them if I were able to find negligence on the part of any servant or agent of their own. If, for instance, I had found the master guilty of negligence, the defence of "compulsory pilotage" would have been of no avail to the defendants, even though the pilot was also negligent. But I am unable to find any such negligence on the part of any actual servant of the owners. Although I do not find that the pilot was guilty of negligence, I am satisfied that, if there was any negligence on the part of anyone, it could only have been on the part of the pilot—and that would raise in the clearest form the question whether compulsory pilotage would be any defence. The argument put forward by counsel for the plaintiffs is that, on the true construction of the port rules, pilotage is made compulsory only in the sense that the ship must carry on board a pilot as an adviser. It was contended that under the rules there was nothing to compel a master to hand over the navigation of his ship to the control of the pilot. Counsel, in fact, went further and said (as was, indeed, the fact) that on the evidence the master of the Seirstad never did hand over the control of his vessel to his pilot, whatever the master of the Waziristan might have done. According to the evidence of the master of the Seirstad, he regarded his pilot merely as an adviser, and he, the master, remained in charge of the vessel. (I noticed, incidentally, that counsel for the plaintiffs did not make any application to amend para. 2 of the statement of claim, which avers that the Seirstad was "in charge of a duly licensed pilot".) In support of his argument counsel for the plaintiffs relied on the special note printed at the beginning of the Basrah port bye-laws. Apart from one or two verbal alterations, the note is the same, in effect, as art. 29 of the Regulations for Preventing Collisions at Sea [contained in sched. I to an Order in Council, dated Oct. 13, 1910 (S.R. & O., 1910, No. 1113)], which reads:
- "Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."
- It is argued that the effect of incorporating that note in the book of rules and bye-laws is to reserve the ultimate control to the master of every ship, so as to leave the pilot only as an adviser. On that basis, counsel for the plaintiffs relied on the old decisions in *The Augusta* (1) and *The Guy Mannering* (2), both of which raised questions of compulsory pilotage in foreign waters. In *The Augusta* (1) it was a question of the law of France, and in *The Guy Mannering* (2) it was a question of the law of the Suez Canal. In each of those cases the court, after inquiry into the foreign law, came to the conclusion that the pilot was not compulsorily in charge of the vessel, but was merely taken on board as adviser, leaving the control of the vessel with the master, and, in those circumstances, the court came to the conclusion that "compulsory pilotage" was no defence. It seems to me at least open to question whether the special note in the bye-laws, on which counsel relies, does not prompt precisely the opposite inference from that which he claimed for it. As I have

said, it reproduces in substance, art. 29 of the collision regulations, and it seems to me equally arguable that its real purpose is to serve as a reminder that, although control of the ship is handed over to the pilot, the master and crew are not to be absolved from their ordinary duties, such as exhibiting lights, keeping a look-out, taking all precautions as are required by the ordinary practice of seamen, and so on. It might be argued that the very fact that it is necessary to incorporate such a note in the bye-laws prompts the inference that the pilot was, indeed, intended to be compulsorily in charge of the vessel so far as her navigation was concerned. In any case, I should have been disposed to hold that, when the bye-law says, as it does, that pilotage is compulsory, it means exactly what it says, i.e., that the operation of piloting the ship (which is equivalent to the control of the navigation of the ship) is to be placed in the hands of the pilot. That was the view which HILL, J., took in *The Andoni* (3), and it is not unhelpful to refer to a passage in his judgment where he said ([1918] P. 18):

“ In my opinion a pilot, in the mouths of British authorities, *prima facie* means, to use LORD TENTERDEN’S words, ‘ A person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port ’. And where you find that pilotage is compulsory, that, *prima facie*, means, in the mouths of British authorities, that the pilot is entitled, and the master is bound to permit him, to conduct the ship, that is, to take charge of the navigation of the ship.”

It was pressed on me by counsel for the plaintiffs that, as was laid down by SIR SAMUEL EVANS, P., in *The Benue* (4), there is a severe burden of proof on any defendant relying on the defence of compulsory pilotage. Having pointed out that the plaintiffs must first establish a case of negligent navigation, SIR SAMUEL EVANS, P., went on to say ([1916] P. 98):

“ The defendants must then prove that a pilot was in charge compulsorily and in fact; that the negligent navigation was due solely to the fault of the pilot; that is to say, that the particular negligent acts or defaults, found by the court to have caused the collision, were committed by the pilot himself, or by the master or crew in obedience to the pilot’s orders. If the case rested in that state, the defence of compulsory pilotage would prevail. But if, in addition, evidence is given, either adduced by the plaintiffs, or obtained from the defendants’ own witnesses, or in any other way forthcoming in the course of the case, that there were also acts or defaults on the part of the master or crew which might have contributed to the collision, the defence would fail, unless the defendants satisfied the court that such acts or defaults did not in any degree contribute to the collision. If the defendants did satisfy the court of that, their defence would hold good; if they did not, their defence would fail.”

In my judgment, in so far as the onus of proof has passed to the defendants in this case, they have, on the facts that I have found, discharged that onus of proof. It follows, therefore, that I should, in any case, have found difficulty in accepting the contention of counsel for the plaintiffs.

The matter, however, goes further than that. We are concerned here with a question of foreign law. So far, I have been attempting to interpret these bye-laws as they would be read by a court in this country. But it is clear that a question of foreign law is raised, as it was in *The Augusta* (1) and *The Guy Mannering* (2), and, on the question of that foreign law, I have had the benefit of hearing the evidence of Mr. Lloyd, who was for many years a judge in Iraq. I think that his views can be summarised by two or three answers which he gave. When he was asked, in examination-in-chief, what was the position in regard to compulsory pilotage in Iraq at the time of the casualty, he said:

"The shipowner is not civilly liable for the negligence of a compulsory pilot by the law of Iraq". In cross-examination, he enlarged on that, and said:

"If the owner has to surrender control of the ship to a third party, liability can only arise if an actual servant has been guilty of neglect or default . . . The Iraq court would assume that the ship was in control of the pilot."

A Finally, in re-examination, he was asked a hypothetical question based on the facts of this case, to which his answer, in the abbreviated form in which I took it down, was this:

"If ship A. grounds solely through the negligence of the pilot, and, in consequence, ship B. sustains damage which could not be prevented, the owner of ship A. is not liable."

B It seems to me that Mr. Lloyd had no doubt what was, in his view, the law of Iraq on the subject at the date of this casualty. No evidence to the contrary was called by the plaintiffs, and, in my judgment, I must accept Mr. Lloyd's evidence as a correct statement of Iraq law. That being so, this case is left in exactly the same position as was *The Arum* (5). That was a case, tried before HILL, J., arising out of a collision which occurred in the harbour at Gibraltar, where it was held that the position had not been affected by British legislation dealing with compulsory pilotage. HILL, J., said ([1921] P. 20):

"If the owners of the *Arum* had been sued in respect of the collision in the courts of Gibraltar, there would have been no answer to the defence that the collision was caused by the negligence of a person who was not the owner's servant. The tort of which the plaintiffs complain was one which did not create a cause of action against the defendants by the law of the place where the tort was committed. How then does the Pilotage Act make it a cause of action against the defendants in this country? Before the Pilotage Act the defendants could have pleaded: (1) 'We are not liable by the law of the United Kingdom for the negligence of a compulsory pilot who is not our servant', and (2) 'we are not liable by the law of Gibraltar for such negligence'. Either defence, if made good, would have been an answer to an action in these courts for negligence committed in the enclosed waters of Gibraltar. Conceding that the effect of the Pilotage Act is that the defendants can no longer set up the first defence, they can still set up the second."

F It seems to me that, substituting the word "Iraq" for the word "Gibraltar" and the word "Waziristan" for the word "Arum", every word of what HILL, J., there said applies to the present case. Therefore, had I found negligence on the part of the pilot of the Waziristan in this case, I should, undoubtedly, have come to the conclusion that the state of the law in Iraq is such that the defendants could not be made liable here for such negligence.

G On the remaining point raised in this case, namely, whether, assuming that there was negligence for which the defendants are responsible, the damages claimed flow from such negligence, I should have been disposed to conclude that the damages here claimed did flow from the negligence complained of. But, on my findings, that is an academic question, and I do not propose to waste further time over it. For the reasons which I have given, it is my duty H to dismiss this action on the ground that there was no actionable negligence on the part of the defendants.

Judgment for the defendants.

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for the defendants).

[Reported by A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re GILPIN (deceased). HUTCHINSON v. GILPIN AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), October 14, 15, 16, 19, 1953.]

Will—"Children"—*Inclusion of adopted children—Adoptive mother incapable of bearing children—"Disposition" made before Jan. 1, 1950—Whether disposition made at date of will or date of testator's death—Adoption Act, 1950 (c. 26), s. 13 (2), sched. V, para. 4.*

Under the Adoption of Children Act, 1926, s. 5 (2), the expression "child" used in any disposition whether made before or after the adoption order is not to include an adopted child or children of an adopted child unless a contrary intention appears. Under the Adoption Act, 1950, s. 13 (2), in any disposition of property made, whether by instrument inter vivos or by will, after the date of an adoption order, any reference to the child or children of the adopter shall, unless the contrary intention appears, be construed as a reference to the adopted person. Schedule V, para. 4, to the Act of 1950, provides: "Sections 13 to 15 of this Act shall apply in relation to an adoption order made under the Adoption of Children Act, 1926 . . . as if it were an adoption order within the meaning of those sections respectively: Provided that nothing in s. 13 of this Act shall affect the devolution of any property on the intestacy of a person who died before Jan. 1, 1950, or any disposition made before that date". In 1917 the testator's daughter, M.A.H., underwent an operation which prevented her from bearing children, which fact was well known to the testator. In 1941 she and her husband adopted the plaintiff by an adoption order made under the Adoption of Children Act, 1926, and the plaintiff was always thereafter recognised by the testator as his grandchild. By cl. 8 of his will dated Sept. 3, 1947, the testator gave his residuary estate to trustees on trust for his son and daughters (whom he had previously named) in equal shares and from and after their death "in trust for the children of my same son and daughters . . . or any of their issue in such shares . . . as they and each of them shall by deed or will appoint and in default of such appointment . . . in trust for the children of my same son and daughters . . . in equal shares". On Oct. 11, 1950, the testator died. On a summons to determine whether the plaintiff was a "child" of M.A.H. within the meaning of cl. 8 of the will,

HELD: (i) the word "disposition" in the phrase a "disposition made before that date" in para. 4 of sched. V to the Act of 1950 meant the document and not the benefit conferred by the document, and, therefore, for the purposes of para. 4 the relevant date was that of the will and not that of the death of the testator, and s. 13 of the Act of 1950 did not affect the devolution of the testator's residuary estate, but,

(ii) on the construction of the will, as the testator knew that his daughter, M.A.H., could have no natural lawful children and approved of the fact that she had an adopted child, he must have intended to include in his testamentary disposition the plaintiff, who was, therefore, a child within the meaning of cl. 8 of the will and entitled to benefit.

Principle stated by LORD CAIRNS in *Hill v. Crook* (1873) (L.R. 6 H.L. 282), and *Re Fletcher* ([1949] 1 All E.R. 732), applied.

AS TO DESCRIPTION BY RELATIONSHIP, see HALSBURY, Hailsham Edn., Vol. 34, pp. 292-298, paras. 344-348; and FOR CASES, see DIGEST, Vol. 44, pp. 807-818, Nos. 6603-6696.

FOR THE ADOPTION ACT, 1950, s. 13, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 477; and FOR Sched. V, see *ibid.*, p. 506.

Cases referred to:

- (1) *Berkeley v. Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.

- (2) *Hill v. Crook*, (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 44 Digest 808, 6614.
- (3) *Re Eve*, [1909] 1 Ch. 796; 78 L.J.Ch. 388; 100 L.T. 874; 44 Digest 812, 6646.
- (4) *Re Wohlgemuth*, [1948] 2 All E.R. 882; [1949] Ch. 12; [1949] L.J.R. 231; 2nd Digest Supp.
- A (5) *Re Fletcher*, [1949] 1 All E.R. 732; [1949] Ch. 473; [1949] L.J.R. 1255; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of cl. 8 of the will of the testator, George Gilpin, and of s. 13 of and para. 4 of sched. V to the Adoption Act, 1950, the plaintiff, as the adopted child of Margery Annie Hutchinson, one of the daughters of the testator, was a "child" of the said daughter within the meaning of the said clause and entitled as such to share in the residuary estate of the testator.

By cl. 8 of his will dated Sept. 3, 1947, the testator gave his residuary estate to his trustees (the defendants in the summons) on trust for sale and conversion, payment of debts, etc.,

C "to stand possessed of the residue thereof in trust for my son and my said four daughters [named in cl. 5] in equal shares. Provided always and I declare that my trustees shall retain the share of my son and each of my said daughters of and in my residuary estate upon the trusts following (that is to say) upon trust to pay the income thereof to my son and daughters during their lifetime but so that they shall not have power to dispose of same by way of anticipation and from and after the death of such son or daughters in trust for the children of my same son or daughters or any of them or any of their issue in such shares (if more than one) and in such manner as they and each of them shall by deed or will appoint and in default of such appointment and so far as any such appointment shall not extend in trust for the children of my same son and daughters who being male shall attain the age of twenty-five years and being female attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child and in case there shall be no child of my same son and daughters then and in such case in trust for my other children in equal shares and so that the share or shares accruing to each or any my said son or daughters of mine under this trust shall be subject to the trusts hereby declared concerning the original share of the same son or daughters under this my will. Provided always and I hereby declare that if any child of mine shall die in my lifetime leaving a child or children who being a male shall attain the age of twenty-five years or being a female shall attain that age or marry then and in every such case the last mentioned child or children shall take and if more than one equally between them the share of capital in my residuary estate to which his her or their parent would have been entitled to the income thereof under this my will if such parent had survived me including any share or shares which would have accrued to such parent under the trusts and provisions in that behalf hereinbefore contained."

By cl. 9 he gave his

H "trustees . . . power to raise any part or parts not exceeding together one moiety of the vested or expectant share of any grandchild of mine under the trusts of this my will and apply the same for his or her advancement preferment and benefit as my trustees shall think fit."

On Oct. 11, 1950, the testator died, and his will was duly proved by the first three defendants on Mar. 17, 1951.

The plaintiff was the adopted son of Margery Annie Hutchinson and her husband, Mrs. Hutchinson being a daughter of the testator. The adoption

order was made in the Leeds County Court on Feb. 12, 1941, under power conferred by the Adoption of Children Act, 1926. It appeared from the evidence that Mrs. Hutchinson, who was born in 1899, underwent at the age of eighteen an operation which prevented her from bearing children. The effect of that operation was known to her father, the testator, and members of her family. She later married her husband and in 1941 adopted the plaintiff, who was the lawful nephew of her husband, and was twelve years old at the date of his adoption. From that time forth the plaintiff lived with his adoptive parents during infancy and called them "Uncle" and "Aunt". The adoption was made with full approval of the testator who recognised the plaintiff as his grandson.

Robert S. Lazarus for the plaintiff.

M. Nesbitt for the defendants.

UPJOHN, J.: This summons raises an interesting question on the construction of the will of the testator, George Gilpin, and as to the true interpretation of the Adoption Act, 1950. The plaintiff is the adopted son of one Margery Annie Hutchinson and her husband, Mrs. Hutchinson being a daughter of the testator. The adoption order was made in Leeds County Court on Feb. 12, 1941, under the powers conferred by the Adoption of Children Act, 1926. Section 5 of that Act is in these terms:

"(2) An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions 'child', 'children' and 'issue' where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child . . . (4) For the purposes of this section 'disposition' means an assurance of any interest in property by any instrument whether inter vivos or by will including codicil."

On Sept. 3, 1947, the testator made his will by which, inter alia, he made a provision for his five children, one of them being Mrs. Hutchinson, and, having given each of his children shares in his residuary estate, he settled each child's share on his or her issue as they should appoint, and, in default of appointment, for the children who attained twenty-one years (reading it subject to the Law of Property Act, 1925), with accruer to other shares if no child of any particular child took. It follows from that that, in view of the provisions of s. 5 of the Act of 1926, the plaintiff would not take any part of the property under that disposition in the will unless he can satisfy the court that a contrary intention appears.

The Act of 1926, however, was replaced by the Adoption of Children Act, 1949, which came into force on Jan. 1, 1950. That Act in turn was repealed and replaced by the Adoption Act, 1950, which came into force on Oct. 1 of that year. The Acts of 1949 and 1950 radically altered the policy of the law in relation to the benefits which adopted children might receive from their adopting parent. Section 13 of the Adoption Act, 1950, is in these terms:

"(1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person. (2) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil),

after the date of an adoption order—(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person; (b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and (c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person."

A

B Sub-section (3) deals with dispositions of real or personal property that go with the dignity or title of honour. Section 14 provides:

"(1) For the purposes of the application of the Administration of Estates Act, 1925, to the devolution of any property in accordance with the provisions of the last foregoing section, and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or (in the case of a joint adoption) of either of the adopters—(a) where he or she was adopted by two spouses jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood; (b) in any other case, as brother or sister of the half-blood. (2) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated for the purposes of the last foregoing section as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date. . . . (4) Where an adoption order is made in respect of a person who has been previously adopted, the previous adoption shall be disregarded for the purposes of the last foregoing section in relation to the devolution of any property on the death of a person dying intestate after the date of the subsequent adoption order and in relation to any disposition of property made after that date."

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Therefore, in cases where an adoption is made under the Adoption Act, 1950, the rights of the adopted child are radically altered, because, unless the contrary intention appears, he or she is for all purposes of devolution to be treated as the child of the adopter born in lawful wedlock. The order in Leeds County Court was made under the Act of 1926, and to such an order the transitional provisions of the Adoption Act, 1950, are applicable. The relevant provision is to be found in para. 4 of sched. V, which is in these terms:

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"Sections 13 to 15 of this Act shall apply in relation to an adoption order made under the Adoption of Children Act, 1926, or the Adoption of Children (Scotland) Act, 1930, or made before the commencement of this Act under the Adoption of Children Act (Northern Ireland), 1929, as if it were an adoption order within the meaning of those sections respectively."

Then follow the important words:

H

"Provided that nothing in s. 13 of this Act shall affect the devolution of any property on the intestacy of a person who died before Jan. 1, 1950, or any disposition made before that date."

The testator died on Oct. 11, 1950, and his will was duly proved by the first three defendants, his executors and trustees, on Mar. 17, 1951.

The first point I have to consider is this. If, for the purposes of the proviso to para. 4 of sched. V, a disposition means the document creating the benefit then

the disposition was made at the date of the will—i.e., Sept. 3, 1947—and s. 13 of the Act of 1950 will not affect it. If, on the other hand, the disposition must be taken to be, as is submitted by the plaintiff, an effective disposition, that is, one which came into force on the death of the testator, because his will then became an effective instrument, the relevant date would be Oct. 11, 1950. Thereupon, unless a contrary intention appears, s. 13 of the Act of 1950 would apply and the plaintiff would be, for the purposes of devolution under the will of the testator, a child of his adopting parent, Mrs. Hutchinson. A

Counsel for the plaintiff has submitted that the disposition means an effective disposition. A will, he submits, is purely ambulatory in its operation and, until the death of the testator, can affect no rights and no interests. It remains revocable, provided the testator remains of sound mind, memory and understanding, up to the very moment of his death, and, therefore, it would not be right to consider such a document as a disposition. The disposition to which the Act is pointing is, he submits, the effective disposition made by the death of the testator and the coming into operation of his will. Counsel pressed me with a decision of the House of Lords in *Berkeley v. Berkeley* (1). That was a decision on the Finance Act, 1941, s. 25 (1), which provides: B

“Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which—(a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (b) was made before Sept. 3, 1939; and (c) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.” C

The question there was whether the provision meant the benefit conferred by the document or whether it meant the document itself. Four of their Lordships came to the conclusion, after a close analysis of the words of the section, that it had the former meaning, LORD PORTER dissenting on that point, but agreeing with the order made by the House on other grounds. The problem which the House of Lords had to consider was succinctly stated by VISCOUNT SIMON ([1946] 2 All E.R. 157): D

“The crucial question is what is the meaning of the phrase ‘any provision, however worded’. It may mean, as the Court of Appeal thought, the words which define a benefit and which are contained in the document or oral contract referred to in s. 25 (1). Or it may mean the benefit conferred by such a document or oral contract. If it bears the first of these meanings, it is to be found in the language of the document or oral contract and is necessarily of the same date, being in effect equivalent to a clause. If it means the second, its date will be the date when the benefit is conferred.” E

Then his Lordship went on to discuss the reasons which led him to come to the conclusion that the correct construction was the second meaning which he had mentioned. F

The word I have to consider is not “provision”, but “disposition”, and I find that word in quite a different context from that which the House of Lords had to consider in the *Berkeley* case (1). I do not myself derive great assistance from the observations they made which were necessarily made in relation to the very different words they had to consider, and I do not think that I need quote further from that case. As I have said, the word here is “disposition”, and, although it may be that a disposition can refer to the benefit conferred by an instrument, it seems to me that ordinarily the word “disposition” would G H

be used in reference to a written document and not to the effect of that document. As counsel for the defendant said in argument, most wills start with this well-known clause:

“ I revoke all testamentary dispositions heretofore made by me.”

Therefore, I approach this problem with the view that the word “ disposition ” is more apt to mean a document, and, therefore, in reference to the making of a
A disposition, the date of the document rather than at the date on which it comes into operation. However, I do not decide this case on any such ground, because, in my judgment, when s. 13 and s. 14 of the Adoption Act, 1950, are analysed closely, there is ample ground for thinking that the draftsman must have intended, when using the word “ disposition ”, to refer to the document which created the right, rather than the event when the benefit thereby given came
B into effect. Counsel for the defendants pointed out that the meaning sought to be put on the word “ disposition ” by counsel for the plaintiff is inconsistent with the phraseology in s. 13 (1), particularly the phraseology used within the brackets:

“ other than property subject to an entailed interest under a disposition made before the date of the adoption order.”

C There is a clear distinction there between property or benefit and the disposition which gives rise to the benefit. The words, he submitted, in sub-s. (2) are even stronger, because they open with this phrase:

“ In any disposition of real or personal property made, whether by instrument inter vivos or by will . . .”,

D those words again showing that the reference was being made to a document. It goes on:

“ (a) any reference (whether express or implied) shall . . .”

and so on. That phraseology is repeated in para. (b) and para. (c). Therefore, when the sub-section is talking of a reference and the construction of a reference,
E one is almost necessarily driven to the view that the draftsman is referring to the document rather than to the operation of the document. The same general comments can be made on s. 14 (1), because it refers to the purposes of the construction of any such disposition, which, again, is apt only when a document is being considered. But what, to my mind, is conclusive on this matter is s. 14 (2), because, if the construction sought by counsel for the plaintiff
F is right, that sub-section is wholly useless and can have no operation whatever, for that sub-section refers to a will or codicil being confirmed by a codicil executed after the date of an adoption order. If the relevant date be the death of the testator, that section can have no conceivable operation. For these reasons, therefore, I come to the conclusion that in para. 4 of sched. V a “ disposition made before that date ” is, for the purposes before me and when considering a dis-
G position by will, referring to the date of the will and not to the date when the provisions of the will became effective by the death of the testator. I do not, of course, in this case have to consider the question of any codicil. Accordingly, in my judgment, the disposition was a will which was made in 1947, so that s. 13 to s. 15 of the Adoption Act, 1950, are not to affect the devolution of any property.

H That, however, does not conclude the matter against the plaintiff, because counsel's second broad point is this: He says, either by operation of the general law or by the operation of the Act of 1926, which (although repealed by the Act of 1950) is kept in force as regards acts done under it by the Interpretation Act, 1889, s. 38 (2) (b), a contrary intention appears. His submission is that on the true construction of the will, the word “ children ” or “ children of the testator ” must necessarily include the adopted child, the plaintiff. [His LORDSHIP read the relevant provisions of the will and continued:] Counsel

for the defendants has directed some forcible remarks to the grammar in the residuary gift in cl. 8. He points out that it is a collective gift and it is not necessary to suppose that the testator intended it to become effective in relation to the issue of all his children. I think the will is open to some grammatical criticism, but I cannot feel the slightest doubt as to what the testator was effecting in cl. 8 of his will. He gave nominatim to each child a fifth share of his residue. That fifth share was settled on each for life, and, on his or her death, that share was to go to the issue of that child as that child should appoint; if the child did not appoint, then it was to go to the children who attained twenty-one years (as corrected by the Law of Property Act, 1925) in equal shares, and if there were no such children, that share was to go over to the other shares and was to be held on the same trusts as those other shares. I do not think there can be any doubt that that is the true construction of the will. In the circumstances which appear in the evidence, counsel for the plaintiff invokes a well known principle of construction to bring in the adopted child. [His LORDSHIP stated the circumstances and continued:] Counsel for the plaintiff contends that the testator must necessarily, when making a gift to the children of Mrs. Hutchinson, have intended to benefit the plaintiff, because when he made his will the testator well knew that his daughter never could have any natural legitimate children. The principle on which he relies is expressed in the oft quoted words of LORD CAIRNS in *Hill v. Crook* (2) (L.R. 6 H.L. 282). That passage was quoted in *Re Eve* (3), and it will be sufficient for me to quote the passage from the judgment of SWINFEN EADY, J. In that case, the testatrix made a gift equally among the children of her sisters, Mary Ann Burns and others, and the issue of such of them as should die in her lifetime leaving issue. Mary Ann Burns was, at the date of the will, a widow nearly sixty-eight years of age. She had been married in 1869, having had two children by her husband before marriage, and had no other children. She was living with the testatrix at the date of her will and her death and the testatrix knew all the facts and was on affectionate terms with the children, and the other sisters and brother had legitimate children living. It was held that Mary Ann Burns' two illegitimate children took shares on the ground that there were not, and never could be, any legitimate children to answer the description. SWINFEN EADY, J., said ([1909] 1 Ch. 799):

"I propose merely to state the law as laid down by the highest authority and apply it to this case. The term 'children' in a will prima facie means legitimate children, and if there is nothing else, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. Then LORD CAIRNS said in *Hill v. Crook* (2): 'But there are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest "to the children of my daughter Jane", Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the courts will hold that those illegitimate children are intended, and they will take under the term "children".' Applying that statement of the law to this case, I have to ask myself who could the testatrix have meant when she made this gift to the children of Mary Ann Burns, the old widowed sister who was then living with her. There were two illegitimate children whom she knew all about, and there never could be any other or legitimate children who could take under this bequest. LORD CAIRNS said that one class of cases in which illegitimate children may take is,

where there is a gift to children and it is impossible that legitimate children should take. That is this case. In the circumstances which existed at the date of the will it was impossible that any legitimate children should take. There were none and never could be any. It is impossible to come to any other conclusion than that the testatrix intended these two children to take, and I must give effect to that intention—an intention which I arrive at not from any conjecture as to what the testatrix meant, but from the will itself with the assistance of such surrounding circumstances as I am bound to look at. I therefore decide that the two illegitimate children of Mary Ann Burns are entitled to shares in the residue.”

The principle was applied in two later cases. In *Re Wohlgenuth* (4) JENKINS, J., applied the general principle of *Hill v. Crook* (2) to the case, a rather exceptional one, where it was proved that the testator himself was incapable of having further children. In that case, the learned judge came to the conclusion that in his will the testator must have intended to benefit two earlier illegitimate children. The learned judge said ([1948] 2 All E.R. 886):

“In the unusual circumstances of this case and on the evidence I find that it is proved that at the date of his will the testator was permanently incapable of having any further children by his wife, and that he was well aware at that date that he was so incapable. One may add also that, rightly or wrongly, he believed that in any case there was no longer any possibility of his wife having a child, irrespective of his own capacity. That being so, in my judgment, the case is brought within the first of the two exceptions to the general rule stated by LORD CAIRNS and applied by SWINFEN EADY, J., in *Re Eve* (3), and, accordingly, the material parts of this will must be construed as making provision for the two children of the testator and the first defendant notwithstanding that they were not legitimate children.”

In *Re Fletcher* (5) ROXBURGH, J., extended the principle to adopted children. The case (which was not unlike the present, although there were many circumstances in that case which are not present in this case) was that the testator's daughter was incapable herself of bearing a child and she adopted a child, and the learned judge came to the conclusion that the testator, in making a gift to the children of that daughter, must have intended to benefit the adopted child. The learned judge said this ([1949] 1 All E.R. 734):

“There is no doubt (and I start with this as a fundamental proposition) that ‘children’ in an English will *prima facie* means legitimate children and does not include either illegitimate or adopted children.”

Having dealt with the first two arguments, the learned judge said he would deal with the third (*ibid.*, 735):

“... though this case concerns, not illegitimate but adopted, children, I must refer to the case of illegitimate children because, while several decisions have been given with regard to illegitimate children, there has been none so far as I am aware, with regard to adopted children.”

Then the learned judge cites the passage from LORD CAIRNS' speech in *Hill v. Crook* (2) and continues (*ibid.*):

“Counsel for the fifth defendant has submitted that I ought not to apply to an adopted child the principles which are applicable to an illegitimate child because an illegitimate child is at least a natural child of the person named whereas an adopted child has no status as a child, except such as is conferred on it by the adoption order. I am disinclined to draw such a distinction. It seems to me that the question in every case is: In what sense has the testator used the word ‘children’? *Prima facie* he has used it in its natural sense as meaning lawful children, but, if once the court comes

to the conclusion that he has not used it in its natural sense of lawful children, it seems to me that it must be legitimate for the court to inquire into the sense in which he has used the word and that it makes no difference in principle whether the court finds that he has used it in the sense of illegitimate children or in the sense of adopted children. It is common for people to speak of both illegitimate children and adopted children as 'children' simpliciter."

I apply the principle illustrated by those cases to this case. I cannot accept the argument of counsel for the defendants that, because it is a collective gift, it was not intended to take effect in favour of each child, but it is sufficient if the words are satisfied in the case of the children who have legitimate children. That submission seems to me to be contrary to principle and certainly contrary to *Re Eve* (3). It seems to me clear that the testator intended to give one fifth share to his daughter for life and then to benefit her children. In 1947 he knew that she could have no natural lawful children. He knew and approved of the fact that she had an adopted child. It was argued by counsel for the defendants that the reference to the word "parent" in the proviso at the end of cl. 8 and the reference to "any grandchild of mine" in cl. 9 was an indication that the testator intended to benefit only his lawful natural grandchildren. I do not take that view. Once it is established, as I think it is, that the testator intended to benefit an adopted child by including such a child amongst the description of "child or children" in the early part of cl. 8, I see no difficulty in assuming that, when he used the word "parent", he intended to include adopted parent, and when in cl. 9 he used the word "grandchild" he meant to include grandchildren by adoption of the daughter. I venture to think that the case is a clear one and that the testator must have intended to include in his testamentary disposition the plaintiff, and I shall declare accordingly.

Declaration accordingly.

Solicitors: *Waterhouse & Co.*, agents for *Ford & Warren*, Leeds (for the plaintiff); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *W. Bateson, Coates & Co.*, Leeds (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

NOTE.

STRETTON v. STRETTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 22, 1953.]

A *Justices—Husband and wife—Appeal—Notes of evidence—Exhibits—Documents produced before justices—Need to make exhibits to notes.*

APPEAL by the husband against an order, dated June 15, 1953, of Norfolk justices sitting at East Harling.

B On Aug. 3, 1948, the justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, in favour of the wife on the ground that the husband had wilfully neglected to provide her with reasonable maintenance, and granted her, inter alia, custody of the two children of the marriage. On Nov. 8, 1948, that order was varied by granting custody of the children to the husband. On June 15, 1953, the order was again varied by granting custody of the children to the wife. Against that decision the husband now appealed.

C *Stimson* for the husband.

R. M. O. Havers for the wife.

D LORD MERRIMAN, P.: I wish to deal by way of preface with a matter to which we have to refer too frequently. There is attached to the notice of motion stating the grounds of appeal a reply from the clerk to the justices, in response to the usual inquiry from the registry, stating that no exhibits were handed in to the court. The notes of evidence show that several documents were produced and handed to the court which were not, as they should have been, made exhibits and sent to us as such. Some of them are extremely important documents. One is the school report of the elder child, a girl, whose educational future is very much one of the matters to be taken into account in considering the paramount question, the welfare of the children. The others concern the relations, whatever they may be, of the husband with a German woman, said by him to be a domestic servant in the house. There is a bundle of letters written before Aug. 3, 1948, which, though they were not all read, were, we are told, produced at the hearing. We have looked at one of them, dated May 7, 1948, which happened to be the one on the top of the pile. It is a fervent love-letter, which affords some confirmation of the wife's statement that the husband's association with this young woman was responsible for the break-up of the marriage in 1948. It is admitted that the others are in the same sense. There was also a bundle of correspondence, about which the husband was cross-examined, between himself and the Home Office, which shows conclusively that he was representing to the Home Office that he wished a passport to be granted to the German woman on the basis that she was his fiancée and that they were about to get married as soon as possible.

G [HIS LORDSHIP then dealt with the merits.]

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *A. D. Foxon*, Leicester (for the husband); *Ford, Michelmores, Rose & Binning*, agents for *Greenland, Houchen & Co.*, Attleborough, Norfolk (for the wife).

A.T.H.

NOTE.

BEAL v. BEAL, READE cited.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.),
October 7, 8, 9, 12, 13, 1953.]

*Divorce—Practice—Trial—Allegation of adultery—Submission by party cited
of no case—Need to elect—Election—Matrimonial Causes Act, 1950 (c. 25),
s. 5.*

PETITION by the wife for dissolution of the marriage on the ground of the husband's cruelty. By his answer the husband denied the allegations of cruelty and cross-prayed for a decree of dissolution on the ground of the wife's adultery with the party cited.

At the hearing, the wife gave evidence as to her allegations of cruelty and as to the husband's allegation of adultery. No other witness was called for the wife. The husband then gave evidence and called witnesses in support of his case. At the close of the husband's case the party cited submitted that as he was in the position of a co-respondent and the husband in that of a petitioner for the purposes of the Matrimonial Causes Act, 1950, s. 5, he was entitled to be dismissed from the suit on the ground that there was not sufficient evidence against him, and that, in view of the wording of that section, he was not bound to be put to his election in making that submission, according to the rule of convenience in *Alexander v. Rayson* ([1936] 1 K.B. 169). The commissioner ruled that, *prima facie*, s. 5 allowed the court to hear the submission without asking the party cited to make his election, but held on the evidence there was a serious case against the party cited who thereupon gave evidence and called witnesses in support. In his judgment, the commissioner said that it would be wrong to hold in principle that s. 5 counteracted the authority of *Alexander v. Rayson* (*supra*), and that the course he had taken must not be treated as a precedent.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 395.

Case referred to:

- (1) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.

A. B. Hollis for the wife.

Aarvold for the husband.

Curtis-Raleigh for the party cited.

Solicitors: *Kinch & Richardson* (for the wife); *Haslewood, Hare, Shirley Woolmer & Co.* (for the husband); *Graham, Hooper & Betteridge*, Brighton (for the party cited).

A.T.H.

H. (orser. D.) v. H.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), October 2, 22, 30, 1953.]

Nullity—Fear—Marriage in country under communist government—Marriage to foreigner to obtain passport—No consummation of marriage.

- A The parties were married in Hungary on Mar. 9, 1949. The wife was a Hungarian, and the husband a French, citizen, and both were living in Hungary. The parties never lived together and the marriage was never consummated. After the marriage the wife obtained a French passport, and on May 7, 1949, she left Hungary and on May 15, 1949, came to England, where she had resided since. She petitioned for a decree of nullity on the ground that she was induced to be a party to the marriage ceremony by fear and duress. She stated in evidence that, before the ceremony of marriage, it was agreed between the husband and herself that they should not live together after the marriage and that it should be dissolved at the earliest possible opportunity, and that she was most anxious to leave Hungary because "the time was so terrible. I was afraid of what was going to happen there." At the time of the marriage a communist government ruled Hungary and the wife came of a family which, owing to its financial and social position, might not be sympathetically regarded by such a government. Two witnesses gave evidence that for the same reasons they had been in grave fear that they might be taken to prison or a concentration camp; that, to obtain a foreign passport and leave Hungary, they had gone through ceremonies of marriage in Hungary with foreigners; and that those marriages had since been dissolved.

- E HELD: the essence of a valid marriage in English law was the consent of the contracting parties; consent might be negated by the fear of a party to the marriage: see observations of SIR FRANCIS JEUNE, P., in *Moss v. Moss* ([1897] P. 268); although, here, the parties intended to become husband and wife, nevertheless the fear of the danger which would imperil the wife if she remained in Hungary was reasonably entertained by her and was of such a kind as to negative her consent to the marriage; in the absence of such consent there was no valid marriage; and there would be a decree of nullity.

- F AS TO CONSENT AS A REQUISITE OF A VALID MARRIAGE, see HALSBURY, *Hailsham Edn.*, Vol. 16, pp. 560, 561, paras. 838, 839; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 36-40, Nos. 131-167.

Cases referred to:

- (1) *Moss v. Moss*, [1897] P. 263; 66 L.J.P. 154; 77 L.T. 220; 27 Digest, Replacement, 36, 131.
- G (2) *Fulwood's Case*, (1638), Cro. Car. 482.
- (3) *Scott v. Sebright*, (1886), 12 P.D. 21; 56 L.J.P. 11; 57 L.T. 421; 27 Digest, Replacement, 38, 147.
- (4) *Field's Marriage Annuling Bill*, (1848), 2 H.L. Cas. 48; 9 E.R. 1010; 27 Digest, Replacement, 38, 154.
- (5) *Brodie v. Brodie*, [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 27 Digest, Replacement, 217, 1726.
- H (6) *Griffiths v. Griffiths*, [1944] L.R. 35.
- (7) *United States v. Rubinstein*, (1945), 151 Federal Reporter, 2nd Series 915.
- (8) *Martens v. Martens*, [1952] 3 South African L.R. 771.

PETITION for nullity of marriage.

By her petition dated Mar. 30, 1953, the wife stated that she was married to the husband on Mar. 9, 1949, at the registry office at Budapest in the republic of Hungary; that after the ceremony of marriage the wife and the husband

never lived or cohabited together, and that the marriage had never been consummated; that the wife was now living in London, and that the husband at all material times was domiciled in, and believed to be living in, France; that the wife had resided in England for three years last past and that the proceedings were brought under the Matrimonial Causes Act, 1950, s. 18 (1) (b); and

“that the [wife] was induced to be party to the said form of ceremony of marriage not of her own free will but through fear and duress”;

that, being in fear owing to the facts that there was a communist government in Hungary, she was a person of some means and social position, and persons in her circumstances had been imprisoned or sent to concentration camps, she determined to leave Hungary, but found it was impossible to do so unless she acquired foreign nationality; that she arranged with the husband, who was a cousin, that they should go through a form of ceremony of marriage, but that it should be a marriage in name only, its sole purpose being to enable the wife to escape the danger which, from the fate of others, she had good reason to apprehend for herself; and that she would never have consented to go through the form of ceremony of marriage had she not, with a good cause, been in fear for her life, liberty and virtue. The wife prayed for a decree that the marriage was null and void. The husband did not enter an appearance to the petition, which came, undefended, before KARMINSKI, J., on Oct. 2, 1953. KARMINSKI, J., adjourned the suit for argument by the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10 (1).

Shelley, Q.C., and R. L. Bayne-Powell for the wife.

The Attorney-General (Sir Lionel Heald, Q.C.) and Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

Oct. 30. KARMINSKI, J., read the following judgment. At the time of the ceremony of marriage the wife was a spinster of the age of eighteen years, a Hungarian citizen living in Budapest. The husband, who is her second cousin, was some six months her junior. He was by birth and nationality a French citizen and at the time of the ceremony of marriage he, too, was living in, and attending school at, Budapest. The parties, therefore, were minors under both English and Hungarian law. It appears from the evidence of Dr. K., a member of the Hungarian Bar and a doctor of laws of the university of Budapest, that a marriage between parties under the marriageable age, which is eighteen for men and sixteen for women, is voidable, but the Minister of Justice can give exemption and I was assured by Dr. K. that registrars of marriage in Hungary invariably obtain the permission or sanction of the Minister before performing the marriage ceremony between parties of whom one or both are under the marriageable age. In any event, the period of time during which this marriage could have been avoided under Hungarian law is now long past. I am satisfied that in form this marriage was valid by the law of Hungary.

After the ceremony of marriage the wife and the husband separated. The wife, having obtained a French passport, left Hungary on May 7, 1949, going first to Paris and soon after to this country where she has resided since May 15, 1949. The parties never lived together and the marriage was never consummated. I have evidence from a gynaecologist that as recently as June 23, 1953, the wife presented on examination all the indications of a virgin. The circumstances attending the ceremony of marriage were unusual. The husband was a school-boy and it appears that on the morning of the ceremony he attended school as usual for the first lesson, obtained leave to absent himself from the second lesson on the convenient pretext that he had to visit his dentist, went through the ceremony of marriage with the wife instead of visiting his dentist, and

returned from the office of the marriage registrar in time to take his place at school for the third lesson of the day. The wife asserts, and I accept, that before the ceremony was performed she agreed with the husband that they should not live together after the marriage and that it should be dissolved at the earliest possible opportunity. The wife had discussed it with her widowed mother who entirely approved the scheme on the basis that it was the only practicable way in which the wife could leave the country.

A The reasons why the wife was anxious to leave Hungary were as follows. She came of a family engaged in a substantial business and of comfortable circumstances—the kind of family who might not be well or sympathetically regarded by a communist government. When Russian troops occupied Hungary in 1945, the wife, then about fourteen years of age, was dressed as a boy in the hope that thereby she might escape the attentions of the occupying troops. She wore this disguise for a few months and then returned to normal feminine dress. It does not appear that she was at any time molested by Russian or other troops. In 1948 a communist government ruled Hungary and the position of the wife, and of many others of her class and background, deteriorated. The wife, undoubtedly, heard many stories of people in her position being taken to prison or concentration camps, and she believed herself to be in real danger of sharing a similar fate. Asked why she was so anxious to leave Hungary, she answered:

“Because the time was so terrible. I was afraid of what was going to happen there.”

D Anxieties of this kind were not peculiar to the wife. A friend of hers, Mrs. A., gave evidence of her own difficulties and anxieties at this time. Mrs. A. herself was, in 1948, in grave fear of being taken away to a prison or a camp. She, too, was determined to leave Hungary. She, too, went through a form of ceremony of marriage at Budapest on Mar. 14, 1949, to an Austrian stranger, with whom she never lived. That marriage has now been dissolved and she has re-married. Another witness, who gave her evidence by affidavit and is now living outside the United Kingdom, was Mrs. P. Though not, I think, present at the actual ceremony, she went with the wife to the civil authorities to make the necessary arrangements and was well aware of the wife's motives, namely, that she was going to use her marriage as a means of obtaining a passport whereby she could leave Hungary. Mrs. P. shared fully the fears of the wife and Mrs. A. Mrs. P. also went through a ceremony of marriage with a foreigner with whom she never lived, left Hungary, and soon afterwards obtained a dissolution of that marriage. Mrs. P. has subsequently re-married. Mrs. P. states that she, too, went through a ceremony of marriage at a time when she was seventeen years of age because she was frightened for her liberty and, possibly, her life. Mrs. P. suggests that she might have purchased safety at the price of becoming the mistress of a Russian officer or official. Mrs. P.'s anxieties did not appear to be groundless: so far as her present information goes her parents have been deported, an order for her own deportation is believed to have been made, but at the time when it was sought to effect it Mrs. P. had left Hungary.

Soon after the ceremony of marriage the husband left Hungary and returned to France. Some letters from him written from Marseilles between 1951 and 1953 have survived. They are of little importance except to make it clear that he regarded his marriage at an end and was anxious to have it annulled or dissolved.

H In a case of this kind the question almost inevitably arises as to what system of law is applicable. In this case it was agreed that either English law or Hungarian law applied. Though the husband was and still is a French citizen it was not contended that French law could apply to the validity of this marriage. The choice between English and Hungarian law would appear to be almost

academic, since the evidence of Dr. K. shows that under the Hungarian Marriage Act, 1894, s. 53,

"a marriage is voidable for duress if one of the spouses entered into the marriage as a result of a well-founded fear induced by threats."

The English law in relation to the avoidance of marriage under fear or duress seems largely similar, and it is probable that on this subject both English and Hungarian law derive from the common parentage of the canon law. I proceed, therefore, to consider this case on the basis that English law is applicable. A

In English, as in canon, law, the essence of a valid marriage is the consent of the contracting parties. AYLIFFE in his *PARERGON JURIS CANONICI ANGLICANI* states (p. 362) that the consent of the parties contracting is sufficient alone to establish such a marriage. But the consent must be perfect, and fear may vitiate consent. AYLIFFE states his proposition thus (*ibid.*, p. 361): B

"Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever: for matrimony contracted through any menace or impression of fear is null and void ipso jure."

The general doctrine that fear may negative consent to marriage has long been accepted in the courts of this country. In *Moss v. Moss* (1) SIR FRANCIS JEUNE, P., said ([1897] P. 268): C

"There must be the voluntary consent of both parties . . . It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulwood's Case* (2)) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will." D

In *Scott v. Sebright* (3) BUTT, J., stated the principle thus (12 P.D. 24):

"Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case." E

In *Scott v. Sebright* (3) BUTT, J., was considering facts very different from those in the present case. There the wife complained that the husband had threatened that unless she married him he would shoot her, would ruin her financially, and would accuse her to her mother and in every drawing-room in London of having been seduced by him. This last suggestion was wholly false, and, indeed, the wife was proved to be *virgo intacta*. In the present case it is not suggested that the fears of the wife derived from any action by the husband or from any default on his side. Indeed, he is represented as a youth of blameless character, who was willing to help the wife even at some possible risk to himself. There appears to be no case reported where fear or duress emanated from any other source than from the respondent or his servants or agents. An analysis of some of the earlier cases is to be found in SIR FITZROY KELLY'S argument in *Field's Marriage Annuling Bill* (4) (2 H.L. Cas. 57). In the majority of the cases there discussed the petitioners were of tender years but ample incomes. In some of the cases violence was used as well as threatened. F

It was argued by the Attorney-General that the facts of the present case cannot be said to prove that the ceremony of marriage was performed under fear or duress, and he rightly emphasised, and I accept, that the principles are strict and should not be rashly extended. He argued, further, that a mental G

reservation as to a vital condition of marriage does not vitiate its validity, though the reservation itself may be bad as against public policy. Thus, in *Brodie v. Brodie* (5) HORRIDGE, J., held that an agreement entered into by the parties before marriage to live apart thereafter was illegal and void. But it was not argued, or suggested, in that case that because of such a reservation by the parties the marriage was itself void or voidable. On the contrary, HORRIDGE, J., affirmed the validity of the marriage by a decree of restitution of conjugal rights.

I agree entirely with the Attorney-General's proposition that mental reservations cannot avoid a marriage. And I also entirely agree with his argument that the court must be slow to pronounce against the validity of a marriage perfect in form and celebrated between, apparently, competent parties, even when, as in this case, it is difficult to withhold a feeling of sympathy with the present difficulties of the parties. There is no doubt that the presumption of law is in favour of the validity of a marriage in form duly celebrated, but the presumption is rebuttable by evidence. The English and Irish cases and the principles to be derived from them have been carefully examined by HAUGH, J., in an Irish case, *Griffiths v. Griffiths* (6). There a man was induced to go through a ceremony of marriage under the threat that he would otherwise be prosecuted for carnal knowledge of the wife, then under seventeen years of age. The threat was in fact false to the knowledge of the wife, but the husband was put in fear by it, and HAUGH, J., found as a fact that the husband married under the duress caused by such fear. As HAUGH, J., explained ([1944] I.R. 42):

"Duress must be a question of degree, and may begin from a gentle form of pressure, to physical violence, accompanied by threats of death."

I respectfully agree, adding only my own view that the question of degree is a question of fact for the court.

In the course of argument my attention was drawn to *United States v. Rubenstein* (7), a decision of the United States Circuit Court of Appeals. That was an appeal from a conviction on a charge of conspiracy to obtain the entry of an alien into the United States by false representations and by the wilful concealment of material facts. A Czechoslovak woman married an American man in order to stay in the United States: the man received \$200 from the woman, and both agreed that a divorce should take place six months after the marriage. HAND, J., found that the suppression of these material facts was a fraud even though the marriage was valid. But he went on to assert that the man and woman were never married at all, and said (151 Fed. Rep., 2nd Series 918):

"Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved . . . if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others."

The South African courts have more recently taken a different view. In *Martens v. Martens* (8) CLAYDEN, J., had to consider a suit for a declaration of nullity or in the alternative for a decree of restitution in the following circumstances. A Greek woman living in Greece desired to enter the Union of South Africa in order to live with a married man there residing. In order to secure admission into the Union, the Greek woman had to satisfy the authorities that she was coming there to get married and for that purpose she engaged herself to marry another man resident in South Africa. This man she deserted immediately after the ceremony of marriage and went to live with the married

man. There was no suggestion that the Greek woman was in any personal difficulty in Greece or under any apprehension of danger to herself in that country. Dealing with these facts, CLAYDEN, J., said ([1952] 3 South African L.R. 775):

"It seems to me that the facts show that the parties did intend that the defendant should become the wife of the plaintiff. That was the very object of the ceremony, so that she could remain in the country, and that object was brought about with a realisation by both contracting parties that there would be need for divorce to end the marriage. As explained later, any agreements contrary to the relationship of marriage must be disregarded. The action for a declaration of nullity of marriage must be dismissed."

In both the *United States v. Rubenstein* (7) and in *Martens v. Martens* (8) the primary object of the marriage was in each case to evade, or at least to circumnavigate, the immigration laws of the United States and of the Union of South Africa respectively. In neither case can I find evidence that the ceremony of marriage was entered into under any fear. It is true that the two courts appear to have come to different conclusions, and, indeed, they were administering different codes of law. With the greatest respect to the persuasive authority of any decision of HAND, J., I find the reasoning of CLAYDEN, J., the more convincing in its relation to English law.

If the present case were devoid of the element of fear I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent. It was conceded in argument by the Attorney-General that, if it had been announced before this ceremony of marriage by the Hungarian authorities that all single women would be put into brothels, a woman might marry with no other intention than to escape that particular fate. But he argued, further, that the essence of the marriage between the wife and the husband in this case was to obtain a passport. It is true that the wife here was desperately anxious to obtain a passport which would enable her to escape from Hungary, but I have to inquire into the reason why she was so desperately anxious to leave her native country. That reason I believe to have been fear of the danger which would imperil her if she remained in Hungary, and I must find on the evidence of the wife herself and of Mrs. A. and Mrs. P. that her fears were reasonably entertained. I find that the fear entertained by the wife was of such a kind as to negative her consent to the marriage. In the absence of consent there can be no valid marriage. There was here neither consent nor valid marriage. I find the contents of the petition proved, and decree, accordingly, that the marriage in fact celebrated between the wife and the husband is null and void.

Decree accordingly.

Solicitors: *Woodham Smith, Borradaile & Martin* (for the wife); *Treasury Solicitor*.
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

PROBATE AND DIVORCE DIVISION.

PRACTICE DIRECTION.

Divorce—Probate—Practice—Receipt or certificate given by solicitor's clerk—Signature by clerk.

A receipt or certificate given on behalf of a firm of solicitors by a clerk authorised to do so should be signed by him personally for the firm (e.g., J. Jones for Smith & Smith & Brown).

By direction of the registrars of the Probate and Divorce Registry.

27th October, 1953.

Re BAWDEN'S SETTLEMENT. BESANT AND OTHERS v.
BOARD OF GOVERNORS OF THE LONDON HOSPITAL
AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 23, 1953.]

National Health Service—Hospital—Legacy to hospital—Discretion to trustees to divert gift if hospital becomes amalgamated or absorbed—National Health Service Act, 1946 (c. 81), s. 11 (8), s. 60 (1).

Perpetuities—Rule against perpetuities—Gift to charity—On amalgamation gift over for purposes of charity or benevolence.

By a settlement dated Dec. 21, 1905, the trustees were directed to pay or distribute the annual income of the trust fund thereby constituted to or between the several charities mentioned in the schedule thereto in the proportions there specified. By cl. 8, the settlement provided that in case at any time thereafter any of the charities "shall cease to exist or shall become amalgamated with or absorbed in any other charity or institution . . . the trustees may in their discretion either pay or apply the share or proportion of the annual income of the trust fund which under the provisions hereof was for the time being payable to or for the benefit of the charity or institution so ceasing to exist or becoming amalgamated or absorbed as afore-said . . . to or for the benefit of the charity or institution with or in which the same shall have become amalgamated or been absorbed . . . or may apply such share or proportion of the annual income to or for such other objects or purposes of charity or benevolence or amelioration of human suffering or advancement of knowledge as the trustees shall in their opinion consider to be most in accordance with the original desire and intention of the settlor." Included in the list of charities in the schedule were two hospitals, the London Hospital and the Poplar Hospital for Accidents, which were affected by the National Health Service Act, 1946. The London Hospital was, together with Queen Mary's Maternity Home, designated a teaching hospital under s. 11 (8) of the said Act. The Poplar Hospital for Accidents became one of a group of hospitals called, in the scheme which was approved by the Minister of Health under s. 11 (4), No. 8 Bow.

HELD: (i) having regard to the terms of s. 11 (8) the London Hospital had become amalgamated (within the meaning of cl. 8) with Queen Mary's Maternity Home, but the Poplar Hospital for Accidents was only associated with other hospitals of No. 8 Bow group for the purposes of management and administration, and that did not constitute amalgamation within cl. 8.

(ii) section 60 (1) of the Act of 1946 did not preclude the operation of cl. 8 of the settlement, for the sub-section was designed merely to ensure that funds applicable to a hospital before the operation of the Act should continue to be so applicable thereafter, and was not intended to deal with a case in which, under the trusts of the trust instrument itself, the funds were diverted.

(iii) clause 8 would, however, on its true construction, enable funds to be paid to or applied for the benefit of non-charitable objects at any time in defeasance of the perpetual primary trust in favour of charities, and, therefore, it was void as transgressing the rule against perpetuities.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 11, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 348; and for s. 60, see *ibid.*, p. 391.

Cases referred to:

(1) *Ministry of Health v. Simpson*, [1950] 2 All E.R. 1137; [1951] A.C. 251; 2nd Digest Supp.

(2) *Re Peel's Release*, [1921] 2 Ch. 218; 90 L.J.Ch. 369; 8 Digest 328, 1109.

ADJOURNED SUMMONS to determine whether, on the true construction of a settlement dated Dec. 21, 1905, and made between Edward George Bawden

of the one part and trustees of the other part, and of the National Health Service Act, 1946, the share of the annual income of the trust fund subject to the trusts of the said settlement which before July 5, 1948, was payable to or for the benefit of the London Hospital, Whitechapel, E., had been since the said date and was (a) payable to the first defendants, the board of governors of the London Hospital, or (b) payable or applicable according to the trusts declared in cl. 8 of the settlement to or between the charities, institutions, objects or purposes in such clause referred to, or (c) held on a resulting trust for the estate of the settlor, the said Edward George Bawden (since deceased), on the footing that the trusts declared in the said cl. 8 were void, or (d) held on any other and what trusts. Similar questions were raised by the summons in relation to the Royal Cancer Hospital (Free) of Fulham Road, Brompton, S.W., and the Poplar Hospital for Accidents.

H. E. Francis for the plaintiffs, the trustees of the settlement.

Sir Lynn Ungood-Thomas, Q.C., and *J. A. Armstrong*, and *V. M. C. Pennington*, *Raymond Walton*, *McMullen*, *J. A. Wolfe* and *N. S. S. Warren* for various defendants.

DANCKWERTS, J.: The questions which I have to decide in this case arise in regard to the trusts of a settlement dated Dec. 21, 1905, of a fund amounting to some £100,000, and at the present time of a value of over £114,000. The deed is obviously one over which a great deal of care has been taken, but, unfortunately, the result is not entirely happy. It was a settlement made by a Mr. Edward George Bawden, and there are three trustees named in the deed. The personal representatives by representation of Mr. Bawden are parties to this summons, and claim that in the result there is a resulting trust in their favour.

The deed begins with certain recitals apparently expressing the intention of the settlor:

"Whereas the settlor for the purposes of charity and benevolence and the advancement of knowledge especially in aid of human suffering is desirous of creating a trust fund the annual income whereof is to be applied for the benefit of such charities and institutions . . ."

It is a curious feature of this deed that the words "charities and institutions" are used in a number of places as though they were two different things. Whether that was really intended or not, I do not know, and fortunately, at any rate for the purposes of this case, it does not matter. The recital continues:

"and in such proportions and manner as hereinafter appears and with that intent has transferred into the names of the present trustees the investments specified in sched. I hereto."

The second recital reads:

"And whereas for the purpose of the distribution of the annual income of the trust fund intended to be hereby constituted but for no other purpose the settlor is desirous that the said capital sum of £100,000 shall subject as hereinafter mentioned be considered as appropriated to or for the benefit of the respective charities and institutions mentioned in sched. II hereto in the respective proportions specified in the same schedule . . ."

I pause, again, to observe that that seems to indicate a desire that, unless something happens to upset that result, the proportions of the income of the sum are to be appropriated to the different bodies mentioned in the schedule. The recital continues:

"it being the desire and intention of the settlor that each of the said respective charities and institutions shall so long as it shall continue an existing charity or institution and shall not attempt to alienate charge or anticipate its proportion of the income of the trust fund receive such

proportion of the total annual income of the said trust fund from time to time distributable between the said respective charities and institutions as the capital sum appropriated to such charity or institution as mentioned in the said sched. II hereto bears to the said total capital sum of £100,000."

A After certain administrative provisions with which I need not concern myself, the important clauses in the operative part of the deed are cl. 4 and cl. 8. Clause 4 is in these terms:

B "The trustees shall subject as hereinafter mentioned pay or distribute the annual income of the trust fund to or between the several charities and institutions mentioned in sched. II hereto in the shares and proportions which the capital sums appropriated to such charities and institutions respectively as mentioned in the said schedule respectively bear to the total capital sum of £100,000 at such times in the year as to the trustees shall appear most suitable and convenient but so that such payment or distribution shall not in the case of any charity or institution be made less often than half-yearly. And all payments made by the trustees to or for C for the benefit of any charity or institution shall be made to the treasurer for the time being of such charity or institution or such person as shall from time to time be nominated in writing to receive the same by the governing body of such charity or institution as defined in cl. 1 of sched. III hereto."

D The clause further provides that the receipt of the treasurer or person nominated is to be a good receipt, and then there is a proviso that the trustees are not bound to pay out in excess of income at the rate of four per cent. on the proportions of the shares in question. There are provisions as to the application of any surplus.

It is plain that, though they may be referring to other clauses, in cl. 4 the words "subject as hereinafter mentioned" refer to cl. 8. Clause 8 is in the following words:

E "In case at any time hereafter any of the charities and institutions mentioned in sched. II hereto or any other charity or institution which shall under the provisions herein contained hereafter become entitled to participate under the trust hereby constituted shall attempt to alienate charge or anticipate its share or proportion of the annual income of the trust fund or shall cease to exist or shall become amalgamated with or F absorbed in any other charity or institution (whether mentioned in sched. II hereto or not) the trustees may in their discretion either pay or apply the share or proportion of the annual income of the trust fund which under the provisions hereof was for the time being payable to or for the benefit of the charity or institution so ceasing to exist or becoming amalgamated or absorbed as aforesaid as follows (that is to say) in the case of a charity G or institution becoming amalgamated or absorbed as aforesaid to or for the benefit of the charity or institution with or in which the same shall have become amalgamated or been absorbed or as well in the case of any charity or institution so becoming amalgamated or absorbed as in the case of any charity or institution attempting to alienate charge or anticipate its share or proportion of the annual income of the trust fund or H ceasing to exist as aforesaid to or between or for the benefit of such one or more of the other charities and institutions mentioned in the said sched. II hereto or any other charity or institution or charities or institutions for the time being entitled to participate under the trust hereby constituted and in such shares and proportions as the trustees shall think proper or may apply such share or proportion of annual income to or for such other objects or purposes of charity or benevolence or amelioration of human suffering or advancement of knowledge as the trustees shall in their opinion

consider to be most in accordance with the original desire and intention of the settlor."

There is a large number of bodies whose names appear in sched. II, and it appears that they are all of them charitable in nature, notwithstanding that the deed refers constantly to them as charities or institutions. There are certain hospitals included in the list, and in particular there is the London Hospital, Whitechapel, E., the Poplar Hospital for Accidents, 303, East India Dock Road, E., and the Cancer Hospital (Free), Fulham Road, Brompton, S.W. The questions which I have to decide arise because of the effect of the National Health Service Act, 1946, which came into operation on the appointed day for the purposes of that Act, July 5, 1948. Certain things were done by that Act or pursuant to its provisions, which affected these three hospitals, or may have affected them. In the case of the Cancer Hospital, an order was made which merely continued the Cancer Hospital as a teaching hospital, but not in association with any other previous hospital, and consequently it is clear that in the case of the Cancer Hospital no question of amalgamation really arises. That was admitted in the course of the case, and, therefore, although a question was raised in regard to the Cancer Hospital in the summons, it is not necessary for me to consider the matter any further. Two questions arise in regard to the London Hospital and in regard to the Poplar Hospital for Accidents.

I will take first the London Hospital, which, under the terms of the National Health Service Act, 1946, was made a teaching hospital, and consequently was dealt with in a different way from those hospitals the property of which vested in the Minister and which were not treated in the same way as teaching hospitals. For the purposes which I have to consider, primarily, at any rate, the relevant provisions of the Act are to be found in s. 11 (8). That sub-section provides:

"The Minister may, after consultation with the university concerned, by order designate as a teaching hospital any hospital or group of hospitals which appears to him to provide for any university facilities for undergraduate or post-graduate clinical teaching, and the Minister shall, in the case of any hospital or group so designated, by order constitute, in accordance with Part III of sched. III to this Act, a board of governors for the purpose of exercising functions with respect to the administration of that hospital or group; and any group of hospitals so designated shall, as from the appointed day or the date of the designation (whichever last occurs), be deemed for the purposes of this Act to be a single hospital."

By the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979), and made pursuant to the provisions of that s. 11 (8), it was provided by para. 2:

"Each of the hospitals or groups of hospitals set out in the second column of the schedule hereto is hereby designated as a teaching hospital and shall be known by the name inserted in the first column of the schedule opposite thereto."

Referring to the schedule, I find that the second group is described as "the London Hospital", and the hospital or group of hospitals which are designated as a teaching hospital in the right-hand column are these:

"The London Hospital, E.1 (including the Croft Home, Reigate, the Marie Celeste Annexe, Reigate, the Zachary Merton Annexe, Banstead, the London Hospital Annexe, Brentwood, and the Herman de Stern Convalescent Home, Felixstowe)."

They are all in one paragraph, and as a matter of fact all those mentioned in parentheses were really small branches of the London Hospital before these recent events. Then, secondly, I find mentioned Queen Mary's Maternity Home, Hampstead, N.W.3. It seems to me the result of that order is that the

London Hospital and Queen Mary's Maternity Home are designated as one teaching hospital—"a teaching hospital", as the order says—and, accordingly, that they form one hospital between them. Indeed, as expressed in s. 11 (8) of the National Health Service Act, 1946, there has been an amalgamation in the case of the London Hospital with Queen Mary's Maternity Home. Therefore, it seems to me that one of the events mentioned in cl. 8 of the deed has come into operation in the case of the London Hospital.

A In the case of the Poplar Hospital for Accidents, the matter is somewhat different, because it is not a teaching hospital under the new scheme, and different provisions of s. 11 apply in consequence. For instance, s. 11 provides:

B " (3) Every regional hospital board shall, within such period as the Minister may by direction specify, submit to the Minister a scheme for the appointment by them of committees, to be called hospital management committees, for the purpose of exercising functions with respect to the management and control of individual hospitals or groups of hospitals, other than teaching hospitals, providing hospital and specialist services in the area of the board. (4) The Minister may approve, with or without modifications, which may include additions or exceptions, any scheme submitted to him by a regional hospital board under the last foregoing sub-section, and it shall be the duty of the board to give effect to the scheme as approved by the Minister. (5) A regional hospital board may at any time, and if directed by the Minister shall within such period as may be specified in the direction, submit a new scheme providing for the modification of the scheme in force under this section, and the last foregoing sub-section shall apply to any such new scheme. (6) A hospital management committee shall be constituted in accordance with Part II of sched. III to this Act."

E It is to be observed, and it is very striking, that there is nothing whatever in those sub-sections corresponding to the provisions to be found in sub-s. (8), that any group so constituted under a scheme shall "be deemed for the purposes of this Act to be a single hospital"; indeed, there is not a word of any kind on that point at all. In the present case, a hospital management committee has been constituted in respect of a number of hospitals, and a scheme has been put forward which has received the approval of the Minister of Health, and, therefore, comes into effect. The scheme in question provides for a management committee of a certain character, and it deals with certain hospitals in a schedule.

F Nothing is very explicit in this scheme. On the point I have to consider, all it says in the schedule under the heading "Number and name of group" is "Bow". Whether it is Bow Group or Bow Hospital that it is to be called, I do not know. Then the next column is headed "Name of Hospital", and I find, first, St. Andrew's, secondly, St. Clements, and thirdly, Poplar, which is, undoubtedly, the old Poplar Hospital for Accidents. They, therefore, are grouped together under the number and name, "No. 8 Bow", and the same appears in the letter of the Minister of Health approving the scheme. I find, therefore, that there is a group consisting of three hospitals, of which the Poplar Hospital is one, but I am unable to see that there is any amalgamation in the same sense that there has been in the case of the London Hospital and in the sense which,

G I think, should be applied to the word (albeit with no technical meaning) in the settlement of 1905 that I have to consider. Certainly Poplar Hospital is grouped with two other hospitals for the purposes of management and administration by the committee, but that, it seems to me, is the extent of the nexus between the three, and I do not find, therefore, that there has been an amalgamation in respect of the Poplar Hospital for the purposes of the settlement of 1905. Consequently, so far as the Poplar Hospital is concerned, it is unnecessary to consider the matter any further.

H

In the case of the London Hospital there are questions to consider. Is the share of that hospital taken away, or may it be taken away, under the discretionary power by the trustees, and is such a trust, if it is intended to operate, valid and effectual?

I propose to dispose, first, of one argument which was put up (not, indeed, on behalf of the London Hospital, but by counsel for the Poplar Hospital), viz., that the provisions of the National Health Service Act, 1946, s. 60, overrode any provisions of the trust which would divert the funds in the events which have happened and would require the funds in question to be paid to the hospital management committee.

Section 60 provides:

"(1) Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day . . ."

Pausing there for a moment, the property subject to the trusts of the settlement would come within that description of property which is not transferred to the Minister, because under the somewhat peculiar provisions in respect of an endowment fund in s. 7 (10) of the Act of 1946, if the property in question is not held "by trustees solely for the purposes of that hospital", it is not vested in the Minister, and, therefore, comes within s. 60. In the case of the trust deed, the property is held on trust for a number of charities including this hospital, and, therefore, it does not fall within s. 7 (10), and is dealt with by s. 60, if it is within that section. Section 60 continues:

" . . . and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income—(a) in the case of a hospital designated as a teaching hospital or included in a group of hospitals so designated, to the board of governors of that teaching hospital; (b) in the case of any other hospital, to the regional hospital board for the area in which the hospital is situated or to the hospital management committee for the hospital or for the group of hospitals in which it is comprised. (2) Any sums paid as aforesaid to any such board or committee shall, so far as practicable, be applied by them for the purposes specified in the trust instrument."

It has been argued that the result of this section is to prevent any gift over from the hospital for which the property was held from taking effect, and, therefore, that the provisions of the settlement of 1905 are overridden by the provisions of this section. It would be a very strong thing, I may observe in the first place, for an Act of Parliament to provide that a condition of defeasance on certain events shall not take effect, and if an Act of Parliament is so intended to operate, one would expect, and, indeed, require, to find express words having that result, but I do not think that it is the intention of this section to do anything of that kind. The object of the section is simply to provide that the funds applicable to a hospital shall continue to be so applicable after the operation of the National Health Service Act, 1946, and provides for the body which takes the place of the former hospital (in whichever class it may fall) continuing the services in question. Consequently, it has no operation where, in the event of the hospital, for instance, becoming amalgamated, the trust no longer requires or authorises the property to be applied for the purposes of that hospital at all. It seems to me, in consequence, that s. 60 has no operation whatever in the circumstances of this case as regards the London Hospital.

A I return to the provisions of the settlement of 1905. It is to be observed that in the event of amalgamation, amongst other things, certain trusts are to come into operation. The discretionary trust created in the trustees enables them to apply the income of the share which the charity formerly obtained before amalgamation either to the same charity in its amalgamated situation, or to some other charity which is within the purposes of the settlement, or it may be applied—this is, of course, the fatal provision—not only for the purposes of charity, benevolence, the amelioration of human suffering, and the advancement of knowledge, but for such other objects or purposes of charity as the trustees think fit. It is, therefore, a trust which is not only for charitable purposes, but quite definitely (in view of the number of decisions of the court culminating in *Ministry of Health v. Simpson* (1) also for non-charitable purposes. The trustees have liberty to apply the income either to charity or not to charity, and in those circumstances the trust is not effective under the rules of our law. It may be it is void for uncertainty, but it seems to me also, in the events that have happened in this case, it is void under the rules against perpetuities.

B
C It was argued that the trust was saved by the final words of cl. 8, viz.: “as the trustees shall, in their opinion, consider to be most in accordance with the original desire and intention of the settlor.” Now the trustees, in my opinion, can only discover what the original desire and intention of the settlor was by looking at the recitals to the settlement. We find at the very beginning that the settlor enumerates the purposes which he has in mind, viz., “charity and benevolence and the advancement of knowledge especially in aid of human suffering.” So he has enumerated three purposes, any one of which is the purpose which he wishes to advance, and one of those purposes is “benevolence”. Benevolence is not a charitable purpose. So that reference back under the final provision of cl. 8 carries the matter no further at all.

D
E In some cases, a gift to a charitable purpose is limited in time, and in others a perpetual charitable purpose may be cut short by a defeasance provision contained in the trusts. It seems to me that, notwithstanding the words, “subject as hereinafter mentioned,” in cl. 4, the trusts which are contained in cl. 4 of the settlement are unlimited in time so far as that clause is concerned, and cl. 8, as it seems to me, contains what is plainly a defeasance clause, cutting short the trusts which would under the provisions of cl. 4 continue indefinitely. Therefore, there is a trust which may come into being in favour of a non-charitable purpose, amongst others, which need not come into being within the time allowed in the rule against perpetuities. Therefore, the trust is void under the rule against perpetuities, as was held in *Re Peel's Release* (2). The result of the defeasance clause being inoperative by virtue of the rule against perpetuities is that the original trust remains unimpaired, which was also the case in *Re Peel's Release* (2).

F
G Consequently, in the present case the original trust in respect of the share of the income payable to the London Hospital remains unaffected under the provisions of cl. 8, and continues in favour of the purpose for which it was intended, and, therefore, operates in favour of the purposes of the body at present carrying on the medical teaching work at the London Hospital.

Order accordingly.

Solicitors: *Bircham & Co.* (for the plaintiffs); *Hanbury, Whitting & Ingle; Farrer & Co.; E. F. Turner & Sons; Boyce, Evans & Sheppard; and Farman, Daniell & Co.* (for various defendants); *Treasury Solicitor.*

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re HAYES' WILL TRUSTS. DOBIE AND OTHERS *v.* BOARD OF GOVERNORS OF THE NATIONAL HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 16, 20, 21, 22, 1953.]

National Health Service—Hospital—Legacy to hospital—Discretion to trustees to divert gift if impracticable or inequitable in consequence of amalgamation—Effect of National Health Service Act, 1946 (c. 81).

By his will dated Sept. 28, 1938, a testator, who died on Nov. 13, 1940, bequeathed £80,000 to his trustees on trust for his wife during widowhood and subject thereto he directed that the legacy should fall into his residuary estate. He devised and bequeathed his residuary estate to his trustees on the usual trusts for sale and conversion, gave administrative directions as to the payments to be made thereout, and directed his trustees to divide the residue among such of twenty-nine charitable institutions which he named (and which included hospitals which were affected by the National Health Service Act, 1946), as should be in existence at his death, but so that any sum or property which under the terms of his will should fall into the residue after his death should be divided equally between such of the said institutions as should be in existence at the date when the same fell in. By the next following clause of his will, cl. 11, the testator provided: "And I expressly declare that my trustees may if they in their uncontrolled discretion think fit exclude any one or more of such institutions from sharing in the residuary trust funds or in any sum or property falling into the residuary trust funds under the terms of this my will or any codicil hereto after my death if in the opinion of my trustees it shall be impracticable or inequitable that such institution or institutions should so share in consequence of such institution or institutions having before my death or before such sum or property falls in as aforesaid as the case may be become amalgamated with some other institution or institutions with power for my trustees at their absolute discretion in the case of any such amalgamation to pay or hand over the share of the residuary trust funds or of such sum or property falling in as aforesaid by this my will given to any institution to the institution or institutions with which the same shall have become amalgamated." On Mar. 19, 1949, the testator's widow died without having re-married. The trustees wished to exercise their power under cl. 11 to exclude hospitals taken over by the State under the National Health Service Act, 1946.

HELD: no amalgamation had occurred by virtue of the National Health Service Act, 1946, so as to render it "impracticable" or "inequitable" that any hospital taken over by the State should benefit, and, therefore, the trustees had no power under cl. 11 to exclude those hospitals from participation.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 333.

Cases referred to:

- (1) *Re Walker's Settlement*, [1935] Ch. 567; 104 L.J.Ch. 274; 153 L.T. 66; Digest Supp.
- (2) *Wall v. London & Northern Assets Corpn.*, [1898] 2 Ch. 469; 67 L.J.Ch. 596; 79 L.T. 249; 10 Digest 1019, 7076.
- (3) *Re Bawden's Settlement*, ante, p. 1235.

ADJOURNED SUMMONS to determine (inter alia) whether the institutions or any of them, named in cl. 10 of the will of George Whitley Hayes, deceased, were on the death of the testator's widow in existence within the meaning of cl. 10 of the will and whether on the death of the testator's widow all or any and if so which of them had become amalgamated with some other institution or institutions within the meaning of cl. 11 of the testator's will.

By his will dated Sept. 28, 1938, George Whitley Hayes bequeathed £80,000 free of duty to his trustees on trust to pay the income therefrom to his wife, Eva Geraldine Hayes, during widowhood, and directed that subject thereto the legacy should sink into and form part of the testator's residuary estate. By cl. 10 the testator bequeathed his residue on trust to be divided and distributed between such of twenty-nine institutions, which the testator named, as should be in existence at his death but so that any sum or property which under the will fell into the residuary trust funds should be divided equally between such of the institutions as should be in existence at the date when the same fell in. By cl. 11, the trustees were given an uncontrolled discretion to exclude any one or more of such institutions from participation if, in the opinion of the trustees, it should be "impracticable or inequitable" that such institution or institutions should so share in consequence of having become "amalgamated with some other institution or institutions" in which case the trustees had absolute discretion to pay the share given under the will to the institution with which the same should have become amalgamated. On Nov. 13, 1940, the testator died and on Mar. 19, 1949, his widow died without having re-married. VAISEY, J., held that all the named charitable institutions were in existence at the date of the testator's death and at the date of the death of his widow, and the further question arose as to those charitable institutions which were hospitals whether, having regard especially to the National Health Service Act, 1946, any or all of them had become amalgamated with some other institution or institutions within the meaning of cl. 11 of the will of the testator.

After the summons was issued, two of the three trustees of the will died.

Harold Christie, Q.C., and Droop for the sole surviving trustee.

Sir Lynn Ungood-Thomas, Q.C., and H. E. Francis, J. G. Strangman, Q.C., and McMullen, Peter Foster, Winterbotham, J. A. Brightman, V. M. C. Pennington, and F. B. Marsh, for various charitable institutions.

Denys B. Buckley for the Attorney-General.

VAISEY, J.: This is a summons raising questions on the true construction of the will of the late Mr. George Whitley Hayes, which is dated Sept. 28, 1938. The date is important, and I emphasise it. The testator died on Nov. 13, 1940, and on Feb. 25, 1941, his will was proved in the Chester District Registry. The estate was a very large one, the net value being approximately £207,000. The testator appointed as his trustees three persons, Mr. Douglas Dobie, a solicitor of Chester, his (the testator's) nephew, William Warburton Hayes, and his cousin, John Higson Hayes, and they are defined in the will by the description "my trustees". The will was proved by those three executors and trustees, but only one of them is now alive, viz., Mr. John Higson Hayes, the sole surviving plaintiff in these proceedings. On Feb. 10, 1953, Mr. Dobie, the solicitor, died, being then aged ninety-one years, and Mr. William Warburton Hayes died a month afterwards, i.e., on Mar. 11, 1953, as the result of a motoring accident.

By his will, the testator bequeathed to his trustees £80,000, free of duty.

"Upon trust that they shall invest the same in any of the investments authorised by law for the investment of trust funds with liberty to vary the investments thereof from time to time and shall stand possessed of the said sum of £80,000 and the investments for the time being representing the same (hereinafter called 'the wife's trust legacy') upon the trusts following that is to say upon trust that my trustees shall during the life of my wife and so long as she remains my widow at their absolute discretion pay or apply the whole or any part of the income of the wife's trust legacy or if they shall from time to time think fit any part of the capital thereof to or for the maintenance and personal support or benefit of my wife . . . and subject to the foregoing trust the wife's trust legacy or such part thereof as shall not be applied under the foregoing trust and

so much of the income thereof as in the opinion of my trustees shall not be required for the purposes aforesaid shall sink into and form part of my residuary estate."

The testator's wife survived the testator and died on Mar. 19, 1949, without having re-married.

By cl. 10 of his will the testator devised and bequeathed all his real and personal estate not by the will otherwise disposed of

"unto my trustees upon trust that my trustees shall . . . sell call in and convert into money the same or such parts thereof as shall not consist of money and shall with and out of the moneys produced by such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and pay or retain the legacies bequeathed by this my will . . . and shall stand possessed of the residue of the said moneys and of any part of my estate retained unconverted and of the investments for the time being representing the same (hereinafter called 'the residuary trust funds') In trust to divide and distribute the same equally between and amongst such of the charitable or other institutions hereinafter named as shall be in existence at my death but so that any sum or property which under the terms of this my will or any codicil hereto falls into the residuary trust funds after my death shall be divided equally between such of the said institutions as shall be in existence at the date when the same falls in as aforesaid . . ."

Then the testator names twenty-nine charitable institutions. I think there can be no doubt that every one of them is a charitable institution, although the testator described them as being "charitable or other institutions". The testator declared that the receipts of the treasurers of the said institutions should be sufficient discharges to his trustees.

The wife being dead, the question was raised whether these twenty-nine institutions were in existence at the testator's death and the widow's death. I have answered that question in the affirmative, so far as it is necessary to answer it. Now we come to a clause of an extremely ambiguous nature, cl. 11. It is almost impossible to ascertain what the testator had in his mind when he wrote it. As the testator died in 1938, he cannot have had in his mind the National Health Service Act, 1946. The arguments in the case have turned almost exclusively on the effect of that Act, but the operations which were carried out by the National Health Service Act, 1946, were not regarded as imminent in 1938, and, in fact, I doubt whether they were discussed at all. The National Health Service Act, 1946, was largely prompted by, and originated from, what is known as the Beveridge Report, which resulted from an inquiry which took place during the war of 1939-45. The will provides by cl. 11:

"And I expressly declare that my trustees may if they in their uncontrolled discretion think fit exclude any one or more of such institutions from sharing in the residuary trust funds or in any sum or property falling into the residuary trust funds under the terms of this my will or any codicil hereto after my death if in the opinion of my trustees it shall be impracticable or inequitable that such institution or institutions should so share in consequence of such institution or institutions having before my death or before such sum or property falls in as aforesaid as the case may be become amalgamated with some other institution or institutions with power for my trustees at their absolute discretion in the case of any such amalgamation to pay or hand over the share of the residuary trust funds or of such sum or property falling in as aforesaid by this my will given to any institution to the institution or institutions with which the same shall have become amalgamated."

Then he repeats:

"And I declare that the receipt of the treasurer or other proper officer

of any such institution shall be a good and sufficient discharge to my trustees."

I think the words "of any such institution" must mean some institution with which the first-named institution shall be amalgamated.

A When the words of this clause are examined, they seem to me to be not far short of unintelligible. The trustees have to form an "opinion" that the sharing of a particular institution in the testator's residue is either impracticable or inequitable. What does "impracticable" mean? It means that something cannot be done. I looked at the OXFORD ENGLISH DICTIONARY and I do not think it throws very much light on the question. I looked at the well known CHAMBERS' TWENTIETH CENTURY DICTIONARY, and "impracticable" is defined as: "Not able to be done; unmanageable; stubborn". "Unmanageable" and "stubborn" do not come in here, so we are left with "not able to be done". What does "inequitable" mean? Again I refer to the latter dictionary, and the only definition given for that word is: "Unfair; unjust". In this court the word "equitable" is a word of the highest importance. The word "inequitable", which is the contrary of it, is that against which this court, by its ancient constitution, and, I hope, by its application of legal principles, is bound to strive. The trustees here have to form an opinion that something is "impracticable", i.e., it cannot be done, or is "inequitable", in the sense of being unfair or unjust. It is difficult to see how they can ever form such an opinion, because they cannot simply say: "We think this is impracticable" and snap their fingers at the court, saying that they have arrived at that agreement and that it is not for the court to cross-examine them on it. It is difficult also to see how they can form the opinion that anything is unjust or unfair, and that it is not for the court to ask them why. I think there has to be some ground or reason in the matter, and the preliminary is that the trustees should form an opinion that the participation of a particular charitable institution would be either impossible, or that such participation would be unjust and unfair. But, furthermore, it has to be impracticable or inequitable in consequence of an institution, having before the death or before the property falls in, become amalgamated with another institution or institutions. The trustees have to take the view that the institution has become amalgamated, and that the result is to make it either impracticable or inequitable that it should share in the testator's estate.

F The whole of the argument has centred round the National Health Service Act, 1946, and it is said that the status of the hospitals which are among these twenty-nine charities has been so changed by way of amalgamation, that it is no longer possible and no longer fair that the hospitals should share in the testator's estate. Very little argument was addressed to me on practicability, but a great deal of argument was addressed to me on the question of want of equity.

G It has been held in certain cases* to which I need not refer that a hospital affected by the Act is still a charity, and is still capable of being benefited as a charity. I cannot see how, disregarding all the other difficulties of cl. 11, it could possibly be inequitable, i.e., unfair or unjust, for an executor to assist in the carrying out of the statutory obligations. Occasionally—perhaps all too rarely—wealthy testators have bequeathed their fortunes to the relief of the National Debt, and I cannot see how anybody could say that such a gift is inequitable. I should have thought that it is praiseworthy and perfectly fair and just, according to the ordinary usage of the English language, and a nationalised hospital is just as much a charity and an object of bounty as it was before it was nationalised. If the testator had said: "In the event of an institution having before my death been taken over by the State, or become nationalised", or something of that kind, a very different position would have arisen. But I cannot see how a man accustomed to the use of the English

* See, for instance, *Re Frere*, [1950] 2 All E.R. 513; *Re Little*, p. 852 ante.

language, and applying his mind to this as a matter of serious consideration, could possibly say that any kind of amalgamation effected by the National Health Service Act, 1946, has made it either "impracticable" or "inequitable" that a nationalised hospital should share in the testator's bounty. The gift under cl. 10 is clear, and cl. 11 purports to stultify certain parts of it, by giving to the trustees the power of excluding a named charity from the testator's bounty. Unless I can be reasonably certain as to the meaning of cl. 11, I ought to leave the preceding gift unqualified. My view is that there has been no amalgamation of such a kind as to produce consequences of impracticability or inequity, and I think that is an end of the case.

I now turn to a very curious situation which arises in this case. These trustees were, one would have thought, entrusted with the most embarrassing, invidious and difficult task, but they are not only submitting to carrying it out if the court thought fit, but they are, with a very great amount of vigour and pertinacity, pressing me to say that this power is vested in them, or was vested in them, and is now vested in the sole survivor. They explain in an affidavit that they are anxious to have what I have described as this embarrassing, invidious and difficult task laid on them, because they would wish to exercise that power of exclusion in respect of any of the institutions which have been taken over by the State. They say that they take up that position because they are satisfied that the testator would have wished them to do so. How they can know that at this time of day, I do not know. The testator cannot have said anything in his lifetime to the effect that if there were a national health service, he would require his trustees to take that course, but these trustees are saying that they are "satisfied", not merely that they are inclined to think, that he would have wished them to do it.

I do not think that that is a proper consideration, except, possibly, as one of a number of considerations, which ought to influence the trustees if they have that power. Realising that, the trustees, in a later affidavit, say, in reference to the first affidavit:

"We were at the date of that affidavit and are of opinion that it will be inequitable that any institution which at the death of the testator's widow had become amalgamated with another or others in circumstances in which on and from the amalgamation the amalgamated institution became maintainable by the State should share in the legacy of £80,000 which the testator bequeathed to be divided equally between institutions which at the date of his said will and death relied on voluntary contributions for their support. We are, however, advised that whether the effect of the National Health Service Act, 1946, on all or any of the institutions referred to in para. 1 of the originating summons herein is such as to make the discretionary power of exclusion conferred by cl. 11 exercisable as regards such institutions or any of them is a question of law depending on the construction of the testator's will and the effect of the provisions of the said Act upon such institutions respectively."

So they realise that they have given a very strange reason for wanting to exercise this power, viz., because they are satisfied that the testator would have wished it. They now put it on a different ground, viz., that they do not like the idea of money going to the nationalised hospitals, and that they want to exclude them as far as they can. It was suggested to me—and I must say that I was somewhat influenced by it—that having regard to the reasons which they have given, the disclosure which they have made as to their mental state, and considering this very important and fiduciary power, if power it is, they ought to be, or the survivor ought to be, in some way controlled and that he should not simply be allowed to say: "I know the testator would have wished it, and I approve also, so I cut all these hospitals out". At any rate, as I think they have no such power, and the clause is not one which operates at all, it

is not necessary for me to say any more about that. I have throughout this case been a little surprised that the trustees should have actively pressed to be entrusted with this difficult task, and I am very glad to feel myself, not entitled, but obliged, to relieve them of any embarrassment in that regard.

We have had, of course, to consider the meaning of the word "amalgamation". The meaning of that word has been considered in *Re Walker's Settlement* (1) in which ROMER, L.J., quotes the definition found in BUCKLEY ON THE COMPANIES ACTS, 11th ed., at p. 487. ROMER, L.J., says ([1935] Ch. 583):

"It is a definition which, so far as it is a definition, I should like to adopt as my own; it is there stated as follows: 'The word "amalgamation" has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company'."

That is further emphasised by a quotation (ibid., 580) by LORD HANWORTH, M.R., of a statement of CHITTY, L.J., who said in *Wall v. London & Northern Assets Corpn.* (2) ([1898] 2 Ch. 481):

"I agree that the term has no fixed meaning in point of law. You have to see how the term is used in the particular document that has to be construed."

One has to see how the word "amalgamation" was used in this particular document, and, as I have pointed out, it has to be an amalgamation of such a character as to have the consequence of raising a case of impracticability and inequity. In my judgment, in this context, there has been no amalgamation either under the National Health Service Act, 1946, or in any other manner so as to have that consequence.

A decision of DANCKWERTS, J., in *Re Bawden's Settlement* (3), was brought to my attention. DANCKWERTS, J., had to consider this question of amalgamation, and the relevant words were:

"In case at any time hereafter any of the charities and institutions . . . shall attempt to alienate charge or anticipate its share or proportion of the annual income of the trust fund or shall cease to exist or shall become amalgamated with or absorbed in any other charity or institution . . .",

then certain consequences might follow. I have read the judgment of DANCKWERTS, J., and also the actual order which was made. If I had had to construe words so unqualified as those in *Re Bawden's Settlement* (3), I should, undoubtedly, without hesitation have followed that decision. But the words which I have to construe are very different, and I do not think that *Re Bawden's Settlement* (3) has helped me.

Apart from the National Health Service Act, 1946, I have also considered a private Act called the Queen Elizabeth Hospital for Children Act, 1942 (5 & 6 Geo. 6, c. vii). Under that Act, certain hospitals were amalgamated, but my conclusion is that neither under the National Health Service Act, 1946, nor under that private Act has there been, or was there at the date of the death of the testator's widow, which is the relevant date, any amalgamation in the sense envisaged in cl. 11 in the case of any of the institutions mentioned in cl. 10.

Declaration that none of the institutions named in cl. 10 of the will had become amalgamated with any other institution within the meaning of cl. 11, and that, accordingly, there was no power in the surviving plaintiff to exclude any of the said institutions from sharing in the legacy.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Brown, Dobie & Rogers*, Chester (for the trustee); *Linklaters & Paines*; *Waterhouse & Co.*; *Farrer & Co.*; *Trower, Still & Keeling*; *Boyce, Evans & Sheppard*; and *Hanbury, Whitting & Ingle* (for the defendants); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

ROBERTS v. ROBERTS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 22, 1953.]

Justices—Husband and wife—Maintenance order—Discharge—Evidence of matters available at original hearing—Admissibility—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

On Nov. 14, 1950, the wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. No allegation was then made by the husband that the wife had committed adultery. The husband now applied under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, for the discharge of that order on the ground that the wife had committed adultery. In support of his application the husband stated that when he went home after demobilisation in 1945 he saw and heard certain things as a result of which he was satisfied that the wife had been living in the matrimonial home with a certain man; that since Nov. 14, 1950, the man had continued to live in the same house as the wife; and that on an occasion since Nov. 14, 1950, the husband had accused the wife, in the presence of a witness, of living with, and being kept by, this man, and the wife, as she now admitted, had stood by and not denied this. It was contended by the wife that, by s. 7, the act of adultery on which the husband sought to rely could be proved only by evidence of matters which had occurred since Nov. 14, 1950.

HELD: although the words "upon fresh evidence" appeared in the first part of s. 7, they did not appear in, and were not to be read into, the second part of s. 7 under which the husband's application was made; accordingly, the husband's evidence of matters which had occurred prior to the original hearing, although not given at that hearing, was, nevertheless, admissible on the application to discharge the original order; on the facts the husband had proved his case; and, since the second part of s. 7 was mandatory in its terms, the order of Nov. 14, 1950, would be discharged.

Ramsdale v. Ramsdale (1945) (173 L.T. 393), applied.

AS TO THE DISCHARGE ON PROOF OF ADULTERY OF AN ORDER MADE UNDER THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACTS, 1895 to 1949, see HALSBURY, Hailsham Edn., Vol. 10, p. 841, para. 1343; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 724-726, Nos. 6922-6932.

FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 852.

Case referred to:

- (1) *Ramsdale v. Ramsdale*, (1945), 173 L.T. 393; 109 J.P. 239; 27 Digest, Replacement, 725, 6931.

APPEAL by the wife against an order of the Liverpool city justices dated Feb. 2, 1953.

On Nov. 14, 1950, the justices made an order in favour of the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. On Feb. 2, 1953, on the husband's application, the justices found that the wife had committed adultery and by virtue of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, they discharged the order of Nov. 14, 1950. The wife appealed.

Nance for the wife.

Pain for the husband.

LORD MERRIMAN, P.: It is clear that at the time of the making of the original order on Nov. 14, 1950, the husband had knowledge of his wife's

association with a particular man. It is clear, also, that he believed that that knowledge was sufficient to prove adultery, and that he did not raise that issue at the time of the making of the order. If he had done so, and if the justices had found that the association with this man was and had been an adulterous association, they would have had no jurisdiction to make the order in favour of the wife, because the Summary Jurisdiction (Married Women) Act, 1895, s. 6, provides that:

A "No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct condoned to such act of adultery."

B In other words, on Nov. 14, 1950, the husband stood by and allowed the order to be made without raising that issue. Manifestly, if, after that, he had applied for leave to appeal out of time against that order, he would have been confronted by that very difficulty, that he had stood by. It is not necessary to decide what would have happened. He is to be assumed, for the purposes of this case, to have known all that it was relevant for him to know at the time the original order was made.

C The present application is made under the Summary Jurisdiction (Married Women) Act, 1895, s. 7. There are two parts of that section. The first provides that the court in which the original order was made,

D "... may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any [order made under the Act], and may upon any such application . . . increase or diminish the amount of any weekly payment ordered to be made . . ."

E provided that the limit, which is now £5, is not exceeded. By the Money Payments (Justices Procedure) Act, 1935, s. 9, in dealing solely with increase or diminution of the amount of a weekly payment, the words "upon fresh evidence", with their well-known significance, are no longer to apply. But those words continue to apply to any other attempt under s. 7 of the Act of 1895 to alter, vary, or discharge any order; and they mean, as has been said repeatedly, evidence of something which has happened since the former hearing, or has come to the knowledge of the party applying since the hearing, and could not by reasonable means have come to his knowledge before that time. In contrast with that part of the section, the concluding words of the section, under which this present application is made, read as follows:

F "If any married woman upon whose application an order shall have been made under this Act or the Acts mentioned in the schedule hereto . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

G In the first part of that section the jurisdiction of the justices is discretionary and permissive, whereas, in the second part, with which we are concerned, the making of the order of discharge is mandatory if either of two things is proved to have happened—either that since the making of the order the wife has resumed cohabitation with her husband, or that since the making of the order she has committed an act of adultery. It is plain that the act of adultery referred to must be one which has been committed since the making of the order, because it relates to the discharge of an order "which shall have been made" on the application of a wife.

H In this case the evidence adduced before the justices in support of the charge that the wife has, since the making of the order, committed an act of adultery, begins with the association between the wife and the man mentioned, of which the husband knew before the order was made on Nov. 14, 1950. His case was

that when he was demobilised in 1945 and went home, he found a state of things prevailing which satisfied him that his wife was living in the matrimonial home with the man mentioned, and, without going into unnecessary detail, he gave evidence of circumstances tending to show that that was so. That evidence, which, as I have said, was available at the time of the first hearing, was given on the application to discharge the original order, but it was supplemented by the fact that from 1945 to that day the man in question had continued to live in the same house as the wife in circumstances which gave ample opportunity of indulging a guilty affection, if that existed between them. That part of the story could not have been told at the time of the first hearing, for it then lay in the future; but it was to the association as a whole that the husband asked the justices to look in deciding whether, within a short time of the hearing, even, it may be, on the night before the hearing, adultery was being committed by his wife with a man for whom it was alleged she had had a guilty affection even before the husband came home from the war in 1945. Further, the wife admitted that she had only obtained the order of Nov. 14, 1950, at the instance of the National Assistance Board, because she was drawing national assistance.

Since the making of that order she had tried to enforce payment by the husband of arrears, and on that occasion the husband had made some remark to her, in the presence of a nephew who was also living in the same house as the wife, that she had "a nerve" to try to enforce orders against him when she was living with, and being kept by, this other man. The evidence is, and it has been accepted, that she made no protest against that remark, and that the nephew said something to the effect that it was no business of his. In other words, for what it was worth, and in the circumstances, I think it was worth something. She stood by when, as she admitted to the justices, she knew that her husband was accusing her of continuing an adulterous association with this man, and made no attempt to deny it. We are faced with the argument that because the words "upon fresh evidence", with the implication which has been attached to them, are used in the first part of s. 7, they must be read and imported into the latter part of the section, with which we are dealing. We have asked in vain for any authority for that proposition. None has been forthcoming, in spite of the careful argument which has been addressed to us by counsel for the wife. Moreover, I doubt whether the draftsman would have been artistic if he had actually put the words into the second part of the section, because the very acts with which he is dealing (resuming cohabitation, and committing adultery, after an order), must, in the nature of things, have happened since the making of the order. What is really argued is that, the act of adultery on which it is sought to rely being itself a fresh act, it can only be proved by evidence of matters which have occurred since the making of the order. I am unable to accept that proposition, which, in my opinion, flies in the face of an authority by which we are bound: *Ramsdale v. Ramsdale* (1) (173 L.T. 393) where

"[the wife] applied to the justices for an order on the ground of . . . her husband having deserted her, and an order was made in her favour on Mar. 11, 1942. In 1945 [the husband] applied to the justices to discharge the order, on the ground that since it was made [the wife] had been guilty of adultery. This charge was based, first on the suggestion that she was conducting, and indeed continuing, an adulterous association with a named man . . . Held, (1) it was clear that what the justices had to deal with was the question: Ay or no, had adultery been committed since the date of the making of the order? But that did not mean, and should not be taken to mean, that that excluded evidence of the nature of the association between [the wife] and the man named before the making of the order . . ."

That part of the headnote is taken from my own judgment (*ibid.*, 394). In

my opinion, a short passage from the judgment of WALLINGTON, J., puts the matter, if I may say so, so neatly, and in a way which so completely covers the case with which we are dealing, that I adopt it as part of my judgment in the present case. He said (*ibid.*, 395):

A " . . . I do think it is desirable that emphasis should be placed upon the impossibility of dealing with a case of this kind, where the inference of adultery, if it is to be drawn at all, must depend upon proof of inclination and opportunity . . . unless the whole of the story is told almost from beginning to end. It is quite conceivable that you might have a case in which the whole of the evidence of inclination is founded upon facts that took place before the original hearing, and the whole of the evidence of opportunity is founded upon facts that are proved to have taken place after the original hearing, so that you get one half of the case before and the other half after the original hearing. Therefore it is obvious in a case of that sort that if you only have evidence of the facts that have taken place after the original hearing you could not hope to make out a proper case . . . "

B Although it is true that in this case there is some evidence of a guilty affection after the original hearing, and some evidence of opportunity before the original hearing, that passage, in my opinion, is decisive of the issue in this case. I think this appeal fails, and should be dismissed. ●

C COLLINGWOOD, J.: I agree. The issue here under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, is whether adultery has been committed since the order—not on any specific occasion, but at any time since D the order. Direct evidence of such adultery is not required in this more than in any other case. The question is: Can the commission of adultery be inferred from circumstances which lead to it, by fair inference, as a necessary conclusion? Those circumstances must include a large number of matters—familiarity, suspicious conduct, admissions and the like. But the inquiry covers the whole association between the wife and the particular man, as forming E the background against which the significance of their acts is to be judged. In my opinion, the order of the court does not and cannot be taken to create an oblivion of all that has gone before, and that is what we have been asked to say. In my opinion, this case is covered by *Ramsdale v. Ramsdale* (1). The quotation from the judgment of LORD MERRIMAN, P. (173 L.T. 394) and the part of the judgment (*ibid.*, 395) of WALLINGTON, J., to which my Lord has F referred, entirely cover the facts in this case. I would only add that I share the difficulty of LORD MERRIMAN, P., in importing the requirement of fresh evidence into the final part of s. 7 of the Act of 1895 in regard to matters which, ex hypothesi, cannot take place until after the making of the order. I agree that this appeal should be dismissed.

Appeal dismissed.

G Solicitors: *Dubovie, Freeman & Co.*, agents for *A. D. Abrahamson & Co.*, Liverpool (for the wife); *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

Re TIMSON (*deceased*). HARPER AND OTHERS *v.* TIMSON
AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 28, 29, 1953.]

Administration of Estates—Real estate—Liability for payment of legacies—Intention of testatrix—Gifts by will of pecuniary legacies and their gift to daughter of real estate and residue of personal estate (after “payment thereof” of debts, funeral and testamentary expenses, and death and legacy duties)—Substituted gift, by codicil, to daughter’s sons in event of daughter predeceasing testatrix—Real and personal estate treated in codicil as single entity—Daughter surviving testatrix—Administration of Estates Act, 1925 (c. 23), s. 34 (3), sched. I, Part II, para. 2.

By her will, dated May 31, 1949, the testatrix appointed executors and trustees, and, after making bequests of specific articles and giving a number of pecuniary legacies, all free of duty, she declared: “I devise all my real estate and bequeath the residue of my personal estate unto my trustees upon trust (after payment thereof of my just debts funeral and testamentary expenses death and legacy duties) for my daughter . . .” By a codicil, dated Nov. 30, 1951, the testatrix declared that, in the event of the daughter predeceasing her, “I devise my . . . real estate and bequeath the residue of my personal estate unto my trustees” on trust for sale and conversion “and to stand possessed of the net proceeds of such sale calling in and conversion and of my ready money in trust after payment thereof of my just debts funeral and testamentary expenses death and legacy duties to divide the residue thereof equally between” the daughter’s two sons. The testatrix died on July 16, 1952. The daughter survived her. After the funeral expenses and debts had been paid and the specific legacies handed over, the assets, apart from the real estate, were insufficient to pay the pecuniary legacies. The daughter claimed that the legacies were payable only out of the personal estate and that the real estate passed to her intact.

HELD: by the codicil the testatrix showed that she regarded her estate as a single indivisible entity, and, therefore, she could not have intended in the will to keep the real estate as a separate item from the personalty; accordingly, in considering the payment of the pecuniary legacies she did not contemplate any differentiation between the realty and the personalty, nor did she contemplate that the real estate should go intact to the daughter; and, therefore, the pecuniary legacies were payable out of the whole estate, both real and personal.

Re Rowe ([1941] 2 All E.R. 330), distinguished.

AS TO LIABILITY OF REAL ESTATE FOR PAYMENT OF LEGACIES, see HALSBURY, Halsham Edn., Vol. 14, pp. 384-386, paras. 713-717; and FOR CASES, see DIGEST, Vol. 23, pp. 496, 497, Nos. 5621-5639.

Cases referred to:

- (1) *Re Rowe*, [1941] 2 All E.R. 330; [1941] Ch. 343; 110 L.J.Ch. 145; 165 L.T. 76; 2nd Digest Supp.
- (2) *Greville v. Broune*, (1859), 7 H.L. Cas. 689; 34 L.T.O.S. 8; 11 E.R. 275; 44 Digest 576, 3942.
- (3) *Withers v. Kennedy*, (1833), 2 My. & K. 607; 3 L.J.Ch. 29; 39 E.R. 1076.
- (4) *Re Thompson*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; Digest Supp.
- (5) *Re Ridley*, [1950] 2 All E.R. 1; [1950] Ch. 415; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the pecuniary legacies bequeathed by the will of the testatrix, Amy Ellen Timson, were payable exclusively out of her personal estate or whether they were also payable out of her real estate.

The testatrix, after giving, free of duty, pecuniary legacies which amounted to about £300, devised and bequeathed all her real estate and the residue of her

personal estate on trust ("after payment thereof" of her debts, funeral and testamentary expenses, and death and legacy duties) for her daughter, Mrs. Tait. After payment of the debts and funeral expenses, the assets, apart from the real property, were insufficient to pay the legacies. The daughter contended that she was entitled to the real property and that the legacies were payable only out of the personal estate.

Teague for the trustees.

A *D. A. Shirley* for the pecuniary legatees.

J. W. Mills for the daughter, the residuary legatee.

VAISEY, J.: This case raises a short, but not easy, question of construction. The testatrix, Mrs. Amy Ellen Timson, made her will on May 31, 1949, and thereby she appointed two persons, who are the plaintiffs in this action, to be executors and trustees. She then bequeathed, free of duty, certain specific legacies (e.g., a watch, a tea service, and pictures) and, also free of duty, a number of pecuniary legacies, mainly to grandchildren. She also bequeathed free of duty to a grand-daughter one hundred shares in a company. Then comes the final clause of the will, which is in these terms:

C "I devise all my real estate and bequeath the residue of my personal estate unto my trustees upon trust (after payment thereof of my just debts funeral and testamentary expenses death and legacy duties) for my daughter . . . Margaret Amy Lawson Tait for her own absolute use and benefit."

D By a codicil dated Nov. 30, 1951, the testatrix recited what she had done by the final clause of her will, quoting it with literal accuracy. She then declared:

E "... should my daughter . . . predecease me then I devise my said real estate and bequeath the residue of my personal estate unto my trustees upon trust—[for sale and conversion]—and to stand possessed of the net proceeds of such sale calling in and conversion and of my ready money in trust after payment thereof of my just debts funeral and testamentary expenses death and legacy duties to divide the residue thereof equally between Sandy Lawson Tait and James Lawson Tait the sons of my daughter . . . as tenants in common."

In all other respects she confirmed her will.

F The testatrix died on July 16, 1952, and her will was proved on Mar. 20, 1953. The daughter, the residuary legatee, survived the testatrix, so that the codicil was unnecessary and had no effect, but, in my judgment, it is material as throwing some light on the meaning of the will. The funeral expenses and debts of the testatrix have been paid, and the specific legacies bequeathed by her will have been handed over. The assets of the testatrix after those operations consist of the sum of £223 18s. 9d. cash, some household furniture and effects valued at £168 12s., and, in addition, real property, viz., a house, of the value of about £1,800. Unfortunately, the assets are insufficient, without resorting to the proceeds of the sale of the house, to pay the pecuniary legacies bequeathed by the will. The trustees were advised that the proceeds of the house should be resorted to for the purpose of paying the legacies. The daughter claimed that the legacies were payable only out of the testatrix's personal estate and that she was entitled to the real property, i.e., the house. She refused to withdraw her claim, and so the matter comes before me for decision.

H The daughter was justified, of course, in seeking the decision of the court in regard to her rights, and she has raised a question not without difficulty. The difficulty, I think, arises chiefly, if not exclusively, from a decision of FARWELL, J., in *Re Rowe* (1). In that case a testator by his will, after giving certain pecuniary legacies, directed as follows: "I devise all my real estate and bequeath all the residue of my personal estate" to two named persons "in

equal shares". Those words are similar to the words in the case which is before me, except that in *Re Rowe* (1) there was no direction "to pay thereout"—whatever that may mean—the just debts, funeral and testamentary expenses, and death and legacy duties of the testatrix. FARWELL, J., held that the law in force before 1926 in regard to the payment of pecuniary legacies out of real estate had not been altered by the Administration of Estates Act, 1925, s. 34 (3), and sched. I, Part II, para. 2, and that, accordingly, as the testator had not made the residue a mixed fund or given his real and personal estate as one mass, so as to bring into operation the rule in *Greville v. Browne* (2), the pecuniary legacies were payable only out of the personality. At first sight *Re Rowe* (1) seemed to me to be so near the present case that I should be rash in not following it. Far be it from me to say that the decision in *Re Rowe* (1) is incorrect, and I do not think it is necessary for me to say that; but it has been criticised and, indeed, doubted. I need not refer to the doubts or the manner in which they were expressed. It suffices to say that the case is not one which has been universally approved, and the disapproval to which it has given rise is largely due to the unwillingness of those who administer and interpret the law to go back to the old history which was generally thought to have become obsolete owing to the passing of the various property Acts of 1925.

I need not refer to many of the other cases which were cited to me. In *Withers v. Kennedy* (3) a testator, after a specific bequest of part of his personal estate, devised and bequeathed all his freehold, copyhold, and leasehold estates, and all the residue of his personal estate and effects, after payment of his just debts and funeral expenses, to trustees, their heirs, executors, and administrators, on certain trusts. SIR JOHN LEACH, M.R., held that the real estate was charged with the payment of debts. In his short judgment, he based his conclusion, I think, largely on the fact that the leasehold properties were combined with freehold. That circumstance was regarded as sufficient, in that case, to charge the debts on the real estate. In *Re Thompson* (4) CLAUSON, J., held that the law in force before the Administration of Estates Act, 1925, as regards the primary fund for payment of legacies as between the personal and real estate, had not been altered by s. 34 (3) and sched. I, Part II, to the Act, that the personal estate must be treated as primarily liable, and that recourse would not be made to the real estate until the personal estate had been exhausted. In *Re Ridley* (5) HARMAN, J., held that there was enough in the will in question to alter the order of application of assets laid down by s. 34 (3) and sched. I, Part II, to the Act of 1925, as it showed an intention that the realty should not be resorted to for the payment of legacies and testamentary expenses until the personality was exhausted. It must be remembered that s. 34 (3) of the Act of 1925 is subject to the provisions contained in a will, which may displace the order of application of assets for which the sub-section provides in the normal case.

I confess that the decision in *Re Rowe* (1) has given me a good deal of anxiety. At one time I thought that I should be obliged to follow it, but, in my view, that case can be distinguished, if to distinguish it is necessary, by the circumstance that the testatrix, by her codicil, has shown that she regarded her estate as a single indivisible entity. She uses, it is true, the same words in the codicil as in the will, viz., "I devise my . . . real estate and bequeath the residue of my personal estate", but she gives the property on trust for sale and on trust to divide the proceeds between the beneficiaries who are there named, the two sons of her daughter. It seems to me that it is almost incredible to regard the testatrix as having been careful, on the one hand, to keep the real estate in existence as a separate item when she was leaving it to her daughter, and, on the other hand, to throw it in and make it one fund with the personality when she was dealing with the substituted provisions for the daughter's sons, and I am inclined to the view that she never contemplated any differentiation between her realty and personality when she was considering the payment of the pecuniary

legacies. Whether "thereout", in the phrase "after payment thereout" refers only to the residue of the personalty, or whether it refers to the realty and the personalty, is difficult for me to say as a matter of certainty, but I am inclined to think that, after the gift of both types of property, the word "thereout" refers to both and not to the one, i.e., it refers to the real estate and the personal estate, and not merely to the residue of the personal estate. It may be said that, in the list of payments to be made "thereout", she says nothing about legacies.

- A Whether she thought that the residue of her personal estate meant the residue of the personal estate less the pecuniary legacies, I do not know, but I am inclined to think that the general scheme of the will indicates an intention on the part of the testatrix that the legacies have to be paid somehow. I do not think that she ever contemplated that the real estate should go intact to the daughter, and I think that the advice which the trustees were given as regards the proper way of administering the estate was, after all, correct. Accordingly, I must declare that the pecuniary legacies bequeathed by the will are payable out of the whole estate, both real and personal, of the testatrix, along with the other expenses of administration, including the costs and expenses of the trustees, an expression which will cover all their proper charges, and the costs of the defendants to be taxed as between solicitor and client.

- C *Order accordingly.*
Solicitors: *Peachey & Co.*, agents for *Darnell & Price*, Northampton (for the trustees and pecuniary legatees); *Jaques & Co.* (for the residuary legatee).
[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

D NOTE.

STARKIE v. STARKIE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 30, 1953.]

- E *Justices—Husband and wife—Appeal—Failure of justices to supply to High Court statement of reasons for their decision—Questions directed to justices—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3).*

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 71 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 231.

- F Case referred to:
(1) *Sullivan v. Sullivan*, [1947] P. 50; 111 J.P. 27; 27 Digest, Replacement, 734, 7023.

APPEAL by the husband against an order of the justices for the Cockermouth petty sessional division of Cumberland, dated Aug. 10, 1953.

- G On July 24, 1953, the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her on July 20, 1953, and that he had wilfully neglected to provide reasonable maintenance for her and the infant child of the marriage from the same date. On Aug. 10, 1953, the justices dismissed the charge of desertion, but found proved the charge of wilful neglect to maintain, and made an order in favour of the wife. The husband appealed.

- H *Sneade* for the husband.
D. R. Ellison for the wife.

LORD MERRIMAN, P.: When the justices were, in due course, asked to give the reasons for their decision, their clerk sent the following statement:

"I hereby certify that the reason given by the [justices] for their decision in this matter on Aug. 10, 1953, was that the [husband] had neglected to maintain the complainant and child."

This is tantamount to saying: "We find wilful neglect to provide reasonable maintenance for the wife and child proved because we find that he has wilfully neglected them." This forces me to speak plainly, not, I regret to say, for the first time during the present sittings of this court, though this is by far the most glaring instance of what I meant in *Sullivan v. Sullivan* (1) (to which I refer the justices and their clerk), where I said ([1947] P. 51) that justices

"... are entitled to make the order, or decline to make the order, without giving reasons, but they are bound to give this court, in the event of an appeal, a proper and sufficient statement of the reasons upon which their decision was based."

I went on to say, in what I hope were unmistakable terms, that the failure to do so was a defiance of this court and a dereliction of duty. I also said (*ibid.*, 52):

"... I wish to say quite plainly that if this court is treated in this way again after this warning, it may be necessary for us to consider what powers we have to ensure that the parties are not put to unnecessary expense owing to dereliction of duty on the part of justices' clerks."

I will set out the questions to which we require a full answer before we decide this appeal. They are as follow:

"(i) In respect of the first parting (from about Aug. 31, 1952, to July 11, 1953) did the justices accept the evidence of the husband in cross-examination by the wife's solicitor that he agreed to pay maintenance, and, if so, at what rate per week if the wife was (a) working or (b) not working, respectively ?

"(ii) Did the justices accept the evidence of both the husband and the wife that the husband paid maintenance at the rate of £4 10s. per week between the resumption of cohabitation on July 11, 1953, and July 20, 1953, the date of the present parting ?

"(iii) On what grounds was the wife's complaint of desertion in respect of the present separation dismissed ? (a) What did the justices find was the nature of this parting, and on what evidence did they base their finding ? (b) If the justices found that the parting was consensual, did they find that there was any agreement (i) expressed, or (ii) implied, that the husband should pay maintenance for the support of the wife and/or the child ? (c) If so, how much ? Note (which applies to the whole question) : A full statement of the grounds for this answer is required. (d) After the parting on July 20, 1953, did the husband pay the wife any maintenance in respect of herself and/or the child, and, if so, how much respectively ? (e) On what ground was the wife's complaint of July 24, 1953, that on and after July 20, 1953, the husband had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child held to be proved ? Note: Repeat the note to question (iii)."

From these questions it will be understood that the combination of (i)—the dismissal of the complaint of desertion—with (ii)—a finding of wilful neglect to provide reasonable maintenance—raises issues which require careful consideration. We have no reason at present to believe that they have received any consideration at all. From the fact that both sides in this appeal were assisted it follows that a certain unnecessary expenditure of public money has resulted owing to the defiance of this court by the justices and their clerk in the respects that I have mentioned. On the return of the answers to these questions the justices will be given the opportunity, if they wish, to be heard by counsel on the question what, if any, order we have power to make regarding this waste of costs.

COLLINGWOOD, J.: I agree.

Solicitors: *Beachcroft & Co.*, agents for *Curwen & Co.*, Workington (for the husband); *Speechly, Mumford & Craig*, agents for *Paisley, Falcon & Highet*, Workington (for the wife).

A.T.H.

CULLINANE v. BRITISH "REMA" MANUFACTURING CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
October 23, 26, 27, 1953.]

Warranty—Breach—Damages—Sale of machine—Breach of warranty of performance—Option of buyer to claim capital loss or loss of profit.

Costs—Payment into court—Claim and counterclaim—Award on claim more than payment in—Award reduced by set-off to less than payment in—Discretion of court—No costs after payment in—R.S.C., Ord. 22, r. 6.

A The defendants sold to the plaintiff for £6,578 a clay pulverising and drying plant, warranting that the plant would be capable of producing dry clay powder at the rate of six tons per hour. The plant supplied to the plaintiff complied with the specification, but it produced powder at the rate of only two tons per hour, and it was, therefore, commercially useless to the plaintiff. The plaintiff now claimed damages for breach of warranty, and computed the damage suffered as (i) the loss of capital, being the difference between the cost of the plant, buildings to house it, and ancillary plant, and their estimated break-up value, (ii) interest on gross capital expenditure, and (iii) loss of profit for three years, arrived at by allowing running costs and expenses and also depreciation at ten per cent. per annum of the original capital outlay (the estimated life of the plant being ten years), and a sum for interest on capital. The defendants counterclaimed £1,078, the balance of the purchase price, and paid £10,000 into court. At the trial the plaintiff was awarded under (i) (£7,370 1s. 5d., under (ii) £1,608 4s. 9d., and under (iii) £8,913 1s., making a total of £17,891 7s. 2d., from which amount £1,078 on the counterclaim was deducted, making a total award of £16,813 7s. 2d. On appeal by the defendants,

D HELD: (i) (MORRIS, L.J., dissenting) where a person obtained a machine which was mechanically in accordance with the order given, but was unable to perform a particular function which it was warranted to perform, he might adopt one of two courses—he might either recover the capital cost incurred, less anything obtained by disposing of the material that he got, or make his claim on the basis of the profit he had lost because the machine fell short in its warranted performance; by stating that his claim for lost profit was limited to three years, and, in computing the profit, making due allowance for depreciation, the plaintiff did not become entitled to claim both loss of capital and loss of profit; and, therefore, he was only entitled to recover the sums awarded under (ii) and (iii), totalling £10,521 5s. 9d.

E (ii) in the circumstances the fair order was that no costs should be paid by either party after the date of payment into court.

AS TO THE MEASURE OF DAMAGES IN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 121-133, paras. 151-170; and FOR CASES, see DIGEST, Vol. 17, pp. 130-135, Nos. 380-412.

Cases referred to:

- (1) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (2) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest 93, 101.

H APPEAL by the defendants from an order of His Honour J. D. CASSWELL, Q.C., Official Referee, dated Apr. 1, 1953.

The plaintiff claimed damages for breach of warranty on the sale of a clay drying and pulverising plant. In his statement of claim he alleged:

"(1) By a contract made in the year 1947 the defendants agreed to sell to the plaintiff and the plaintiff agreed to purchase a pulverising and

drying plant at a price of £5,460, the defendants reserving the right to make an additional charge if their costs were increased from date of quotation to date of dispatch, as a result of which an additional charge was in fact made of £1,118 . . . (3) By the said contract the defendants expressly or alternatively impliedly warranted and agreed that the said plant should be capable of handling the plaintiff's clay known as Wareham Ball clay containing up to twenty per cent. to twenty-two per cent. moisture, the said clay to be cut, dried and ground so as to produce a dry clay powder containing approximately two per cent. final moisture at the rate of six tons per hour."

It was, further, alleged that the plant was delivered on or about Apr. 1, 1950, that the plant did not produce a dry clay powder at the rate of six tons per hour, that the defendants thereby were in breach of the warranty, and that the plaintiff had in consequence suffered damage, particulars of which were set out as follows:

Particulars of Damage

- A. Cost of buildings erected and work done by the plaintiff to house, support, accommodate, and generally be ancillary to the plant supplied by the defendants

Total cost	...	...	...	...	£4,559	1s.	5d.
<i>Subtract</i> estimated break-up value of buildings	...	...	...	...	£2,000	0s.	0d.
					£2,559 1s. 5d.		

- B. Cost of plant supplied by the defendants £6,578 0s. 0d.

<i>Subtract</i> estimated residual value of the plant	...	...	...	...	£3,289	0s.	0d.
					£3,289 0s. 0d.		

- C. Cost of associated and ancillary plant and charges—

[Items] Total cost	...	...	...	...	£3,343	0s.	0d.
<i>Subtract</i> estimated residual value of plant	...	...	...	...	£1,671	0s.	0d.
					£1,672 0s. 0d.		

- D. Interest on capital at four per cent. from Apr. 1, 1950, to Dec. 15, 1951 (and continuing until settlement [of claim for damages])

A.	...	...	...	...	£4,559	0s.	0d.
B.	...	...	...	...	£6,578	0s.	0d.
C.	...	...	...	...	£3,343	0s.	0d.
					£14,480 0s. 0d.		

- Subtract* interest at four per cent. for the same period on the balance of the purchase price

...	...	...	...	£1,078	0s.	0d.
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£13,402 0s. 0d.

On which interest is £915 16s. 0d.

E. Loss of profit.

(a) Per annum.

Receipts from warranted output of
six tons per hour on a forty-seven
hour week: 14,664 tons per annum
at £1 17s. 6d. per ton £27,495 0s. 0d.

Subtract

Depreciation at ten per cent. and
maintenance at five per cent. on
plant and buildings (on £14,480)...

£2,172 0s. 0d.

Running costs £6,433 2s. 10d.

Office expenses £1,030 0s. 0d.

Interest on capital £579 4s. 0d.

£10,214 6s. 10d.

Estimated net profit per annum ... £17,280 13s. 2d.

(b) From Apr. 1, 1950, to Dec. 15, 1951

and continuing £29,521 2s. 6d.

£37,956 19s. 11d.

Subtract balance of the purchase price
of the plant outstanding and due
from the plaintiff to the defendants...

£1,078 0s. 0d.

£36,878 19s. 11d.

In reply to a request for further and better particulars, the plaintiff stated, inter alia, that under E. (b) the words "and continuing" covered the period from Dec. 15, 1951, to the date of the trial of the action.

By their defence the defendants denied the allegations in para. 3 of the statement of claim, paid £10,000 into court, and, inter alia, alleged that the plaintiff had failed to mitigate the damage in that he had failed to take steps to procure other plant. By way of set-off and counterclaim the defendants pleaded that there was due and owing to them from the plaintiff the sum of £1,078 the balance of the purchase price, and they counterclaimed £1,078, alternatively, as damages.

On Oct. 24, 1952, it was ordered that the action be heard by His Honour J. D. CASSWELL, Q.C., official referee. In January, 1953, the defendants paid £10,000 into court. On Apr. 1, 1953, the official referee found that the plaintiff was entitled to the following sums:

Under A., £2,559 1s. 5d.; under B., £3,289 0s. 0d.; under C., £1,522 0s. 0d.; under D. (calculated to Apr. 1, 1953) £1,608 4s. 9d.; and under E., £8,913 1s. 0d.—Total, £17,891 7s. 2d. Less sum counterclaimed by defendants, £1,078 0s. 0d.—£16,813 7s. 2d.

The official referee gave judgment in favour of the plaintiff for £16,813 7s. 2d. and awarded him five-sixths of the costs of the action. The defendants appealed, and the plaintiff cross-appealed asking that the estimation of damages for loss of profit be carried forward to the date of judgment on the appeal.

Wilson, Q.C., Megaw, Q.C., and Summerskill for the defendants.
Raeburn, Q.C., and E. V. Falk for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: This appeal relates only to the proper measure of the damages which flow from what has been found to be a breach of warranty in regard to certain plant manufactured by the defendants and supplied to the plaintiff. It is, in my judgment, important to have clearly

in mind the nature of the contract and, particularly, of the warranty. The plant, as I understand, was built according to a detailed specification and there is no doubt that as supplied it strictly conformed with the specification. Unfortunately, however, as the official referee found, it did not satisfy the warranty, because the machine, although capable of handling the plaintiff's clay and of cutting, drying and grinding it so as to produce a dry clay powder, was not capable of producing it at the rate of six tons per hour, and the difference in rate, commercially speaking, was the difference between a profitable and an unprofitable commercial venture. A

[HIS LORDSHIP referred to the particulars of damage and continued:] It is, I think, obvious that in respect of plant for which the purchase price was £6,578 and which was to be used in an enterprise which seems (from my reading of the learned official referee's judgment) to have been of a speculative character, the sum of £36,878 19s. 11d. was a large sum to claim as damages for loss of profit, and the total amount awarded turned out to be considerably less, namely, £16,813 7s. 2d. That reduction is attributable almost entirely to a reduction of the claim for loss of profit under E., the award for which amounted to £8,913 1s. Summarising the award, it is made up of the three items under A., B. and C., representing loss of capital, together amounting to £7,370 1s. 5d.; the sum of interest on the gross capital expenditure (£1,608 4s. 9d.); and the loss of profit (£8,913 1s.), there being deducted the unpaid balance of the purchase price of £1,078. B C

The argument of the defendants in this court has been that the award involves giving damages twice to the plaintiff. The machine was made precisely according to the specification. It was delivered and is now in the plaintiff's possession and is in fact, I understand, working, though it does not perform its productive function in the way that was warranted. The principle on which damages for breach of contract are awarded has been many times stated and was carefully considered by ASQUITH, L.J., in delivering the judgment of this court in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (1). The passages from that judgment which we have read are expository of the original principle laid down in *Hadley v. Baxendale* (2) as follows (9 Exch. 354): D

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." E F

It is, in this case, plain that to the knowledge of the defendants this machine was required to perform a particular function as shown by the warranty given. There is, therefore, no doubt that the plaintiff is entitled to rely on the second part of the passage I have read and to claim

"damages . . . such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach." G

In other words, the plaintiff would not be confined in this case to what might be called the natural result of a machine which turned out to be worth less than the purchase price which had been paid for it.

Some reference has been made to the Sale of Goods Act, 1893, but, to my mind, that Act, which put into statutory form the principles which had long been established, does not for present purposes add anything to what I have already stated from my citation from *Hadley v. Baxendale* (2). It is, however, perhaps right that I should notice that the Sale of Goods Act, 1893, s. 53, is directed particularly to the remedy for breach of warranty, and provides: H

"(2) The measure of damages for breach of warranty is the estimated

loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

A I have read those two sub-sections, but I do not think they assist, or qualify, the general statement which may be applied here, that the plaintiff, who got a machine which in the event failed to live up to the performance warranted, should be put in the same position (so far as money can do it) as he would have been in if the machine had been as warranted.

B It is plain from the statement of claim that the plaintiff was alleging entitlement on his part to the sum total of the capital loss he had suffered by having laid out £14,480, and finding himself with material which was worth only £6,960, and also to the loss of the profit which this machine, if it had been as warranted, would have brought him during its mechanical life. It is fair to say that in making his computation of damages for loss of profit he did deduct from the annual sum a figure of ten per cent. of the total original capital outlay in respect of depreciation. It appears from the finding of the official referee that the machine would have continued to perform its mechanical functions for a period of ten years; so that, if there had been clay to grind and markets in which the ground clay could have been sold, it would have brought emoluments to the plaintiff for that period. I base that statement on the passage of the judgment where the learned official referee says:

D "If the plant had been as warranted Mr. [D.] gave its probable life as ten years. I find that it was within the contemplation of the defendants that this plant would be used, not as a museum piece but as a means for making a profit by the sale of its products. If the plant had been as warranted, the plaintiff's intention was to use it for its life, or for so long as it could provide profit. At the end of that time it would be useless."

E It seems to me, as a matter of principle, that the claim for damages, as pleaded, was not sustainable, in so far as the plaintiff sought to recover both the whole of his original capital loss and also the whole of the profit which he would have made. That, I think, as a proposition is self-evident, because a claim for loss of profits could only be founded on the footing that the capital expenditure had been incurred. As I have said, however, there was a deduction in respect of depreciation at ten per cent., and, if the life of the plant is taken at ten years, it follows that, during the period of ten years in which profits must be assumed to have been earned, the whole of the capital cost would have been written off. In other words, if the estimation of damages under head E. had been carried on for the whole period of ten years, the effect of these considerable calculations would have been that A. plus B. plus C., having been elaborately set out, would have all been deducted again in the course of calculating E.

G As a matter of principle again, it seems to me that a person who has obtained a machine such as the plaintiff here obtained, which was mechanically in exact accordance with the order given, but was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may, when he discovers its incapacity and that it is not what he wanted and is useless to him, claim to recover the capital cost he has incurred less anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. H He is, in other words, back where he started, and, if it were shown that the profit-earning capacity was, in fact, very small, the plaintiff would probably elect so to base his claim. Alternatively, he may, where the warranty in question relates to performance, make his claim on the basis of the profit he has lost, because the machine as delivered fell short in its performance of that which

it was warranted to do. If he chooses to base his claim on that footing, depreciation has nothing whatever to do with it.

During the course of the argument many analogies were taken, and I find assistance from the simple agricultural analogy of the cow. For example, A. sells to B. a cow for £100, and warrants that for its next five lactations it will produce milk at the rate of four gallons a day and it is discovered that the cow's performance is at the rate, not of four gallons, but one gallon a day, and that a one-gallon-a-day cow is worth not £100 but £10. The buyer might then elect either to claim the difference between the £100 that he had paid for a four-gallon-a-day cow and £10, the true value of the one-gallon-a-day cow, and recover the difference, £90, which puts him in the same position as if he had intended to buy what in fact he bought. Alternatively, he might say: "I keep this cow and I shall sue you for the loss I have suffered because her performance was not as warranted. I am getting, not four gallons, but one gallon a day, and, therefore, I am losing what I would have made on the sales (less necessary expenditure) of an extra thousand gallons a year". If the latter course is chosen, then, as I have indicated, it seems to me that the depreciated or depreciating value of the cow has nothing whatever to do with the claim. So much, I think, is conceded, and it has, therefore, seemed to us that it would be impossible to combine in this case a claim for the capital loss and a claim for the total loss of profit, just as it would be impossible to recover both the £90, being the capital loss on the cow and the full amount of the loss due to the shortage of milk.

In the course of these proceedings an event occurred which has given rise, as I think, to the whole difficulty in the case. The particulars of damage, E. (b), read:

"From Apr. 1, 1950, to Dec. 15, 1951, and continuing."

The defendants asked the plaintiff to give particulars of the words "and continuing". By that request the defendants were asking the plaintiff to state for what period of time he was alleging and intending to prove loss of profit. The actual words of the request are of importance. Particulars were sought

"of the words 'and continuing', stating precisely what period is referred to and the amount of loss of profit (if any) claimed in respect of such period."

To that the plaintiff answered:

"'And continuing' is the period from Dec. 15, 1951, to the date of trial of this action."

That, as it seems to me, was a clear and unequivocal statement by the plaintiff that, so far as his claim was based on loss of profit, he was only claiming loss of profit up to the date of the trial and did not propose to claim or to seek to prove loss of profit beyond that date. The effect of that statement in the particulars left the statement of claim as a claim for the full amount of the capital loss (arrived at by setting out in each case the total sum actually spent and deducting from it the estimated break-up or residual value of the buildings and plant, which I suppose was to be taken at the date of the statement of claim), plus a claim for loss of profit, but, subject to this qualification, that in the computation for loss of profit there remained in the statement of claim the item of depreciation at ten per cent. per annum on the original capital cost.

At the trial, the defendants sought to show that this enterprise was one foredoomed to failure from the start, and that the plaintiff never could have made any profit by pulverising his clay and trying to sell it. That attempt to disprove the claim for loss of profit failed. The learned official referee said this:

"Having carefully considered the evidence, and giving due allowance, I hope, to commercial contingencies, I estimate that during the first year, at the beginning of which the plaintiff had no orders and during which teething troubles would be expected, the plaintiff could have sold two

thousand tons, during the second year five thousands tons, and during the third year six thousand tons. These obviously must be very largely in the nature of guesses, but, if I have over-estimated them, it must be remembered that I am giving the plaintiff no damages for loss of profit after the end of three years . . . In respect of each year I have deducted the interest charge on the capital, but not depreciation."

A It is not, I think, open to doubt that to allow, in addition to the total capital loss, the total profit less appropriate revenue charges, is not justified, for in the absence, at any rate, of any allowance for depreciation the learned official referee seems to have given the full amount of profit on the footing that the capital expenditure had been incurred and at the same time given the plaintiff the full amount of the loss of capital so as to indemnify him for having incurred it.

B I have been unable to see how, in estimating the profits in a case of this kind, depreciation comes into the picture. I have already given my reasons for that view. As the matter has developed the point may be briefly stated. The plaintiff formulated his claim showing the capital he had lost or thrown away so that, if he recovered it, he would be in the same position as though he had never bought this machine at all, and he also showed what he claimed to be the profit he would have made, not on the footing that he had not bought the machine, but on the footing that he had bought it and that the machine had been in accordance with its warranted performance. When asked for particulars he said as regards C the latter claim that he only proposed to prove damages for three years, for reasons which, no doubt, were good to him. Counsel for the defendants, when opening the appeal, argued that the inevitable inference to be drawn from the statement in the particulars and from passages in the judgment which I have D read was that, although this machine was mechanically capable of operating for ten years, what he called its commercial life was limited to three years—in other words, that this enterprise could not in any circumstances have been a profitable commercial venture for more than three years. If that be right, there would be nothing left to argue about, but I have been unable to accept that view. In my judgment, there is no basis for supposing that the learned official referee E thought or found, expressly or impliedly, that three years was the limit of this enterprise. But it does not seem to me that that conclusion affects the validity of the defendants' argument. Whatever might have been the length of time during which this enterprise could have been carried on profitably, the plaintiff chose to limit his claim in that respect to three years. I agree with counsel for F the plaintiff that the actual figures, which show a crescendo for the first three years, are not easily consistent with the view (in the mind of the learned official referee) that at the end of the three years the sales would have stopped altogether. On the other hand, the whole enterprise was obviously speculative, a fact which is, I think, reflected in the words which I have already read, where the official referee said

G "if I have over-estimated them [the profits for the first three years] it must be remembered that I am giving the plaintiff no damages for loss of profit after the end of three years,"

words which lead me to think that the referee may well have supposed that the total profit that would have been made on the enterprise was probably not much different from that which he awarded.

H But, whatever be the answer to these problems, I come back to the same point, namely, that the plaintiff can choose either to claim on the basis that he had wasted capital and that he ought to be put in the position he would have been in if he had never bought this machine, or to say: "I have got the machine. What I am claiming is the loss I have suffered because its performance falls short of that which was warranted, and, therefore, I have not made the profitable sales which I would have made, and I claim, accordingly, the loss of resultant profits". The second alternative being the larger, he is entitled to choose that,

but, in my judgment, he should be limited to it. He is not, in my judgment, by stating that his claim for lost profit is limited to three years, able to claim (as he admittedly could not claim if he had not placed the limitation on the profit) both for loss of capital *and* for loss of profit. It is said that he may do so provided that in the computation of profits he makes due allowance for depreciation, but, in my judgment (as I have already stated), depreciation has nothing to do with the profit lost as a consequence of the breach of warranty, and the effect of so reducing the profit would appear to be that the plaintiff first recovers for loss of capital and then has to bring into account against the profit, part of what he has recovered for loss of capital. A

On the question whether the plaintiff could have claimed for loss of profit up to the date of the hearing and then an additional sum because he was at that date left with a machine less valuable than, as warranted, it should have been, I do not say any more than that the plaintiff has not so claimed. Had he done so, the second part of the claim would appear to be no more than a method of computing profit for the possible profit-earning period after the date of the hearing. B

The result will be that from the figures which I have mentioned the first three items [A., B. and C.] ought, as it seems to me, to be omitted. Otherwise I think that the plaintiff is claiming damages, in effect twice over. The total amount of damages proved which the plaintiff is entitled to recover consists of £8,913 ls. under E., to which must be added the item of interest under D., since that has been deducted in calculating the £8,913 ls. The sum total of those figures is £10,521 5s. 9d. As I have already stated, however, the total price of the machine remains unpaid to the extent of £1,078. A question arises (on which we have not yet heard argument) whether that should be treated as proper to be set off against the £10,521 5s. 9d. so as to reduce the amount for which the plaintiff can get judgment to £9,443 5s. 9d., or whether the £1,078 is more properly a subject of counterclaim—with the result, I take it, that the plaintiff would be entitled to judgment for £10,521, the defendants being entitled to judgment for £1,078. That, however, I will leave over until we have heard further discussion. C D

There was, in addition to the appeal, a cross-appeal on the part of the plaintiff asking that the estimation of damages for loss of profit should be carried forward to the date of the judgment in this court, on the ground that the appeal had, so to say, postponed the date of judgment in the action. I am unable to apprehend that claim or to give effect to it. I have already said that the plaintiff (for reasons good, bad or indifferent) limited his claim in respect of profit to a claim up to the date of judgment in the action (which was Apr. 1, 1953), and having so limited his claim he must, I think, be bound by it. I only add that, if the period were extended, I have no possible means available on which I could estimate any further loss of profit. In my judgment, therefore, the appeal succeeds, the sum for damages being reduced by the elimination of the three items, A., B., and C.; and the cross-appeal should be dismissed. E F

JENKINS, L.J.: The general principle applicable to the case is, I apprehend, this. The plant having been supplied in contemplation by both parties that it should be used by the plaintiff in the commercial production of pulverised clay, the case is one in which the plaintiff can claim as damages for the breach of warranty the loss of the profit he can show that he would have made if the plant had been as warranted. Where damages are awarded on that basis the object in view (as, indeed, in any other assessment of damages) is to put the plaintiff in the same position (so far as money can put him in the same position) as if the contract had been duly complied with or the subject-matter of the contract had conformed to any warranty given. It follows that in such a case, while, no doubt, the plaintiff can at his option claim damages based on the difference between the value to him of the article as actually supplied and the contract price of the article, he cannot claim both that amount, representing his G H

capital expenditure thrown away by reason of the breach, and also the full amount of the profit he can show that he would have made in the event of the article answering the warranty. In considering loss of profit he must be placed in the same position as if the article had been as warranted. On that hypothesis, the full contract price would have to be paid, and all other expenditure necessary for the article to be used for the contemplated purpose would have to be incurred before any profit could be earned at all. Therefore, where the claim is based on

A loss of profit it must be calculated either by estimating the difference between the contract price of the article and the value of the article as supplied, and allowing the amount claimed for loss of profit only in so far as it is in excess of that amount, or, more simply, by letting the capital expenditure lie where it falls and computing the amount of loss of profit. In certain circumstances, it may be to the plaintiff's advantage to claim on the basis of the difference between the contract price and

B the value of the article, because it may be that in some instances that would give him a larger sum than any sum he could prove as representing loss of profit. Where the loss of profit is the larger sum, then the plaintiff, of course, will elect to take that, but he cannot have both.

[HIS LORDSHIP referred to the particulars of damage and continued:] It will be observed that the mode of formulating the particulars of damage adopted in

C the statement of claim was to take the course (contrary to the principle I have endeavoured to state) of allowing the plaintiff damages in respect of his capital expenditure thrown away and, in addition, his estimated loss of profit. But as against that it is to be noted that in computing his loss of profit he allowed depreciation at ten per cent. on his capital expenditure. It follows that if the loss of profit were to be estimated with respect to a period of ten or more years,

D the items separately claimed in respect of capital expenditure and allowed by the official referee would have been in substance wiped out.

Counsel for the plaintiff did not, as I understand him, quarrel with the general principle which I have endeavoured to state, but his argument was of this nature. He accepted the position that, if the loss of profit was to be calculated over a

E period of ten years (that being the period accepted by the official referee as the probable life of the plant), it would be wrong to give the plaintiff both the full amount of the loss of profit estimated over the whole of that period and also the amounts claimed as capital expenditure thrown away. But, he says, the period for the purpose of calculating the loss of profit was in fact limited to three years, and he says that was only three-tenths of the estimated life of the plant. Therefore, in his contention, the plaintiff will not have received all the damages

F to which he is entitled unless he receives something on account of the capital expenditure thrown away. At the end of the three years, says counsel, assuming a life of the plant of ten years, the plant, if the warranty had been complied with, would have been a plant still capable of operating for another seven years at a profit, and, if profits for that period of seven years had been estimated and added to the profits for the first three years, all would have been well, but, as it is, the

G plaintiff gains profits for three years only and nothing to compensate him for his loss of profit thereafter. Counsel for the plaintiff put it, I think, that that loss of profit could be properly allowed for by leaving in the calculation of damages the whole of the capital thrown away, though he was, I think, disposed to concede that as against that it would be right to allow the defendants depreciation at

H ten per cent. on that capital expenditure for the period of three years to which the estimate of profit extended. I find myself unable to accept that contention. As a matter of pleading the plaintiff in the first instance claimed for loss of profit without limit as to time, and on that footing included the additional sum representing loss of capital expenditure thrown away, though at the same time allowing the ten per cent. depreciation which I have mentioned. When asked, by the request for particulars, in respect of what period the loss of profit was claimed, the plaintiff answered, in effect, that he claimed damages in the way of loss of

profit only for the period down to the date of judgment. That being so, it seems to me that the plaintiff must be bound by his pleading and cannot now go back and say: "I wish to claim a further amount representing the profits for the residue of the life of the plant". The particulars of damage being in that form and limited in that way, I think the only possible course is to proceed on the footing that the only damages in the way of loss of profit either alleged or proved consist of the loss of profit for the period of three years down to the date of the judgment.

The learned official referee, in his judgment, said:

"If the plant had been as warranted, the plaintiff's intention was to use it for its life, or for so long as it could provide profit. At the end of that time it would be useless, and in order to ascertain what profit he would have made from it there would have to be deducted from the aggregate of his net profit the original price of the plant, unless this had already been written off against his gross profits as depreciation."

Although the thought, perhaps, is not so clearly expressed as it might have been, those words suggest that at that point in his judgment the learned official referee recognised that the plaintiff cannot claim the whole of his capital expenditure thrown away in addition to the whole of his loss of profit, but, if he claims capital expenditure thrown away, can claim loss of profit only in so far as it exceeds the amount claimed under the heading of capital expenditure. He continues:

"But if the plaintiff recovers the cost to him of the plant less its residuary value he has recovered his initial outlay, but none of the profit which he would have made from it and which would have formed part of the value of the plant to him. He cannot hope to replace that plant except at a considerable expense and without having to wait for a period of at least fourteen or fifteen months. Counsel for the plaintiff has stated that he is content to ask for merely the estimated net profit from Apr. 1, 1950, until repayment or judgment."

Then the learned official referee expressed his conclusion as to the profits which the plaintiff could have earned during the three years down to the date of judgment; and he goes on to say, as regards the estimated output or sales of two thousand tons in the first year, five thousand tons in the second year and six thousand tons in the third year,

"These obviously must be very largely in the nature of guesses, but if I have over-estimated them it must be remembered that I am giving the plaintiff no damages for loss of profit after the end of three years."

Then he says, with regard to the estimated loss of profits:

"In respect of each year I have deducted the interest charge on the capital, but not depreciation."

From those passages it seems to me to be reasonably plain that the official referee, in allowing, as he did, the loss of capital expenditure in addition to loss of profit, calculated without any figure for depreciation, was not doing that as a special method of dealing with the matter by reason of the fact that the claim for loss of profit was limited to three years. He was treating the three-years figure as representing the whole of the loss of profit, and even on that basis was allowing the claim in respect of capital expenditure. Further, it is to be observed that he says in the passage to which I have already referred:

"These obviously must be very largely in the nature of guesses, but if I have over-estimated them it must be remembered that I am giving the plaintiff no damages for loss of profit after the end of three years."

That seems to me to suggest that his estimate of the profits year by year might well have been more conservative if a longer period than three years had been

taken. It is, to my mind, impossible for this court now to proceed on any other basis. Estimates which were "very largely in the nature of guesses" in relation to the first three years would, to my mind, become even more speculative when an attempt was made to carry the calculation on to a point of time as distant as ten years from the delivery of the plant. If a loss of profit for ten years had been claimed and sought to be established before the learned official referee, it is impossible to say at what additional figure he would have been likely to arrive. We have no material on which it is possible to reach any conclusion as to that. It may be that the defendants would have succeeded in bringing the additional figure down to an inconsiderable sum. It may be that the plaintiff might have been able to justify a considerable addition. It is impossible to say what the result might have been. Accordingly, in my view, having regard to the state of the pleadings, this case must be dealt with on the footing that the only loss of profit claimed was the profit for the three years down to the date of judgment, which the learned official referee estimated at £8,913 1s., and, that being, for this purpose, the full amount of the claim for loss of profit, in my view, the learned official referee erred in allowing the plaintiff, in addition to that sum, the items of capital expenditure under A., B., and C. By so doing he was giving the plaintiff his damages twice over so far as the amounts allowed in respect of capital expenditure were concerned.

Accordingly, in my view, this appeal should be allowed and the damages should be reduced to the two items consisting of the interest dealt with under D., £1,608 4s. 9d. and the loss of profit under E., £8,913 1s. The charge for interest is, in my view, proper to be allowed, because a contra allowance of interest on the same sum, as I understand it, was made in the calculation of the loss of profit. Accordingly, in my view, the judgment in the plaintiff's favour should be reduced to the total of those two sums and the appeal should be allowed to that extent. As to the unpaid balance of purchase money, it remains to consider whether that should be dealt with as a set-off or as a judgment in favour of the defendants on their counterclaim. There was a cross-appeal by the plaintiff in which he asked that the loss of profit might be computed over an extended period which was to end with the conclusion of the present appeal. In my view, that is an application to which it is quite impossible for this court to accede, and, accordingly, I think the cross-appeal should be dismissed.

MORRIS, L.J.: In this case I have not found myself agreeing in their entirety with the conclusions which have been reached by my Lords. I need hardly say that it is with diffidence that I venture to express a divergent opinion, but to the extent to which my conclusions differ from those reached by my Lords I feel that it is my duty to express them.

There are one or two passages in the judgment of the learned official referee which serve to illumine some of the difficult problems with which we are confronted. There is no doubt that the machine was delivered in March of 1950. Some time elapsed thereafter in endeavours on the part of the defendants to put the machine into the working condition that they had promised. The time that passed was wasted from the point of view of the plaintiff as time within which he could as a business man have earned profits as he desired to do. The learned official referee said in his judgment:

"The plant was finally erected in March, 1950. It never produced the warranted amount of powder, and the defendants introduced various modifications and additions in an endeavour to fulfil their contractual obligations. Mr. [B.], a very senior engineer of the defendants with considerable technical experience, visited the plaintiffs on four occasions: first, when it was commissioned, for ten days; again in April and May, 1950, for thirteen days; in July and August for eleven days; and, finally, in August, 1951, when he stayed about ten days. Other representatives of

the defendants were there also. They were quite unable to make the plant produce more than about two tons per hour output. I find as a fact that the plant is incapable of producing more than about one-third of the warranted output when using the plaintiff's clay."

I imagine that the defendants were very disappointed with the performance, and there is every reason to think (and the passage that I have quoted illustrates it) that they made genuine and honest endeavours to try to get the plant into satisfactory working condition. But, unhappily, they failed: and so time passed. A When it came to the litigation which ensued, the defendants said to the plaintiff: "Well, even if we had delivered to you a plant that was in compliance with the warranty we gave, nevertheless the whole thing would have been useless to you; it would have been a white elephant, for you could not have made any profits." That sort of contention on the part of a seller who has unhappily B been unable to comply with a warranty that he has given never meets with a very enthusiastic reception from the purchaser of the machine. But that matter was litigated, and, no doubt, a good deal of the time during the hearing was occupied in a careful ascertainment of the facts. The learned official referee came to the conclusion that that submission on the part of the defendants failed. He said:

"Counsel for the defendants contended that even if the plant had been of the quality warranted the plaintiff could not have found an economic market for his output, that the plant would have been a 'white elephant' in his keeping, that he made a mistake in ever thinking that he could procure an adequate market, and that the plant would, in any case, have been valueless and the plaintiff cannot recover any but nominal damages." C

The learned official referee considered the evidence as to the markets that would be available for the plaintiff, and he expressed his conclusion as follows: D

"The plaintiff said that he had supposed that his main sales would be to the rubber industry. In this he was mistaken. However, there is obviously an extensive use for pulverised clay by foundries, makers of vitreous enamelling, welding and pottery, and in my judgment the possibility is that the plaintiff could have made a useful addition to his income with the products of the plant if it had been equal to warranty; it would not have been a white elephant. It is to be noticed that Mr. [D.] himself agreed that if the plant had been as warranted it would have been worth the price charged . . . The plaintiff says that the plant is useless for the purpose for which it was required, he cannot run it except at a loss, and this is not seriously challenged." E F

In addition to the matters to which I have already referred the defendants took another point. They said that the plaintiff ought to have mitigated his loss. That submission was not successful. In his judgment the official referee said:

"Finally, it has been suggested that the plaintiff could and should have purchased other machinery in order to mitigate his damage. I think that this would have been quite unreasonable. To obtain a product at the rate warranted he would have had to purchase, as I have said, more than two attritor plants, and would have incurred all the expense of dismantling and removing the defendants' plant, of adapting and probably enlarging his building to accommodate the substituted machinery, and of installing it. Moreover, the defendants were suggesting that they could bring his machine up to the warranted standard even as late as autumn, 1951. He could not have hoped to substitute other machines before the end of 1952, even if by then." G H

The learned official referee had already said:

"He cannot hope to replace that plant except at a considerable expense

and without having to wait for a period of at least fourteen or fifteen months".

A It seems to me that the basis on which the pleader for the plaintiff pleaded the damage in this case was permissible and logical. Supposing that a machine cost £10,000 and had a life of ten years, and supposing it were found that there would be net profits of £2,000 a year. At the end of ten years with fulfilment of the warranty the purchaser would have received £20,000, and allowing for the £10,000 he had spent in buying the machine he would be £10,000 to the good. Supposing the machine is delivered to him and supposing he pays £10,000 for it and supposing it is found to be entirely valueless, the purchaser might say: "Well, I am claiming simply my profits, £20,000". But it seems to me that he could alternatively say this: "Out of £2,000 each year I would have allocated B £1,000 each year over the ten years to pay for the plant, and so my net profit would be £1,000 a year. Instead of claiming £20,000 I claim back the £10,000 I have paid for the plant, which is valueless, and I claim the profits that I would have made, £1,000 a year over ten years, £10,000". In either way of statement, the amount of the claim is the same. It seems to me that what was done in the statement of claim here was to put the matter in that latter way. It was pleaded on behalf of the plaintiff that by reason of the breach of warranty the plaintiff C was out of pocket. He had spent sums for the plant and for accessory plant and for buildings. He says: "I want those sums back, less, of course, the present scrap value of what I have got, and in addition I want the profits that I would have made, namely, my net profits, out of the profits that I would have received each year. I make an allocation of one-tenth and making that allowance I arrive at my net profits". It seems to me that that is a permissible and a D logical way of approaching the matter if the claim is so formulated.

Under the heading "loss of profit" in the particulars of damage in the present case there was a subtraction of depreciation at ten per cent. per annum. There came the time when the plaintiff, being asked for particulars, limited his claim. It was, in the first place, a claim for what he had spent less the scrap value of what he still had, together with net profits for the whole period which was covered E by the words "and continuing". Being asked for particulars, he limited his claim as regards the item of profits to the period to the trial of the action. As events turned out, that proved to be a period of almost precisely three years from the date of the delivery of the plant. The claim being so limited, it seems to me that when computing profits, if they are being given in addition to what the plaintiff has lost, it would be right to follow the pattern of the statement of claim and F make a deduction each year (the life of the plant being ten years) of ten per cent. from the net profits, as was originally done in the statement of claim. Counsel for the defendants has submitted, as being his minimum submission, that in any event there should be such a deduction from the damages as awarded. To that extent I for my part would accede to his submission. I would say that G the damages as awarded should be reduced by three times £1,448 (being ten per cent. depreciation on the value of plant on a building of £14,480) which I think makes a deduction of £4,344. But if such a reduction is made, then, in my judgment, the result is logical and the resultant figure correct. As it seems to me, it was reasonable for the plaintiff to have limited his claim as regards profits in the way he did. There would have come a time when it would have had to be recognised as a matter of reality that the plant was no good and that the whole H project with that plant was a fiasco. Time had passed which was unproductive and that time was irretrievably lost. That being so, I should have thought it was rational for the plaintiff to say: "Well, then I limit my claim for loss of profit". He would have to do his best to mitigate his loss. The defendants themselves said that the plaintiff had not done enough to mitigate his loss. The plaintiff would have to see what alternative steps he could take to make such profit in business as he had hoped to make as a result of a satisfaction by the defendants

of the warranty that they gave in regard to the machine that they had sold. Hence I think that it was reasonable to limit the claim.

Then counsel for the defendants presents a formidable submission. He says: "If profits are claimed in that way, it should have been proved that there would have been profits during the remaining seven years of the life of this plant", and he submits that the limitation by the plaintiff of his claim to a period of three years has brought about the result that the plaintiff has not proved profits beyond three years and cannot say that there would have been profits beyond the three years. I have not felt myself able to accede to that part of counsel's submissions. It does not seem to me that it was implicit in the limitation recorded by the delivery of particulars, nor by what was said by counsel for the plaintiff at the hearing, that the plaintiff was saying: "Not only do I limit my claim to a period of three years, but I state that profits would not have been made thereafter and I acknowledge that it ought not to be open to anyone to say that profits would be made thereafter". It seems to me that the whole tenor of the judgment of the learned official referee was that the plaintiff would have made profitable use of this machine had the warranty been satisfied, and would have made it over the period of the life of the machine. The contention that the whole thing would have been a "white elephant" and that there would have been no markets failed. The learned official referee took the view that it was shown to him that there would have been demands for the product. The figures at which he arrived showed a crescendo. They showed better results as the second year succeeded the first and the third the second. It seems to me that it would be unreal to think (following counsel for the defendants' submission) that, at the end of three years, profits would fade away, that after the rising tide there would be an evaporation and that nothing would be there. Indeed, I read the sentence from the judgment of the learned official referee:

"These obviously must be very largely in the nature of guesses, but if I have over-estimated them it must be remembered that I am giving the plaintiff no damages for loss of profit after the end of three years",

as meaning, not that there would not be profits at the end of three years, but that there would be profits, but that no claim for them was made. I take the view that it was almost implicit in the success of the plaintiff in defeating the attack on his claim in regard to profits that it was shown that the profits were not such that they would disappear at the end of the period in regard to which the plaintiff limited them. For those reasons I think that the basis of the claim that was pleaded set out a reasonable way to state the claim for damages. The plaintiff at the end of a period found that it was wasted time, and he said: "I want in the first place to avoid being out of pocket, and I want just to make good my loss: that is the first thing". But he says: "In addition, as I cannot start again for some time, I want what I have actually lost, that is to say, what would have come to my pocket by way of profits during that period". I think that that amount should be the amount of the net profit after making the appropriate allocation (or whatever word is used, and the word "depreciation" may not be a happy one) that would have been made year by year so as to wipe out the purchase price of the article. I, therefore, think that with that important modification of the view and the figure reached by the learned official referee, the appropriate basis of damages would be established. I think, therefore, that the plaintiff was entitled to the sum awarded by the official referee less £4,344.

I do not desire to add anything with regard to the cross-appeal. For the reasons SIR RAYMOND EVERSHED, M.R., has stated, I do not feel that the cross-appeal can succeed.

The plaintiff submitted that the defendants had no right to set off the liquidated amount of the counterclaim against unlimited damages awarded in the action, that the award was, therefore, more than the sum paid into court and that the

order as to costs below should not be disturbed. The defendants contended that there should be a set-off, thereby reducing the award below the sum in court, and that they were entitled to the costs of the action since the date of payment in.

SIR RAYMOND EVERSHERD, M.R.: The question now arises in regard to costs because there was a payment into court in January, 1953, of a sum of £10,000. The nature of the claim was one for damages for breach of warranty, an unliquidated sum, and by the defence there was a claim to set off, or, alternatively, A a counterclaim for, the unpaid balance of the purchase price, £1,078. I do not forget that in the particulars of the damage in the statement of claim, there appears at the end the item "Subtract balance of the purchase price . . . £1,078". I am prepared to assume (without deciding) that the cross-claim (to use a negative term) of the defendants was a proper subject-matter of equitable set-off. But that does not necessarily decide this matter since costs are B always in the discretion of the court. The considerable argument which we have heard has, to my mind, shown a degree of ambiguity as to the effect of the payment in, illustrated, for example, by the questions: What would have been the position if the plaintiff had taken out the £10,000? Would the defendants then necessarily have been prevented from pursuing their counterclaim? That is one C matter for consideration. Another is the general nature of the case as it was fought. It lasted, we are told, some thirteen days before the official referee, and a great part of that time must have been occupied by the defendants' contention that the plaintiff was under an illusion in thinking that this business of pulverising and selling the clay would ever have been a profitable commercial enterprise in any circumstances. Bearing all those considerations in mind, I think that the D fair result is to say that the plaintiff recovers his costs (of the claim and counter-claim) to the extent ordered by the official referee up to the date of payment into court, but that thereafter there should be no costs of the trial on either side. The defendants must be entitled to their costs of this appeal.

JENKINS, L.J.: I agree.

E **MORRIS, L.J.:** I agree.

Judgment varied by substituting £10,521 5s. 9d. for £16,813 7s. 2d. Judgment for defendants on counterclaim for £1,078.

Solicitors: *Herbert Smith & Co.*, agents for *Parker, Warskett & Chapman*, Sheffield (for the appellants); *Kimbers, Williams, Sweetland & Stinson*, agents for *Humphries, Kirk & Miller*, Wareham, Dorset (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at Law.]

STARKOWSKI (by his next friend) v. ATTORNEY-GENERAL AND OTHERS.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), June 30, July 1, 2, 6, 7, November 12, 1953.]

Conflict of Laws—Legitimation—Validity of Austrian marriage—Retrospective effect of Austrian legislation—Determination according to Austrian law—Legitimacy Act, 1926 (c. 60), s. 1 (1).

On May 19, 1945, H. went through a ceremony of marriage in Austria with R. according to the rites of the Roman Catholic faith. At that time the German Marriage Law of 1938, which required that a marriage, to be valid, must be contracted before the civil authorities, was still in force. On June 26, 1945, an order was published by the provisional government of Austria, to take effect on June 30, 1945, by s. 3 (1) of which: "Marriages which were solemnized during the period from Apr. 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognized church or religious community have the effect of a marriage solemnized at a register office in accordance with . . . the Marriage Law of . . . 1938, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office." In July, 1945, R. and H. left Austria for Italy, and in the autumn of 1946 they came to England, where they lived together as man and wife until 1947, when they separated. Subsequently, H. met M., and on Mar. 27, 1949, she gave birth to C., the petitioner, of whom M. was the father. On July 18, 1949, the ceremony of marriage between R. and H. of May 19, 1945, was registered in accordance with the order of June 26, 1945, of the Austrian provisional government. On Feb. 11, 1950, H. went through a form of marriage with M. at a register office, he being a bachelor and domiciled in England. C. petitioned for a declaration that M. and H. were lawfully married and that he, C., was rendered legitimate by and from the date of such marriage.

HELD: a foreign validating Act with retroactive effect dealing with the form of marriage, with consequential effect on the status of persons domiciled outside the legislating country, was a law concerning the formality of marriage and not a law affecting status and the registration required to render the marriage in Austria valid was an administrative act, not necessarily dependent on the will of the parties; the principle applicable was that the validity of marriage, as regards formalities, was governed by the *lex loci celebrationis*, and, therefore, although the ceremony of May 19, 1945, between H. and R. was originally invalid, it became a valid marriage under Austrian law as from the date of solemnization when it was registered in July, 1949; accordingly, at the time of the second ceremony in February, 1950, H. was a married woman whose husband was still alive, her marriage with M. was invalid, and C. was not entitled to a declaration of legitimacy.

Lynch v. Paraguay Provisional Government (1871) (L.R. 2 P. & D. 268), distinguished.

Decision of the COURT OF APPEAL ([1952] 2 All E.R. 616), affirmed.

AS TO THE LAW GOVERNING THE VALIDITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 285-288, paras. 341, 342; and FOR CASES, see DIGEST, Replacement Vol. II, pp. 458-462, Nos. 927-952.

Cases referred to:

- (1) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.
- (2) *Luna v. Godin*, 10 Chumet (1881), 621.

- (3) *Doe d. Breakey v. Breakey*, (1845), 2 U.C.R. 349; 27 Digest, Replacement, 66, 142.
- (4) *Salvesen (or Von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.
- (5) *Lynch v. Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest, Replacement, 394, 513.
- A (6) *Re Luck*, [1940] 3 All E.R. 307; [1940] Ch. 864; 109 L.J.Ch. 380; 164 L.T. 172; 2nd Digest Supp.

APPEAL by the petitioner from an order of the Court of Appeal (SOMERVELL, DENNING and ROMER, L.J.J.), dated July 30, 1952, and reported [1952] 2 All E.R. 616, affirming an order of BARNARD, J., dated Feb. 18, 1952, and reported [1952] 1 All E.R. 495, on a petition for a declaration of legitimacy under the

B Legitimacy Act, 1926, s. 1 (1), and the Matrimonial Causes Act, 1950, s. 17 (1). The Court of Appeal held that the principle that a marriage valid according to the *lex loci celebrationis* was valid everywhere applied even though that law was not the law of the domicile, and was not confined to a marriage which was valid according to the *lex* at the date of the ceremony, but extended to a marriage which was invalid at that date but was validated retrospectively C by subsequent legislation; that under the order of June 26, 1945, the ceremony between H. and R., although originally invalid, became a valid marriage under Austrian law as from the date of solemnization when it was registered in July, 1949, and, even if, at the date of the second ceremony on Feb. 11, 1950, H. had acquired an English domicile, on that date she was a married woman whose husband was still alive; and, therefore, her marriage with M. was invalid, and D the petitioner was not entitled to the declaration he sought.

Heathcote-Williams, Q.C., and *Dobry* for the appellant.

Simon, Q.C., and *Colin Duncan* for the Attorney-General.

The House took time for consideration.

Nov. 12. The following opinions were read.

E LORD MORTON OF HENRYTON: My Lords, I have had the advantage of reading in print the opinions which will be delivered by my noble and learned friends, LORDS TUCKER and COHEN, and I agree with them. The marriage ceremony which took place in Austria on May 19, 1945, was clearly F validated by the laws of that country before Feb. 11, 1950, when the appellant's mother went through a form of marriage with his father in Croydon. For the reasons given by my noble and learned friends, the appellant's mother must be regarded as having been already a married woman when the latter event took place, and this appeal must be dismissed.

I express no opinion as to the results which might have followed if the ceremony at Croydon had taken place before the order of the Austrian provisional G government had come into force, or before the ceremony in Austria had been registered in accordance with that order.

H LORD REID: My Lords, the appellant was born in London in 1949. His parents went through a ceremony of marriage at Croydon in 1950 and the appellant, by his next friend, now seeks a declaration that that marriage was valid and that he was legitimated by it. The question is whether that marriage was valid, and that depends on whether a previous marriage of the appellant's mother, Henrica, to the respondent, Urbanski, is to be regarded by the law of England as valid. In 1945 Henrica and Urbanski were domiciled in Poland and resident in Austria. Henrica was pregnant by Urbanski and they wished to marry. During the German occupation the law of Austria had been changed so as to require a civil marriage. There was some difficulty about arranging a civil marriage and the priest at Kitzbushel, where they then were, refused to

marry them. But when the Germans were driven out there was much confusion and the priest agreed to marry them. They were married in a Roman Catholic church on May 19, 1945. It is admitted that that was not then a legally valid marriage. On June 30, 1945, a new law came into force in Austria making civil marriage unnecessary: with regard to a religious marriage which had already been solemnized without a civil marriage it provided for the priest sending particulars to the civil registry and enacted that such a marriage should be valid as from the day of solemnization as soon as it had been registered in the civil registry. Owing to some oversight the priest at Kitzbuehel failed to forward particulars until 1949, but on July 18, 1949, the marriage was duly registered. It is admitted that before this date the law of Austria would not have regarded the parties as married, but that after this date the law of Austria would have regarded them as married and as having been validly married on May 19, 1945.

Before 1949 the parties had become domiciled in England. It was really not disputed that, if the question of their status had arisen when they first became domiciled here, neither the law of Austria nor the law of England could have regarded them as legally married, and it was not maintained that the law of Poland is relevant in this case. The question to be determined is whether the law of England can give effect to the retrospective Austrian legislation, and the present case appears to me to be indistinguishable from a simple case where two English people domiciled here go through a ceremony of marriage in another country which is invalid in form and return to this country, and then retrospective legislation is enacted in that country which validates the marriage in that country as from the date of its celebration. If the Attorney-General is right, then it is possible for foreign legislation to alter the status of English people who were neither domiciled, resident nor present in the foreign country when the legislation was passed, nor at any time thereafter. It is certainly unusual that foreign legislation should have that effect whether it purports to be retrospective or not, but I do not think that it can be laid down as a universal rule that it can never have that effect, and, therefore, it is necessary to consider more closely the circumstances of cases like the present case.

It has long been settled that the formal validity of a marriage must be determined by the law of the place where the marriage was celebrated. But if there has been retrospective legislation there, then a further question arises: Are we to take the law of that place as it was when the marriage was celebrated, or are we to inquire what the law of that place now is with regard to the formal validity of that marriage? This question does not appear to have arisen for decision in England. There are many cases in which there have been statements of high authority of the general principle and of its application in various circumstances, but I do not think it helpful to analyse these statements of the law. I can find nothing to indicate that the present question was even in contemplation in any of these cases, and, at best, one could only make a speculative inference from words used as to what their author might have thought if he had had to consider the present question. Some other authorities were cited, but they do not appear to me to carry one very far. To my mind, the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will, on the whole, lead to much more just and reasonable results, that appears to me to be a strong argument in its favour. Cases calling for retrospective legislation have frequently occurred in England. The common case is that some fact has been discovered which shows that marriages celebrated in particular circumstances were invalid: sometimes many marriages extending over a long period were involved, but no one had suspected that these marriages were other than valid. It was then thought proper to pass legislation which had the effect of validating these

marriages ab initio. If that had not been done there would have been great confusion and, in many cases, great injustice. It can be assumed that some of the marriages involved were between persons domiciled in other countries, and similar cases may well have occurred abroad. Persons domiciled in England may have been married in another country by ceremonies apparently valid but later discovered to be invalid, and retrospective legislation may then have been passed in that country. If people have lived, and acted, and brought up families, in the reasonable belief that they were married, it is highly desirable that the law should recognise some practical way of neutralising a belated and fortuitous discovery that their marriage was formally invalid. But if retrospective legislation in the country where the marriage was celebrated is to be of no avail to persons domiciled outside that country, it will seldom be possible for the country of their domicile to afford any remedy. If validating legislation is passed soon after the cause of the invalidity has been discovered, it is not easy to see how any practical difficulties or hardships can result from it. But serious difficulties could arise if there were a long interval between the discovery of the invalidity and the remedial legislation. If the spouses are still living together when the invalidity is discovered, they can avoid most of the difficulties by re-marrying. But if they have separated they would be in the position of knowing that they are, for the moment, unmarried, but are liable at any time to become married against their wishes by retrospective legislation. It was argued that we should only recognise foreign retrospective legislation if the spouses in some way consented to its operation, but that argument is based on a misapprehension of what such retrospective legislation sets out to do. It has no concern with the state of affairs at the time when it is enacted: its purpose is to validate the original ceremony, and, if there was then the necessary consent to marry, that is all that matters. Then it was argued that no valid consent was given in this case at the ceremony in 1945 because the wife Henrica knew that the ceremony was insufficient to constitute a legal marriage; but it is not proved that the husband Urbanski also knew that, and the wife cannot be heard to say that her consent freely given in church was not a consent to marry. I need not consider what the position would be if both parties knew at the time that the ceremony was insufficient in law. It was suggested in argument that the law of England might recognise foreign retrospective legislation subject to certain qualifications or exceptions. For example, it was said that if one of the parties had entered into another marriage before the retrospective legislation took effect, then a different rule should apply; and it was suggested that if an English court of competent jurisdiction had decided that either party was unmarried, then subsequent retrospective foreign legislation should not affect that decision. It would not be proper to attempt to decide such questions in advance, but I shall assume for the purpose of the present argument that such exceptions would not be made and that a person who knew that his marriage abroad was invalid for want of form might be left in complete uncertainty if the circumstances were such as to make it at all reasonable to suppose that validating legislation might be passed. If that is so, there is at first sight compelling force in the appellant's argument that a person ought at any time to be able to find out with certainty whether he or she is married or not, and that the law of England ought not to recognise a principle which may result in a person being for the moment unmarried in law but knowing that he is liable to become married retrospectively. If there were any substantial likelihood of this happening I would be inclined to agree, but one must look at realities. I find it difficult to suppose that in any country there would be substantial delay in deciding whether to legislate retrospectively once the reason for the invalidity had come to light, and I cannot think that anyone who had discovered that his marriage was formally invalid would for long be in any real doubt whether there was to be remedial legislation. In the present case,

remedial legislation was promptly enacted and this could have been discovered and, indeed, may have been known to the parties: it was only by a mischance that the necessary executive action in Austria was delayed for four years.

Accordingly, in my opinion, the balance of justice and convenience is clearly in favour of recognising the validity of such retrospective legislation (subject, it may be, to some exceptions) and the objections to doing so are not substantial and are not founded on any compelling principle. Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision. I, therefore, agree that this appeal should be dismissed.

LORD TUCKER: My Lords, by a petition under the Legitimacy Act, 1926, and s. 17 of the Matrimonial Causes Act, 1950, the infant appellant, suing by his mother as his next friend, sought a declaration that his mother and one Starkowski were lawfully married on Feb. 11, 1950, at the register office of Croydon in the county of Surrey, and that by this marriage he became legitimated as from the date of the said marriage. The Attorney-General was made respondent to the proceedings and Starkowski and one Urbanski and Barbara Urbanska were parties cited. The petitioner and parties cited are of Polish nationality, and, for convenience, they were referred to in the courts below by the anglicised versions of their christian names. The infant petitioner was called Christopher, his mother Henrica, and his father, one of the parties cited, Michael. The other parties cited were called Richard and Barbara. I shall, accordingly, continue to refer to them by these names.

The facts are conveniently set out in the judgment of BARNARD, J., as follows. Henrica and Richard were born in Cracow in Poland and lived there until the autumn of 1944, when they moved to Kitzbuehel in Austria. Henrica was then pregnant. They were both Roman Catholics and anxious to be married in a church by a priest. Owing to the German occupation of Austria there were difficulties in their way, but eventually, on May 19, 1945, they went through a ceremony of marriage according to the rites of their church in the parish church at Kitzbuehel. On June 12, 1945, Barbara, the third party cited, the child of that union, was born. On June 16, 1945, she was registered as an illegitimate child, but on July 16, 1945, was baptised as legitimate. Richard and Henrica lived together as man and wife until 1947, when they separated. In July, 1945, they had left Austria with Barbara for Italy, and in the autumn of 1946 they arrived in England. Towards the end of 1947, or early in 1948, Henrica met Michael, and on Mar. 27, 1949, she gave birth to the petitioner, Christopher, of whom Michael was the father. On Feb. 11, 1950, Henrica went through a form of marriage with Michael at the register office in Croydon, he being a bachelor and having by that time acquired an English domicile. The trial judge has found as a fact that, assuming she was a feme sole when she came to England, Henrica had also by that time acquired a domicile in this country. The learned judge accepted the evidence of three expert witnesses to the effect that, by the German marriage law which was still in force at Kitzbuehel on May 19, 1945, the religious ceremony which Richard and Henrica went through on that date did not constitute a valid legal marriage. On Apr. 27, 1945, Austria had been liberated, but by an order of the provisional government published on May 1, 1945, although certain of the German laws were repealed, the marriage law was for the time being confirmed. On June 26, 1945, the Austrian provisional government published Order No. 31 to come into force on June 30, 1945. The relevant sections are as follows:

"Section 3 (1): Marriages which were solemnized during the period from Apr. 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognised church or religious community have the effect of a marriage solemnized at a register office in

accordance with ss. 15 et seq. of the Marriage Law of July 6, 1938*, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office. (2) The offices in which such marriages have been solemnized shall forward without delay to the register office which would have been competent to solemnize the marriage at the time of its solemnization in respect of the bridegroom, true copies of the entries made in the marriage register showing exactly the words, figures and letters . . . Section 5 (1): The register offices are to enter in their register the occurrences affecting personal status communicated to them in accordance with s. 3 and s. 4."

Section 4 is a section dealing with the registration of births and deaths. For reasons which were not explained the ceremony of May 19, 1945, was not registered in accordance with s. 3 and s. 5 until July 18, 1949. Accordingly, the question for decision was whether, immediately before the ceremony at Croydon on Feb. 11, 1950, Henrica was, or was not, already validly married to Richard according to private international law as applied by the courts of this country. BARNARD, J., answered this question in the affirmative, rejected the petition of the petitioner, and declared that the marriage solemnized on Feb. 11, 1950, was not a valid marriage, and that the petitioner, Christopher, born on Mar. 27, 1949, was not legitimated for the purpose of the Legitimacy Act, 1926. This decision was confirmed by the Court of Appeal.

Counsel for the Attorney-General, in supporting the judgments of the courts below, submitted that the case was governed by the well-established rule of private international law that, so far as formalities are concerned, the validity of marriage is governed by the *lex loci celebrationis*, and he cited the well-known passage to this effect in the speech of VISCOUNT DUNEDIN in *Berthiaume v. Dastous* (1) ([1930] A.C. 83), and other authorities to the like effect. Counsel for the appellant did not dispute this principle, but contended that an equally well-established rule of private international law was applicable to the facts in this case, viz., that the courts of one country will not recognise the extra-territorial effect of a foreign statute on the status of a person not domiciled in, or the subject of, the legislating state. The problem is whether a foreign validating Act with retroactive effect dealing with the form of marriage, but with consequential effect on the status of persons domiciled outside the legislating country, should be treated as a law concerning the formality of marriage or as a law affecting status.

My Lords, at one time I felt some doubts whether, on its special facts, this case did, in truth, involve a conflict between these two principles, having regard to the fact that at the date of the coming into force of the validating order of June 26, 1945, Henrica and Richard were still resident within the jurisdiction of the country where they had gone through the marriage ceremony, and the registration of the marriage was merely an administrative act which should have been carried out immediately after the ceremony but which happened to have been delayed until the parties had left and acquired a fresh domicile elsewhere. On consideration, however, I have reached the conclusion that the date of registration is the material date in this connection and that the position is the same as if Order 31, having immediate retroactive effect without the necessity for registration, had been enacted on July 18, 1949. Which, then, of these two conflicting principles should your Lordships—in the absence of authority—apply to this case? Whichever is chosen must inevitably result in hardship to one or other of the children whose legitimacy is in question.

My Lords, I feel little doubt that it is the former that should prevail and be regarded as an exception to the latter, or rather, perhaps, that the latter should be interpreted as referring to laws directly affecting status as distinct from those which deal with form and only have indirect or consequential effect

* German Official Gazette, I, p. 807.

on status. What influences me most in reaching this conclusion is that there is no field of legislation which has been so fruitful of retrospective validating legislation in this country as that of marriages invalid for lack of some requisite formality. Your Lordships were referred to more than fifty of such statutes between 1780 and 1939. Seventeen of these Acts deal exclusively with marriages outside the United Kingdom in territories, or portions of territory, regarded for certain purposes as notionally British soil, and generally apply only where one or both of the parties is a British subject, but the remainder deal with marriages in the United Kingdom and in no single instance is the validity made to depend on the domicile of the parties at the date of marriage or at the date of the Act. The legislature of this country has clearly assumed competence to pass legislation validating informal marriages contracted here irrespective of domicile or nationality. It would seem to be in accord with comity and with principle that our courts should recognise the validity of similar foreign laws dealing with an aspect of marriage, viz., formality, which has always been recognised as governed by the *lex loci celebrationis*. There are other reasons for accepting this view, the most cogent of which are, I think, as follows: (i) Since a marriage, even if valid by the law of domicile, is regarded as invalid if not in conformity with the law of the place of celebration, it would seem illogical if this same law cannot retrospectively cure the invalidity. (ii) The legislature of the place of celebration is more likely to be cognisant of the informality, and, accordingly, more likely to afford the necessary statutory relief.

A number of authorities were cited in argument and several of them are referred to in the judgments of the courts below. None really deals with the problem which now arises for decision for the first time. It is, however, satisfactory to find that in the case of *Luna v. Godin* (2), the French courts accepted the principle of private international law which BARNARD, J., and the Court of Appeal considered applicable. It would not, I think, be right to found too much on the language of ROBINSON, C.J., in the Canadian case of *Doe d. Breakey v. Breakey* (3), because he was, in fact, dealing with an imperial statute which was binding on him, but he did say (2 U.C.R. 357):

"Now, if none of the exceptions in the statute prevent its applying for the purposes of this action, and if the marriage were by that Act made valid in Ireland merely, it follows that we must treat it here as having been a valid marriage at the time it was solemnized; for it is the *lex loci* that must govern."

There is also a sentence in the speech of VISCOUNT HALDANE in *Salvesen (or Von Lorang) v. Austrian Property Administrator* (4), which seems to be in accord with the view I have endeavoured to express. That case decided that when the parties to a marriage are domiciled in a foreign country a decree of nullity of marriage pronounced by a competent court of that country will, in the absence of fraud or collusion, be recognised as binding and conclusive by the courts of England and Scotland unless it offends against British notions of substantial justice. In the course of his speech to this effect VISCOUNT HALDANE said ([1927] A.C. 651):

"No later French law which would apply nor any circumstances had cured the invalidity thus brought about."

With regard to the case of *Lynch v. Paraguay Provisional Government* (5), where it was held that succession to property in England of a deceased foreigner is governed by the law of the place of his domicile at the time of his death, and that no subsequent retrospective legislation would be recognised as affecting the distribution of his personal property in England, I agree with the observation of BARNARD, J., that that case decided that the relevant date was the time of death, whereas in the present case the relevant date is that of the second ceremony and that, consequently, the decision is one which would have been of more assistance

to the petitioner if the second ceremony had preceded the registration of the first marriage. *Re Luck* (6) was a case where the Court of Appeal, by a majority, held that, as the father of an illegitimate child, born in California, had not acquired a domicile of choice in California at the date of the child's birth, a declaration of adoption, after he acquired domicile, which, by Californian law, was effective to legitimate the child as from birth, could not be recognised by the courts in this country. In that case it was not disputed that the law of domicile had to be applied, but the question was whether domicile at the date of the child's birth or domicile at the date of the declaration of adoption was to be looked at. In the course of the majority judgment, however, there are passages in which SIR WILFRID GREENE, M.R., and LUXMOORE, L.J., assume that no provision of foreign law will be recognised here as effective to change the status of a person not domiciled in the foreign country at the time, except, perhaps, where the law of the country in which such person is domiciled would itself recognise such foreign law. This language was used with reference to laws expressly directed to the alteration of status, and the court was not concerned to express any view as to the indirect effect on status of foreign law dealing with the formalities of marriage which have always been recognised as being within the province of foreign law. I do not, therefore, consider that any real assistance is to be derived from that case.

It was further contended by the appellant that in any event there was no evidence that Henrica had consented to the registration of the marriage and insufficient evidence that she had consented to marry in that she knew that the ceremony was invalid by Austrian law. So far as registration is concerned, this being a mere administrative requirement in no way dependent on the will of the parties, it is clear that want of consent on her part is immaterial. As to consent to the marriage, the learned trial judge has made no finding, but it is to be observed that, although there was evidence that the parties knew that such a ceremony was invalid prior to the liberation of Austria, it is by no means clear that they were aware that, after the liberation, which had taken place before the marriage, such a ceremony was still invalid. But, in any event, in my opinion, it would be impossible to hold that there is such an absence of consent as to vitiate the marriage where the parties have gone through a form of marriage in accordance with the rites of the Roman Catholic church with the intention of creating a union binding on them in the eyes of the church to which they belong.

I do not consider it necessary or desirable to express any opinion as to whether it follows from this decision that the result would necessarily be the same if the parties had acquired a domicile here and contracted a marriage valid by the law of this country before the passing of the foreign validating statute.

For the reasons stated above and those contained in the judgment of BARNARD, J., and the Court of Appeal, I would dismiss this appeal.

LORD ASQUITH OF BISHOPSTONE: My Lords, I have had the advantage of reading, in print, the opinion of my noble friend, LORD TUCKER. I agree in general with his reasoning, and, in particular, with his analysis of the authorities, none of which seems to me to be helpful in relation to the facts of this case. I desire to add nothing under the last head, and only a few sentences on the more general issue.

This House has strongly affirmed the principle "*locus regit actum*": *Berthiaume v. Dastous* (1) ([1930] A.C. 83). Where two persons, neither of them domiciled in country A, enter into a ceremony or formalities which, according to the laws of that country, constitute a valid marriage, the law of England will recognise that marriage as valid. I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid *ab initio* according to the local law and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of country A's legislature. Here, the marriage ceremony took place in Austria in May, 1945, and the validating Act

was passed in June, taking effect from the thirtieth of that month. True, it contained a provision that the validation should not be complete until the irregular marriage was entered in a certain register and that there was a delay of four years in so entering it. But before the second ceremony of marriage was performed, the triple complex (ceremony, validation, and registration) was complete in relation to the first marriage, and the parties were validly married. The registration was, in my view, a mere ministerial act, not necessarily dependent on the will of the parties—a mere by-product or corollary of what happened in 1945, to which year it may not unreasonably be related back. But whether its actual date is taken as decisive, or whether it can be antedated notionally by four years, the fact remains that all three of the requirements necessary to validate the first marriage had been fulfilled before the marriage ceremony of 1950 was solemnized. The question what was the precise matrimonial status of the parties between 1945 and the date of registration (1949) is by no means easy, but it does not arise on the facts of the present case. There is no rule of English private international law which precisely covers the facts of this case. The appellant suggested that retrospective validating Acts were repugnant to English public policy, and that English public policy was a factor to which weight should be attributed in moulding the rules of English private international law, or in adapting them to new combinations of fact. I would not demur to the second of these propositions, but the history of our domestic legislation seems to me destructive of the first. The table of validating English statutes produced by the respondents seemed to me decisive on this point. Validating Acts may, of course, result in some hard cases, often with the object of obviating a larger body of hard cases. Nevertheless, our legislature has endured and indulged them on a very large scale, and the argument so far as based on public policy would seem to be ill founded.

I agree that the appeal should be dismissed.

LORD COHEN: My Lords, the question for your decision was correctly and succinctly stated by BARNARD, J., as follows ([1952] 1 All E.R. 501):

“ Were both parties [to the marriage which was celebrated at Croydon] free to marry on Feb. 11, 1950 ? ”

It was common ground between the parties before your Lordships that the correct answer to this question depends on the further question whether the ceremony of marriage celebrated in the parish church at Kitzbuehel on May 19, 1945, was a valid form of marriage, and that this further question must be determined by the law of Austria. The appellant contended that the law of Austria to be applied is the law as it stood on May 19, 1945, whereas counsel for the Attorney-General argued that the law applicable was that law as amended down to Feb. 11, 1950.

The general principle that the validity of a marriage as regards form is governed by the *lex loci celebrationis* is not in dispute, and counsel for the Attorney-General took us through a number of cases in England and Scotland in which that principle has been stated in terms wide enough to support his contention that the question must be answered as the courts of the place of celebration would have answered it on the date at which it became material to determine the question (in this case Feb. 11, 1950), but in none of the cases was the attention of the court or of this House directed to the particular point which your Lordships have to decide. I do not, therefore, find it necessary to trouble your Lordships with any of those authorities except *Salvesen v. Austrian Property Administrator* (4). In that case it became necessary to determine the validity of a decree of nullity granted in 1924 by a German court in regard to a marriage celebrated in Paris in the year 1897 between an Austrian citizen and a British subject then domiciled in Scotland. At the time of the decree the parties were clearly domiciled at Wiesbaden in Germany. The evidence established that the parties had not, in 1897, complied with the requirements of French law as to residence and publication, and the German court, acting on the principle *locus regit actum*, declared

the marriage null and void. VISCOUNT HALDANE, in setting out the facts, said ([1927] A.C. 651):

“The [German] court satisfied itself that the marriage had been constituted neither in accordance with the conditions required by French law nor in accordance with those required by the law of the domicile. No *later French law which would apply* nor any circumstances had cured the invalidity thus brought about.”

A The italics are mine. Counsel for the Attorney-General submitted, I think correctly, that the reference to “later French law” would have been irrelevant had VISCOUNT HALDANE not thought that a later French law retrospectively validating the defective ceremony would have altered the position. Counsel for the appellant pointed out that even if this is the correct
B inference to be drawn from VISCOUNT HALDANE’S speech, it is in the nature of dictum, and they emphasised the inconveniences which would arise from the acceptance of the argument of counsel for the Attorney-General. Thus, an Englishman who had been through a defective ceremony abroad would never know whether he was married or single. If, relying on the ceremony being invalid, he entered in England into a marriage undoubtedly
C valid at the time it was celebrated, he might find doubts cast on this marriage if subsequent to the date thereof a decree similar to Order No. 31 in the present case were passed in the country where the original ceremony took place declaring it to be a valid form of marriage as from the date of solemnization. That difficulty does not arise in the present case, and I do not propose to express an opinion as to how the doubts ought in such a case to be resolved. I would observe,
D however, that other difficulties would arise from the acceptance of the arguments for the appellant. The parties to the marriage abroad might live and die in ignorance that there was any doubt as to the validity of the marriage ceremony. Yet, unless those doubts could be removed by a validating law passed in the country where the ceremony took place, the courts of this country might be bound to hold that the children of the marriage were illegitimate. Counsel for
E the appellant argued that recognition in the courts of this country of the validity of an Act passed by the Parliament of the place of celebration retrospectively validating a defective ceremony would infringe the principle that the law of the domicile regulates essentials as distinct from forms, since such retroactive legislation might have the effect of altering the status of a person from single to married. This argument at first attracted me, but on consideration I do not see
F that it gives any greater power to the foreign law to affect status than is necessarily involved in the principle *locus regit actum*. Moreover, the law favours the validity of marriage and Parliament in this country has never hesitated to pass retroactive legislation to cure defects in form. Your Lordships’ attention was called to a large number of such statutes an instance of which was the Greek Marriage Act, 1884. As counsel for the Attorney-General pointed out,
G the legislature of the place of celebration is more likely than the legislature of the place of domicile to become cognisant of informality and more likely, therefore, to grant the necessary statutory relief.

I must refer to two cases on which counsel for the appellant particularly relied. The first was *Lynch v. Paraguay Provisional Government* (5). In that case a domiciled Paraguayan died in Paraguay leaving personal property in England.
H After his death, but before a grant was made in England, a decree of the government of Paraguay purported to confiscate all his property wherever situate. The government of Paraguay opposed the grant of probate in England to the person who was universal legatee at the date of death, but LORD PENZANCE, in delivering judgment, pointed out the inconvenience and injustice which might arise from any other conclusion than that which he proceeded to state and, in the absence of authority to the contrary, held himself bound, in deciding who was entitled to a grant, to have regard only to the law of the place of domicile as that law

existed at the time of death. The subject-matter with which LORD PENZANCE was dealing is, however, so remote from the question before your Lordships that I cannot regard his observations as throwing any light on the present case, especially when I remember that under the law of England probate of a will when granted relates back to the date of death. In *Re Luck* (6) the question at issue was whether a child, illegitimate by the law of England at the date of its birth, of a person domiciled in England at that date would be recognised, by the law of England, as the legitimate child of that person if he was subsequently legitimated by adoption according to the law of California, in which State the father had by then acquired domicile. The Court of Appeal, applying the principle adopted by English courts in regard to legitimation by subsequent marriage, held that by the law of the father's domicile at the date of the son's birth, the relationship was immutably that of putative father and illegitimate child and nothing thereafter could change it. LUXMOORE, L.J., delivering the judgment of himself and SIR WILFRID GREENE, M.R., posed this question ([1940] 3 All E.R. 316):

"Will the English courts recognise the power of Californian law retrospectively to affect the status of a person in respect of a period when that status was subject to the law of England . . . ?"

LUXMOORE, L.J., went on to say that, having regard to the view which he and SIR WILFRID GREENE took on the broader issues of the case, it was unnecessary to answer this question. Counsel for the appellant, however, submitted that it is clear from the judgment that they would have answered it in the negative. I do not find it necessary to consider whether counsel is right or whether the answer he suggests that the Court of Appeal would have given to the question is correct, for in *Re Luck* (6) their Lordships were dealing with an issue which was admittedly governed by the law of the domicile, whereas your Lordships have to deal with a question which the law of the domicile refers to the law of the place of celebration.

In my opinion, therefore, there is no reported case which supports the arguments advanced on behalf of the appellant. On the other side, there is the dictum of VISCOUNT HALDANE in *Salvesen v. Austrian Property Administrator* (4), to which I have already referred, and of ROBINSON, C.J., in *Doe d. Breakey v. Breakey* (3) (2 U.C.R. 357), to which both BARNARD, J., and SOMERVELL, L.J., refer. These support the view expressed by SOMERVELL, L.J., with which I respectfully agree, that ([1952] 2 All E.R. 619):

"Legislative Acts of the kind in question are passed to remedy what has been done in good faith, but which turns out not to have achieved the result which the parties intended"

and that there is (*ibid.*)

"... no reason why those who were at the time, or later became, domiciled elsewhere [than in the country where the marriage was celebrated] should be impliedly excepted from its provisions."

For these reasons I would dismiss the appeal, and would add that the fact that a similar conclusion was reached by the French courts in *Luna v. Godin* (2) suggests that the orders of the courts below are in accordance with a generally accepted principle of private international law.

Like my noble and learned friends, LORDS MORTON OF HENRYTON and TUCKER, I express no opinion as to the consequences which might have ensued if the ceremony at Croydon had taken place before the order of the Austrian provisional government had come into force, or before the ceremony in Austria had been registered pursuant to that order.

Appeal dismissed.

Solicitors: *George & George* (for the appellant); *Treasury Solicitor*.

[Reported by G. A. KIDNER, ESQ., *Barrister-at-Law*.]

GOUGH v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.JJ.), October 15, 16, 19, November 4, 1953.]

Child—Negligence—Allurement—Tramway track used by public and children—Slow-moving trucks—Child riding on buffers.

Licensee—Negligence—Child—Trap—Tramway track used by public and children—Slow-moving truck—Child riding on buffers.

A

The defendants used a tramway track which they owned to haul trucks up a slope at about six miles an hour. The track was unfenced and without warning signs except one at the foot of the slope, and no one accompanied the trucks and no one was on duty on the track during the upward or downward journey. The track ran near to houses and the public crossed it inter alia to go to allotments and to swimming-baths, and children played on the land and the track, to the knowledge of, and without objection by, the defendants. With the knowledge of the defendants but without their permission, children made a practice of riding on the buffers of the trucks. The plaintiff, a boy of six and a half years, who had been forbidden by his father to ride on the trucks, but who, though warned by his father of it, was found to have been not of sufficient age to have appreciated the danger, slipped while jumping off a truck on which he was riding and was injured.

B

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HELD: (i) the plaintiff was a licensee on the land under a general licence not limited to crossing the line for specific purposes and he did not become a trespasser by riding on the truck

D

Lynch v. Nurdin (1841) (1 Q.B. 29) and dictum of DU PARCQ, L.J., in *Holdman v. Hamlyn* ([1943] 2 All E.R. 141), applied; *Addie (R.) & Sons (Collieries) v. Dumbreck* ([1929] A.C. 358) and *Hardy v. Central London Ry. Co.* ([1920] 3 K.B. 459), distinguished.

E

(ii) the slow-moving trucks were to the knowledge of the defendants an allurement to children and they were a trap for the plaintiff, notwithstanding that he had been warned of the danger and forbidden to ride on the trucks, since he did not appreciate the real danger involved; and riding on the trucks was something children might have been expected to do.

(iii) the defendants were, therefore, under a duty to take reasonable care to prevent injury to the children and, having failed in that duty, were liable to the plaintiff for negligence. ✓

F

AS TO THE DEGREE OF CARE REQUIRED TOWARDS CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 69, 70, Nos. 441-453.

AS TO WHO IS A LICENSEE, see HALSBURY, Hailsham Edn., Vol. 23, p. 609, para. 859; and FOR CASES, see DIGEST, Vol. 36, pp. 45, 46, Nos. 282-287.

Cases referred to:

G

(1) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.

(2) *Scott v. Shepherd*, (1773), 2 Wm. Bl. 892 (96 E.R. 525); 3 Wils. 403; 36 Digest 17, 78.

(3) *Bird v. Holbrook*, (1828), 4 Bing. 628; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest 94, 629.

H

(4) *Lynch v. Nurdin*, (1841), 1 Q.B. 29; 10 L.J.Q.B. 73; 5 J.P. 319; 113 E.R. 1041; 36 Digest 24, 118.

(5) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.

(6) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P. 319; Digest Supp.

(7) *Hardy v. Central London Ry. Co.*, [1920] 3 K.B. 459; 89 L.J.K.B. 1187; 124 L.T. 136; 36 Digest 71, 457.

- (8) *Holdman v. Hamlyn*, [1943] 2 All E.R. 137; [1943] K.B. 664; 113 L.J.K.B. 7; 169 L.T. 85; 2nd Digest Supp.
- (9) *Cooke v. Midland & Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest 70, 450.
- (10) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.

APPEAL by the defendants against an order of FINNEMORE, J., at Cardiff Assizes, dated Mar. 31, 1953, awarding damages to the plaintiff in an action for damages for negligence.

The defendants were the owners of a tramway track on land which the public used and children played on without objection by the defendants. The plaintiff was injured through riding on a slow-moving truck on the track, following the practice of children which was known to the defendants, though not permitted by them. It was contended for the plaintiff that he was a licensee on the land, that the slow-moving trucks were an allurements to children and a trap, and that the defendants were negligent in not taking sufficient steps to prevent injury to children. The defendants contended that the plaintiff was a trespasser; that, if he was a licensee, he was a licensee only for the limited purpose of crossing the track and became a trespasser by riding on the truck; and that the slow-moving trucks were not a trap for the plaintiff since his father had warned him of the danger and forbidden him to ride on the trucks.

Lloyd-Jones, Q.C., and *W. N. Francis* for the defendants.

H. Edmund Davies, Q.C., and *A. T. Davies* for the plaintiff.

Cur. adv. vult.

Nov. 4. The following judgments were read.

SINGLETON, L.J.: The Albion Colliery at Cilfynydd in South Wales is owned and worked by the National Coal Board, who were the defendants in this case. Waste from the colliery is taken up to a pit by means of what is called the tramway, which is about one thousand yards long. Eight trucks or trams are drawn up by an engine which is at the top of the slope. That happens, perhaps, twenty-four times a day. No one accompanies the trucks nor is anyone on duty on the track when the upward or the downward journey is being made.

Cilfynydd is a small mining village, and there are houses on both sides of the lower part of the track. There is no fence of any kind. Those who live in the neighbourhood, and maybe others, are allowed to pass over the track to get from one part to another. I take this passage from the evidence of the colliery manager, Mr. Williams. Counsel for the plaintiff asked the witness:

"Q.—It is within your knowledge, is it not, that grown-ups were frequently in the habit of crossing the tramlines? A.—Oh, yes. Q.—And to that you would raise no objection, of course? A.—None at all. Q.—And I suppose, in the same way, there were places where they would not cross at right-angles, but, being on the road, would walk along for a short while and then go over to the other side? A.—Yes, that has been done. Q.—And to that you take no objection? A.—No, I never have. Q.—And your attitude in regard to children would be exactly the same, if they did merely that? A.—If they did merely that. Q.—Yes. And it is a fact, is it not, that not only adults, but children, did that sort of thing in quite large numbers? A.—It was a common practice to walk, yes."

The infant plaintiff, Gerwyn Evan Gough, met with a serious accident on the track on the morning of Saturday, Dec. 2, 1950. He was then six years of age. He lived with his parents at 8, Mary Street, some eighty or one hundred yards away. He and another boy from the street went up the incline on to the track. There was a journey of trucks going up, and they jumped on, the plaintiff towards the back and the other boy on the first truck. When a little later the plaintiff jumped off he slipped and fell. His right leg was caught, and it was later

amputated above the knee, leaving a short stump. It would appear from the evidence that this was by no means the first time that he had jumped on a truck, but that he was following a practice pursued by other boys. He said that he had never been stopped by anyone. It is clear, however, that the practice was not permitted by the colliery officials, though it may be questionable as to whether they had adopted any proper or sufficient means to stop a practice of which they knew. The plaintiff himself said that he knew that it was wrong to ride on the trams, that he had been told by his father and his mother not to do so, and that his father would have hit him if he had known that he was riding on them.

The plaintiff, through his father, his next friend, brought this action against the defendants alleging that his injuries were caused by the negligence of the defendants. The defendants denied negligence. They did not plead contributory negligence in view of the boy's age, but they pleaded that:

"The dangers of the said journeys of trams were obvious and the plaintiff knew or ought to have known of them."

The action was heard by FINNEMORE, J., at Cardiff on Mar. 16, 17 and 18, 1953, and on Mar. 31 he gave judgment in favour of the plaintiff and awarded him £4,000 damages. The defendants appeal to this court.

It is desirable that I should say a little more as to the facts. The speed of the journey of trucks is only about six miles an hour. When the colliery was in the hands of the Albion Colliery Co., there was a man riding on one of the trucks as they went up and down. That was considered a dangerous practice, and it was discontinued a good number of years ago. The Powell Duffryn Co., who were the immediate predecessors of the defendants, had a maintenance man working on the line when the journeys were made. That course has not been followed since the defendants took control, and, according to the evidence of the boy's father: "You very rarely see a man there now."

There were at least three paths across the track. Witnesses pointed out the danger arising from the road and the danger from the moving trucks. One witness, Mr. Peter Jones, a retired colliery worker, said that he thought it was dangerous for children to play on the track at all. When asked if he thought it was dangerous for him to be on the track, he gave the significant answer: "Well, I knew more than them, like, did I not?" He said he had seen children playing about there and jumping on the journeys, and that he had told them to go away. It had happened for many years past, and more since there had been no rider. Another witness, Mr. E. J. Rees, said that he used the track to go to places such as the graveyard, the public-house, or for a walk. He was asked:

"Is it a common thing for the tramline to be used by grown-ups?"

A.—Yes. About twelve months ago a whole party of them went from the chapel. The youth of the Sunday School go there. It is not private at all there, you see. We can go there, and nobody says anything. Q.—You have never been checked, I gather from your last answer? A.—I have never been checked at all. Q.—Have you ever heard any others being checked? A.—No, not at all. Q.—What about children? A.—Well, it is a funny thing; a dangerous place like that, and yet they will play there. Q.—What steps, if any, have you seen being taken when children have been playing there? A.—Well I have seen the chaps sending them from there. But they go for the time being, and then back they come again. Q.—What chaps have you seen doing that? A.—Mr. Jones. We would all congregate where the drive goes up to the manager's house, we go there and talk. Q.—You were saying that chaps had sent them away. What chaps are you speaking of now? A.—The men at the bottom of the street, you know."

I should say that point is close to the pit and is at the bottom of the hill. Then he was asked:

"Q.—Could you name some men? A.—Peter Jones is one, who has given

evidence today. We have a talk down there, and the journey is just above our heads. Q.—When you say ‘down there’, do you mean Mary Street? A.—Yes. Q.—And you say the journey is—— A.—Just above our heads. Q.—And if you saw children up there on the incline, what would you do? A.—Well, I would chase them away. Q.—Merely because they were on the incline, or because the journey might be approaching? A.—Well, if a full journey is down on top of the pit, the rope does swing up and down and out, and all that is dangerous. Q.—Even though the journey be not then in sight, the fact that the rope is moving, or might be moving, up and down would render the place dangerous, in your view? A.—Yes.”

The witness was cross-examined by counsel for the defendants, and I think I ought to read these questions and answers:

“Q.—As I understand it, Mr. Rees, you are saying that the presence of children on this tram track at all would, in your view, be dangerous? A.—Oh, yes. Q.—And you would tell them to get away? A.—I have told them many times. Q.—Many times? A.—Many times. Q.—And not only you, but other people down in the town? A.—Yes, the mothers, and the people that are there. I have heard the women shouting many times. Q.—You mean it has been for many years an almost constant battle, as it were, between the children and the parents, and people like yourself, to keep them off? A.—When there was a man on the journey going up the tip, the children would be afraid of him. Q.—What time are you talking about now? A.—A few years ago now, when the old Albion company was there. Q.—That is many years ago, is it not? A.—Up to 1930. Q.—Were you a boy there then? A.—A boy? Q.—Were you, shall we say a young man, there at the time yourself? I do not know how old you are. A.—I am fifty. Q.—I am so sorry. Were you actually born in this place? A.—In Cilfynydd, yes. Q.—Did you, by any chance, as a boy ever play about on that track? A.—Not when I was a boy. I did not do it at all. Because of my hand I could not jump on the journey. I was there, though, with them. (FINNEMORE, J.): Other boys were jumping on the journeys, were they? A.—Yes, my Lord. I was afraid of my hand. (Counsel): It is an old practice, as one can well imagine. (FINNEMORE, J.): As you got older, did you ever tell boys not to do it because it was dangerous? A.—Well, I have grown up now. Q.—Did they take any notice of you if you told them? A.—Yes, the boys would go away and then come back again. Q.—They took notice while you were there? A.—Yes. (Counsel, resuming cross-examination): And then did it again when your back was turned, I suppose? A.—Yes. Q.—Is it right that practically everybody in Cilfynydd has told these children not to go on the track except colliery officials? A.—Dozens of people walk there. Q.—Not by any chance have you seen a colliery official shouting to them or telling them to get off? A.—Yes; when the empty journey comes down, it comes down into the gulley, the back lane, of Mary Street. The boys then go up on the top and put the journey on the rails. Q.—But have you never heard anybody at the colliery, not a single soul, the whole time of your recollection, ever tell the children not to do what you warned them not to do? A.—If I go back years to the Albion Colliery Co., there was a man cleaning the road there. He was there continually. Q.—The road is sometimes cleaned now, is it not, from time to time? It is dealt with from the maintenance point of view? A.—Well, not like it was then. That man was permanently on there. Q.—But there is somebody who does it now from time to time? A.—Oh, I expect so, yes.”

I have referred to this evidence in order to show the value of having someone on or near the track when the trucks were in motion. There is no doubt about the danger to children. It was well known that they used the track, and the fact

that they sometimes jumped on the slowly moving trucks was well known. Mr. Oliver, an assistant at the washeries, who was called on behalf of the defendants, said that the practice of jumping on to the journeys had gone on for eighteen to twenty years, and he used these words: "Since I have been there there has always been someone jumping on the journeys." He had been employed at the colliery for forty-three years, and had at one time been traffic foreman. Mr. Williams, the manager, said that he had had reports of boys jumping on the journeys, though he had not seen it himself.

FINNEMORE, J., in the course of his judgment, said:

"There were no warning signs except one right at the bottom near the village, and I think it is common ground now that people frequently crossed this line, and children frequently crossed this line. It was a short cut to the swimming-baths, it was a way of going to certain allotments, and in addition, children played either near the line on colliery property, or actually over the line itself. In addition to these matters it appears to be true that, at all events, not so infrequently as to be a rarity, boys used to yield to the temptation of getting a ride on this tramway by standing on the buffers of one or other of the trams, often, indeed, on the buffers of two trams, one foot on each. It was whilst taking a ride of this kind that the plaintiff unfortunately fell when he was getting off, so that his right leg came under the wheel of one of the trams, with the disastrous consequences which are now fully known."

The learned judge referred to the evidence of a number of witnesses as to use of the track, and added:

"Mr. Williams, who struck me as being a perfectly frank and honest witness, the present manager, who has been there since 1949, actually put the matter beyond any dispute, because he said that it was quite a common practice to walk across the line. He knew adults frequently crossed the line and he took no objection to that, nor did he take any objection to children crossing the line if that was all that they did. I do not think it is suggested in this case—anyhow I am not satisfied—that the children were allowed to ride on the buffers of the trams without complaint. But what this all comes to for them is this, that this boy quite plainly on the evidence—it was not really disputed by counsel for the defendants at the end—was a licensee as far as going on to the colliery property and over the lines was concerned. No effort was ever made to prevent that. There was no fencing, there was no warning, and, as I have already pointed out, Mr. Williams said on the whole he did not object to it. It is quite obvious that no one had really objected to it for many years past."

Counsel for the defendants submitted that, even if the plaintiff was a licensee when he was on the track, and for the purpose of crossing the track, he became a trespasser immediately he stepped on a truck, and that, in those circumstances, the defendants were not responsible in damages. He submitted that the defendants owed no duty to the plaintiff. The difficulty of cases of this kind is well recognised. In *Latham v. R. Johnson & Nephew, Ltd.* (1) HAMILTON, L.J., said ([1913] 1 K.B. 413):

"Children's cases are always troublesome. English law has been very ready to find remedies for their injuries. Scotch law has been less indulgent." Then the learned lord justice referred to certain authorities and added (*ibid.*):

"They are the commonest cases of the general rule, which is as old as *Scott v. Shepherd* (2), that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird v. Holbrook* (3); *Lynch v. Nurdin* (4)) that injury would not have occurred. Children acting in the

wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief."

The learned lord justice went on to say (*ibid.*, 415):

"Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement'. A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. 'Allurements', too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object. Finally, what objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

Part of the last passage was repeated by LORD SHAW OF DUNFERMLINE in *Glasgow Corpn. v. Taylor* (5) ([1922] 1 A.C. 63), and LORD SUMNER in the last case said (*ibid.*, 67):

"Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations."

Now, this child was on the track with the tacit permission of the defendants. At the time of the accident he was doing something which he might be expected to do and which, from the history, the defendants might have anticipated he, or any other boy, would probably do. The slowly moving trucks were an attraction to boys. Boys knew they ought not to get on them, but can it be said that this boy appreciated the risk he was running? He was not asked a question on that.

In *Liddle v. North Riding of Yorkshire County Council* (6) SCRUTTON, L.J., said ([1934] 2 K.B. 112):

"In my opinion, to make the landowner liable for injury to a child on

his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable."

A I do not think that any help is given by the decision in *Hardy v. Central London Ry. Co.* (7), for in that case it was held that the boy was fully aware that he was a trespasser in the booking hall. The submission of counsel for the defendants that the plaintiff became a trespasser when he got on the truck appears to me to be answered by a passage from the judgment of DU PARCQ, L.J., in *Holdman v. Hamlyn* (8) where he said ([1943] 2 All E.R. 141, 142):

B "It was indeed argued that the infant plaintiff was a trespasser. The truth is, however, that he was an invitee, at any rate down to the moment when the threshing machine proved an irresistible temptation. If the boy strayed beyond the strict limit imposed by the terms of the invitation, it was because of the failure of the defendant's agent to guard him against a dangerous allurement; and if he can properly be called a trespasser at all, the trespass was a natural and probable result of the negligence of the defendant's agent. A defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser."

C An examination of the authorities leads me to the conclusion that, if an occupier allows children of tender years on his land, and if he has thereon something which is, to his knowledge, attractive to them and which is dangerous, he must take reasonable care to protect them from the danger. Warning may be sufficient in some cases, though not in all. What is reasonable care depends on a number of circumstances, among which are: (i) the nature of the land and the position and nature of the dangerous object; (ii) the knowledge of the occupier; and D (iii) the age of the children. Of these the last, perhaps, presents the most difficulty. E A child may know that he ought not to do something. It does not follow that he appreciates the danger or likely consequence of his doing that which he ought not to do. The plaintiff was considered to be too young to be guilty of contributory negligence, and I do not think that it ought to be held that he appreciated the danger of that which he did in the absence of any question directed to that point. The defendants might have forbidden the use of the track to persons F generally or to children. They might have fenced the track, or they might have had someone on or about the lower part of the track, where there are houses, when the tramway was in motion. They did none of these things. There is evidence that on some occasions children were chased away. Whether that was sufficient in the circumstances is a question of fact.

G The position is summarised in WINFIELD ON THE LAW OF TORT, 5th ed., p. 587, in this way:

"An occupier must take reasonable care to see that children, of whose presence he knows or ought to know or to anticipate and who are too young to appreciate the danger of some attractive object under his control and within his knowledge, are protected against injury from that danger either H by warning which is intelligible to them or by some other means."

I agree with that statement of the law. FINNEMORE, J., said that he could think of

"few things more likely to tempt small boys than a slow-moving set of trams on which a boy can get for a little distance a pleasant and unusual ride. From time immemorial boys have always been anxious to get rides, and it has always been a very real allurement to them."

His judgment shows that he did not consider that the defendants had taken

the steps which they ought to have taken, and, further, that the plaintiff did not appreciate the real danger of what he was doing. Those were questions of fact for the judge, and this court ought not to interfere with his findings on them. Moreover, they were amply warranted on the evidence, and I agree with them. I am in favour of dismissing the appeal.

BIRKETT, L.J.: In this case the defendants appeal against a decision of FINNEMORE, J., given at the Glamorgan Winter Assizes at Cardiff on Mar. 31 of this year. The plaintiff in this action was a boy who was six years of age when he met with the injuries which were the subject of the action. He sued the defendants through his father as next friend, claiming damages for the injuries he had sustained, as he alleged, through the negligence of the defendants. The defendants denied that they were negligent, and did not plead contributory negligence on the part of the boy. FINNEMORE, J., considered his judgment and found for the plaintiff, awarding him the sum of £4,000. A B

On the morning of Saturday, Dec. 2, 1950, the infant plaintiff went on to the land owned and occupied by the defendants at the Albion Colliery in South Wales. On that land was a tramway, about one thousand yards long, which ran up a steep incline, and it was used by the defendants for the purpose of removing rubbish to the top of the incline, where the rubbish was discharged from the trams on to a dump. From the photographs which were shown to us, and from the evidence, it would appear that the tramway is not guarded in any way, and the evidence also showed that, when the trams are in motion, they are unattended by any servant of the defendants, whatever may have been the practice in former years. The trams are drawn up the incline by an engine placed at the top of the incline, and they travel quite slowly, about six miles per hour, and about twenty-four journeys are made in one day. The infant plaintiff climbed on to one of the trams when it was in motion on this Saturday morning, and in the act of jumping off he slipped in some way, and his right leg was run over, injuring him so much that his leg had to be amputated above the knee. The boy lived with his father in a small village quite near to the land on which the defendants' tramway was used, and the home of the plaintiff was about eighty to one hundred yards away, though the nearest house to the land of the defendants was only about five yards away. There were no warning signs except one at the bottom of the incline. C D E

The evidence clearly established that, for a considerable time past, men, women and children entered on the land of the defendants and crossed and re-crossed the tramway, to the knowledge of the defendants. There was evidence, too, that children played near the tramway and on the tramway. Further, there was evidence that, on occasions, children actually rode on the trams when the trams were on a journey, sometimes standing on the buffers of the trams, though Mr. Ronald Williams, the manager of the colliery, said that, whenever it had been reported to him that children had been seen riding on the buffers, instructions had been given by him to the servants of the defendants in these words, to "get after these boys if they were riding." F G

It became quite clear, as the case progressed, that the infant plaintiff on the Saturday of the accident was in the position of a licensee on the defendants' land, and a licensee to cross and re-cross the tramway. Counsel for the defendants said, however, that one important feature of the case distinguished it, on the facts, from the reported cases on the subject of the position of children and the duties of occupiers of land, and that was that the boy had been warned by his father not to ride on the trams, and also had been told many times of the danger of so doing. But the father also said that he did not know whether his son was old enough to appreciate the danger of which he had been warned. The infant plaintiff told counsel for the defendants that he knew it was wrong to ride on the trams, because his father had told him not to do it, and his father would have hit him had he known of his disobedience. Counsel for the defendants, therefore, submitted that, even if the infant plaintiff was a licensee on the land in the H

limited sense for which he contended, he was not a licensee to ride on the trams, and, the moment that he climbed on to the trams to take the forbidden ride, he was in fact and in law a trespasser and was there at his own peril, and that the defendants were not liable to him for the injuries he had sustained.

The issue raised by counsel is to be decided, I think, on the facts of the particular case. The evidence may show that an occupier of land is well aware that young children habitually come on to his land for one purpose or another, and that he tacitly allows them so to come, and takes no step whatever to forbid them or to remove them. He may know, or should know, that on his land there is some particular object that, in the ordinary course of things, will be a great attraction to children. He may know, or should know, that some of the children that come on to his land are much too young to appreciate that the attractive object may have dangers for young children. And if these things are proved in evidence, his duty is to take suitable precautions to prevent injury to the children in those circumstances, and to protect them against the danger which they are too young to appreciate. But everything turns on the particular facts of each case.

In *Cooke v. Midland & Great Western Ry. of Ireland* (9) the facts showed that the child was not a trespasser, but at least a licensee, and in that case not merely a licensee as to the land on which the turntable stood, but also as to the turntable itself, and that the turntable was properly described as a trap. But in *R. Addie & Sons (Collieries) v. Dumbreck* (10) a child of four was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. That wheel was attractive and dangerous to children, and was in a field belonging to the defendants that was inadequately fenced, which field the defendants knew was used by the children as a playground. The child had been warned by his father not to go near the field or the wheel. The child was held to be a trespasser and the defendants were not liable. But the ground of that decision emphasises what, I think, is the quite vital distinction between that case and the present one, for in the words of VISCOUNT DUNEDIN ([1929] A.C. 372):

“ . . . when a proprietor protests and goes on protesting, turning away people when he meets them, as he did here, and giving no countenance in anything that he does to their presence there, then I think no court has a right to say that permission must be implied.”

In the present case FINNEMORE, J., says:

“ But what this all comes to for them is this: that this boy quite plainly on the evidence—it was not really disputed by counsel for the defendants at the end—was a licensee as far as going on to the colliery property and over the lines was concerned. No effort was ever made to prevent that. There was no fencing, there was no warning, and as I have already pointed out, Mr. Williams said that on the whole he did not object to it. It is quite obvious that no one had really objected to it for many years past.”

Similarly, in *Hardy v. Central London Ry. Co.* (7), the Court of Appeal reversed the decision of the learned trial judge, who had based his decision on the ground that the boy in question was a licensee, by holding that the boy who was injured on the moving staircase at Liverpool Street station, which staircase could be reached from the booking hall which was open to the street, was a trespasser. Both BANKES, L.J., and WARRINGTON, L.J., came to the conclusion, on the facts proved in the case, that the boy was not only a trespasser on the moving staircase, but that he was a trespasser in the booking hall itself.

Now, if the infant plaintiff in the present case was a licensee on the land of the defendants where this tramway ran, as FINNEMORE, J., found, and as the evidence plainly indicates, and if this tramway with its slowly moving trucks was an attractive thing to children, as he also found, and as the evidence plainly indicates,

then I do not think that the plaintiff's claim can be disposed of by saying that the moment the boy went on to the trucks he was a trespasser. The duty of the defendants in the circumstances disclosed by the evidence has been made quite plain by many authorities. Counsel for the plaintiff stated it in his second submission before us in these words:

"The defendants' duty accordingly was not to have on the land a concealed danger or trap."

He further submitted that whether a trap exists or not depends on the facts of the particular case, and that these slowly moving trams were in fact a trap for this boy on the facts of this case.

I do not think it is possible to dispute these four conclusions that arise from the evidence: (a) The plaintiff was plainly a licensee on the defendants' land which contained the tramway and the trucks. (b) The slowly moving trams were an obvious allurement to young boys, and the plaintiff was at least a licensee to cross and re-cross the tramways. (c) From the evidence, the defendants knew that it was such an allurement, because they knew that boys were in the habit of climbing on to the trucks and stealing rides. (d) When the trams were in motion the allurement was dangerous to young boys.

Now, although the boy had been forbidden by his father to ride on the trams, and had been warned of the danger and was conscious of his disobedience, the learned judge found that he did not appreciate the danger of what he was doing, and if that finding can be supported, then the slowly moving trams became a concealed danger to the boy, and, therefore, properly described as a trap. Counsel for the defendants submitted that, when the boy knew that he was being disobedient to his father's warning of danger, it followed that the boy must have had knowledge of some danger. I do not think myself that it follows by any means. He may have known that he was being disobedient to his father's warning without appreciating the danger involved in disobedience. That, I think, is the view of FINNEMORE, J., in his use of the word "real":

"The boy . . . was not, in my opinion, of a sufficient age to appreciate the real danger of what he was doing . . ."

In the judgment of FINNEMORE, J., there are three important passages which seem to me to contain the essence of the whole matter, and with those passages I most respectfully agree. The first is this:

"From time immemorial boys have always been anxious to get rides and it has always been a very real allurement to them. Now that means that, if this moving tramway was an allurement to boys, and particularly to this little boy of six and a half, a danger which he would not properly appreciate, and which would tempt him to use it in a way that was likely to be dangerous to him, it was the duty of the defendants to do something about it. One thing they might have done—I dare say they will do it in future—would be to stop anybody, whether children or adults, going over this line at all, whether by fencing it or by putting up notices, or having someone on duty from time to time to stop it, or some other way. I do not know. But they must do something to see that the children whom they allow to go near to, and on to, their tramway line are protected against this dangerous allurement of a slow-moving tramway of trucks."

The second passage is this, speaking of the duty of the occupier of land:

"What he must not do to a licensee is to put a trap on his land, and a trap, for the purpose of a child, means something which is dangerous but very tempting and attractive which is likely to lead him into danger while on the land which he has entered, at all events, with the tacit permission, if not the express permission, of the owner. And I think that if the child, as I find he was in this case, was a licensee over the whole of that land through which the tram track ran, he did not cease to be a licensee when he

succumbed to the very temptation against which he ought to have been protected, that is, the moving of the tramway."

Then the final passage is:

A "Having considered all these matters, I am of the opinion that the law as argued by counsel for the plaintiff is the right law, that, if a child is a licensee on the land, the allurements which are on the land must be protected in some way, and the boy does not become, for the purposes of this doctrine, a trespasser as soon as he meddles with the very machine against which he ought in fact to be protected. Nor do I think it makes any difference that the boy had been told by his father that he should not ride on those trucks, and that he would get into trouble at home if he was found doing it. B Forbidden fruit is not less tempting than when permissible: in fact it is often more tempting, and a boy of six and a half, although he knew he had been told by his father not to ride on the trucks, was not, in my opinion, of a sufficient age to appreciate the real danger of what he was doing, and I think he was extremely likely to succumb to the temptation which, so to speak, was flaunted in front of him by this slow-moving tramway over the property which he was in fact allowed to use, together with other children C and other people, by the defendants."

As I have said, I think those three passages from the judgment of FINNEMORE, J., contain the essence of this matter so far as this particular case is concerned. I think that the learned judge stated the law correctly. The questions of fact were carefully considered by him after seeing the witnesses, D and, in particular, the infant plaintiff himself, and he has stated his findings quite clearly. I see no ground on which his judgment can be effectively assailed, and I am of the opinion that this appeal should be dismissed.

HODSON, L.J.: This is an appeal from an order of FINNEMORE, J., made on Mar. 31, 1953, by which he awarded to a small boy damages against the defendants for the loss of his leg. The accident happened on Dec. 2, 1950, at E the Cilfynydd Colliery in the county of Glamorgan, when the boy was riding on the buffers of a tram used to haul refuse from the colliery for disposal at the top of a hill. He fell under the wheel of one of the trams and was injured. The line on which the trams ran was about one thousand yards long, unguarded and unfenced. There were houses close to it. There were no warning signs except one at the bottom near the village, and people, including children, frequently F crossed the line. It was a short cut to the swimming-baths, it was a way of going to some allotments, and children played on or near the line. The learned judge found that the child was a licensee on the land when he was injured, and that the journey of trams on which the child rode was a concealed danger or trap for children of the age of the plaintiff, since it was an allurements to them the dangers of which they could not properly appreciate. He, accordingly, awarded damages.

G The case for the defendants is put in various ways. First, it is said that the child was a trespasser from the moment he set foot on the land. Secondly, it is contended that even if he was a licensee on the land, including the lines on which the trams ran, he became a trespasser as soon as he climbed on the journey of trams. In the third place, it is said that, even if he were a licensee, yet, on the facts of this case, there was no trap or concealed danger, and he cannot recover.

H The first argument is directed against the learned judge's finding that he was ever a licensee upon the land. It is said that the evidence only shows that there was a licence to cross the lines for the purpose of going to the allotments, the swimming-baths, or, possibly, for certain other specific purposes. The licence, it is argued, must be limited in extent and cannot be construed as covering playing on the lines, still less climbing on a moving journey of trams, a practice which was never tolerated by the defendants or their predecessors, the colliery companies who had formerly occupied the land. It is said that the intention with

which the plaintiff went on the lines must be considered, and that the learned judge ought to have found on the evidence that, having gone on the line to play, he was a trespasser ab initio and never became a licensee.

In support of this proposition reliance was placed on a decision of this court in *Hardy v. Central London Ry. Co.* (7). There a small boy was injured on a moving staircase at Liverpool Street station, which led from the booking-hall to the underground platforms. The trial judge held that he was unable to distinguish the case from the well-known case of *Cooke v. Midland & Great Western Ry. of Ireland* (9) and that the child was a licensee. The defendants knew that children were in the habit of frequenting the station, and he came to the conclusion that they were there with the licence of the defendants because they did not take steps to exclude children from their property; that the moving staircase was an allurement to children; and that the defendants were negligent in not protecting the machinery at the place where the accident happened. This court reversed the trial judge's finding of a licence and held that the child was a trespasser. In that case the evidence clearly showed that children were warned off whenever they were seen playing on the moving staircase. BANKES, L.J., came to the conclusion that they were all fully aware of the fact that they had no right to be, and no licence to be, where they were. He added that an elder boy, in whose charge the plaintiff was, appeared to have been fully aware that he was a trespasser in the booking hall from which the escalator led, and that the plaintiff was probably old enough to be aware of the fact also, since a policeman had driven the children away on several occasions. WARRINGTON, L.J., in his judgment used these words ([1920] 3 K.B. 470):

"I think the plaintiff was not a licensee or invitee, but a mere trespasser.

I think on the evidence that the defendants cannot be said to have permitted children to resort to the booking office as a playground or for any purpose not connected with the use of their railway."

That case, it is said, shows that the children were only found to be trespassers because they resorted to the station as a playground and not as intending travellers. It is said, applying the ratio of *Hardy's* case (7) to the case now to be decided, that the child who was injured by falling off the tram came on to the land to play and not for the licensed purpose of crossing the line to get to one or other of the destinations mentioned. Hence he was a trespasser ab initio and cannot recover damages. This argument will not, I think, prevail in the state in which the evidence in this case stands. The licence to go on the land was a general one, as found by the learned judge, and not one limited to crossing the line for specific purposes, and I think that the evidence justifies his finding. He referred specifically to the evidence of Mr. Paget, who said he had crossed the lines for years to reach the allotments, that any amount of adults used the line, and that he frequently saw children playing on the line and had never seen anyone send them away. There was other evidence tending to the same effect. I think, therefore, that the learned judge's finding that the child who was injured was a licensee on the land should be upheld and that this case is legitimately distinguishable upon its facts from *Hardy's* case (7), where the children were aware at all material times that they were trespassers on the land in question.

This brings me to the second point, which was that the children, being licensees on the land, were never licensees on the journey of trams, for the evidence shows that they were never allowed to ride on the trams without complaint. Hence they were trespassers on the trams if not on the land. I find this contention unsupported by authority and inconsistent with relevant authority. Some negative support for the proposition is said to be found in the leading case of *Cooke v. Midland & Great Western Ry. of Ireland* (9), because from that case it appears that the child who was injured was treated as a licensee, not only on the land of the railway company on which the turntable which brought about his injury stood, but also on the turntable itself. Ergo, it is said,

if the child had not been a licensee on the turntable, he would not have recovered damages.

A I agree with the learned judge, who dealt with this argument by saying that such a contention destroys the whole doctrine of allurement to children. Once the child is a licensee on the land, the question of trespassing on an object on the land does not, in my opinion, arise. The trap or concealed danger will often be an object on the land, but I cannot conceive that the licence to go on the land is to be taken to exclude the thing which, being an allurement to children, is a concealed danger for them. The contention of the defendants to this effect runs counter to the decision in such cases as *Lynch v. Nurdin* (4), from which all the cases on allurement to children descend. It will be remembered that in that case the injured child was unlawfully on a vehicle on a public highway. This fact was no defence to the person who had left it there, as the vehicle in question was itself an attraction to children and dangerous. LORD ATKINSON in *Cooke v. Midland & Great Western Ry. of Ireland* (9) in dealing with the principle involved in the cases from *Lynch v. Nurdin* (4) downwards, pointed out that owners of such vehicles would be liable in damages for injuries sustained by juvenile intermeddlers even though the injured person in any particular case be a trespasser on the vehicle or machine at the moment the accident occurred.

C The last point made by the defendants, viz., that here there was no trap or concealed danger, because the child had been specifically warned of the danger and knew that he would be punished by his parents if he rode on the trams was, I think, effectively answered by the trial judge, who said that, although the child had been told by his father not to ride on the trams, he was not, in his opinion, of a sufficient age to appreciate the real danger of what he was doing. In another passage in his judgment the learned judge referred to "a danger which he could not properly appreciate". Counsel for the defendants contended that the child knowing it wrong to act as he did and that he would be punished was sufficient. I do not agree. Once the child is lawfully on the land and the allurement is there, it is the knowledge of the danger, not of the error of his conduct, that is material. D To this counsel replied that, if that were so, the learned judge, by using the adjective "real" before the word "danger" in one place, and the adverb "properly" before the words "appreciate the danger" in another, must be taken to have found that some appreciation of the danger was present in the boy's mind. I cannot accept this argument. The essence of the allurement cases, where young children are concerned, is that they do not appreciate the risks which they run, and it is impracticable in a particular case to analyse minutely the degree of appreciation of the danger.

E F In my opinion, the finding of the learned judge on this point does not relieve the defendants of liability, and is consistent with the evidence of the child's father, who admitted giving the warning of the danger to his child. When asked if the boy knew that it was dangerous and wrong he replied: "I could not answer for that. Being his age, I could not say whether he was of the age to understand." G In my opinion, therefore, the learned judge was entitled to come to the conclusion that this slow-moving journey of trams travelling across the land was not only an allurement to children, but was also a concealed danger or trap in the circumstances disclosed by the evidence in this case. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

H Solicitors: *Donald H. Haslam*, agent for *W. H. F. Barklam*, Cardiff (for the defendants); *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CHINA v. HARROW URBAN DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.),
October 13, 14, November 6, 1953.]

Limitation of Action—Distress for rates—Application for warrant more than six years after demand—“Action”—“Date on which cause of action accrued”—*Limitation Act, 1939 (c. 21), s. 2 (1) (d), s. 31 (1).*

Rates—Distress warrant—Application more than six years after demand—Statutory bar to proceedings—Limitation Act, 1939 (c. 21), s. 2 (1) (d), s. 31 (1).

When dealing with an application to issue a distress warrant in respect of arrears of general rates, the justices are acting, not ministerially, but judicially: dicta of VISCOUNT SIMON, L.C., and LORD WRIGHT in *Potts v. Hickman* ([1940] 4 All E.R. 495 and 506), applied; and, therefore, the application is a “proceeding in a court of law”, within the definition of “action” in s. 31 (1) of the Limitation Act, 1939, and comes within s. 2 (1) (d) of the Act, which is intended to apply to all money claims made in a court. As the word “action”, as used in the Act, is intended to embrace proceedings which are not actions in the ordinary sense, “cause of action”, in s. 2 (1), should be read as “cause of proceeding”. The cause of the proceedings in respect of arrears of rate accrues when the ratepayer fails to pay on demand a rate duly made and published in respect of which he has been assessed, and, therefore, the period of six years in which the proceedings must be taken, under s. 2 (1) (d), runs from the demand of the rate, and a distress warrant cannot be issued after that period has expired.

AS TO DISTRESS FOR RATES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 526-528, paras. 976, 977; and FOR CASES, see DIGEST, Vol. 18, pp. 402-404, Nos. 1428-1444, and Vol. 38, pp. 628, 629, Nos. 1470-1485.

FOR THE LIMITATION ACT, 1939, s. 2 (1) (d), and s. 31 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1160, 1192.

Cases referred to:

- (1) *Potts v. Hickman*, [1940] 4 All E.R. 491; [1941] A.C. 212; 110 L.J.K.B. 101; 164 L.T. 346; 105 J.P. 26; 2nd Digest Supp.
- (2) *Danby v. Watson*, (1877), 46 L.J.M.C. 179; 36 L.T. 412; 41 J.P. 406; 18 Digest 420, 1590.
- (3) *Liverpool Corp. v. Hope*, [1938] 1 All E.R. 492; [1938] 1 K.B. 751; 107 L.J.K.B. 694; 158 L.T. 215; 102 J.P. 205; Digest Supp.
- (4) *Lloyd v. Heathcote*, (1820), 2 Brod. & Bing. 388 (129 E.R. 1017); 5 Moore, C.P. 129; 4 Digest 83, 748.
- (5) *Re McGreavy*, [1950] 1 All E.R. 442; [1950] Ch. 269; 114 J.P. 185; 2nd Digest Supp.
- (6) *Davis v. Burrell*, (1851), 10 C.B. 821; 17 L.T.O.S. 51; 138 E.R. 325; 31 Digest, Replacement, 517, 6397.
- (7) *Mackie v. Fox*, (1911), 105 L.T. 523; 75 J.P. 470; 25 Digest 331, 329.
- (8) *R. v. Price*, (1880), 5 Q.B.D. 300; 49 L.J.M.C. 49; 42 L.T. 439; 44 J.P. 248; 18 Digest 398, 1392.
- (9) *Sweetman v. Guest*, (1868), L.R. 3 Q.B. 262; 37 L.J.M.C. 59; 18 L.T. 52; 32 J.P. 212; 18 Digest 430, 1671.
- (10) *R. v. St. Edmundsbury & Ipswich Diocese (Chancellor)*. *Ex p. White*, [1946] 2 All E.R. 604; [1947] K.B. 263; 175 L.T. 483; *affd.* C.A., [1947] 2 All E.R. 170; [1948] 1 K.B. 195; 177 L.T. 488; 2nd Digest Supp.
- (11) *Roberts v. Battersea Metropolitan Borough*, (1914), 110 L.T. 566; 78 J.P. 265; 38 Digest 119, 861.
- (12) *R. v. Benn & Church*, (1795), 6 Term Rep. 198; 101 E.R. 509; 18 Digest 403, 1431.

(13) *Harper v. Carr*, (1797), 7 Term Rep. 270; 101 E.R. 1070; 18 Digest 398, 1390.

CASE STATED by Middlesex justices.

On Mar. 18, 1953, at a court of summary jurisdiction sitting at Wealdstone, a complaint was preferred by the respondents, Harrow Urban District Council, that the appellant, Denis Percival China, being a person duly rated and assessed by the general rate for the respondents' rating area, was in arrear in the sum of £31 4s. 1d., which he neglected or refused to pay.

The following facts were found. The respondents were a rating authority for the purposes of the Rating and Valuation Act, 1925. The general rate for the year 1940/41 was duly made and published. The appellant was rated for the half year ending Sept. 30, 1940, in the sum of £8 9s. 2d. in respect of premises then occupied by him at 7, Warple Close, Harrow. At the time he was in arrear in the sum of £26 15s. 4d. in respect of general rates for previous half years. On July 5, 1940, he ceased to be liable for future rates in respect of the premises, and, therefore, instead of being liable for £8 9s. 2d. for the half year ending Sept. 30, 1940, he was liable only for £4 8s. 9d. in respect of his occupation of the premises from Apr. 1 to July 5, 1940. For various reasons, including the fact that the appellant was thereafter engaged on war service and, after that, the respondents had no knowledge of his whereabouts, no further action was taken to recover the sum due, viz., £31 4s. 1d., until Feb. 11, 1953. On that date a further demand for payment of the sum was made on the appellant, but he neglected and refused to pay it. A summons to appear before the justices was duly issued and served on him.

It was contended on behalf of the appellant that the general rate was a sum recoverable by virtue of an enactment, within the Limitation Act, 1939, s. 2 (1) (d), which under s. 2 (1) (d), it was not recoverable after the expiration of six years from the publication of the rate, and that, therefore, the application for the issue of a distress warrant must fail. The respondents contended that the duties of the justices on an application for the issue of a distress warrant in respect of arrears of rates were ministerial, and that, therefore, the Act of 1939 did not apply, as the definition of "action" in s. 31 (1) of the Act was "any proceeding in a court of law" and, in the circumstances, the justices were not acting as a court of law. The justices were of opinion, having regard to *Potts v. Hickman* (1), that their duties when dealing with applications for the recovery of rates were judicial, but, having regard to *Danby v. Watson* (2) and *Liverpool Corpn. v. Hope* (3), they were of opinion that the recovery of the general rate was not by "action", within the meaning of the Limitation Act, 1939, and that the position remained as it was before 1939 with no limitation of time on the recovery of the general rate. Accordingly, on May 27, 1953, they issued a distress warrant for the sum of £31 4s. 1d. and costs.

Aron Owen for the appellant, the ratepayer.

Squibb for the respondents, the rating authority.

Curr. adv. vult.

Nov. 6. The following judgments were read.

LORD GODDARD, C.J.: This is a Special Case stated by justices for the county of Middlesex, and it raises the short and interesting question whether the Limitation Act, 1939, applies to proceedings for the recovery of rates. The facts are that in April, 1940, the ratepayer was in arrear in respect of rates for previous years to the amount of £26 15s. 4d., and he became liable for a proportion of a further half year's rates amounting to £4 8s. 9d. in respect of his occupancy of the rated hereditament between Apr. 1 and July 5, 1940, when he ceased to be the occupier. No action was taken by the rating authority against the ratepayer at the time, as he was then on war service, or for some time after that, as they did not know where he was living. The Case goes on to say that, on Feb. 11, 1953, having ascertained his whereabouts, the rating authority made a further demand

for payment, from which I assume the court was satisfied that previous demands had been made, as in the ordinary course of things they would have been. No point was made that demands had not been made, and on Mar. 18, the rating authority preferred a complaint against the ratepayer with a view to obtaining a distress warrant, which was granted. It, therefore, appears that the rating authority were seeking, and have obtained, a warrant for arrears all accruing more than six years ago, and some, at least, fourteen or, perhaps, fifteen years ago.

The question whether there is any period of limitation for the recovery of rates is entirely destitute of authority, which, perhaps, is not surprising. It is hardly likely that any local authority has ever before sought to take proceedings after such a length of time, and it must, I think, be conceded that before July 1, 1940, when the Limitation Act, 1939, came into force, it could not have been argued that there was a period of limitation. The Limitation Act, 1623 (21 Jac. 1, c. 16) sets out in terms [in s. 3] the various personal actions to which it applies. They are actions on the case, other than for slander, actions of account, trespass quare clausum fregit, debt, detinue and replevin, for all of which six years is the period named, and actions for assault, other cases of trespass to the person, and slander, for which shorter periods are named. Proceedings for the recovery of rates have always been regarded as a class apart. It is settled that no action lies for their recovery, and that the only method is that laid down in the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2, namely, by application to justices for a distress warrant: see *Liverpool Corpn. v. Hope* (3). None the less, arrears of rates are a debt, and one must not confuse the debt with the remedy: see *Lloyd v. Heathcote* (4) and *Re McGreavy* (5). The remedy of distress is only a special procedure for dealing with defaulting ratepayers. Other matters which have been decided with reference to these proceedings are that a demand is a necessary preliminary to the application for a warrant (*Davis v. Burrell* (6)), and that, though the time limit of six months within which proceedings must be taken before courts of summary jurisdiction [under the Summary Jurisdiction Act, 1848, s. 11] applies to such proceedings for the recovery of civil debts as those courts can entertain (*Mackie v. Fox* (7)), this limitation does not apply to those for the recovery of rates: see *R. v. Price* (8).

As I have already said, it would have been impossible to contend that the Limitation Act, 1623, applied to this class of proceeding and the court has now to determine for the first time whether the Act of 1939 has applied a period of limitation. Not only is there no authority on this question but there is no communis opinio among text writers. The learned editors of FARADAY ON RATING, 5th ed., at p. 330, are of opinion that the Act does apply, while the equally learned editors of RYDE ON RATING, 9th ed., at p. 812, express a contrary opinion, though, if I may so, the cases they cite in support of their opinion do not really assist. All they show is that rates may be recovered after the year for which they have been made. I, therefore, turn to the provisions of the Act of 1939. Section 2 (1) enacts

“The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued . . .”

Among those enumerated are:

“(d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”

If that sub-section stood alone, it is clear that, as no action lies for the recovery of rates (*Liverpool Corpn. v. Hope* (3)), it would follow that it has no application. It is unnecessary to burden this judgment by referring to the numerous decisions as to the meaning of “action”, as, for the purposes of the Act, the word is defined by s. 31 (1) as including “any proceeding in a court of law, including an ecclesiastical court”, unless the context otherwise requires. It is not, in my opinion, open to doubt that an application for a distress warrant is a proceeding in a court of law. The dicta of COCKBURN, C.J., in *Sweetman v. Guest* (9) and *R. v.*

Price (6), that justices are, in such a matter, acting ministerially, and not judicially, has not been followed. In *Potts v. Hickman* (1) VISCOUNT SIMON, L.C., said ([1940] 4 All E.R. 495) that "justices, when granting a distress warrant for rates, are proceeding judicially." LORD WRIGHT said (*ibid.*, 506) that an order for a warrant of distress was made in a judicial proceeding, and (*ibid.*, 508) that the dictum of COCKBURN, C.J., in *R. v. Price* (8), could not be supported as a statement of the general law. He added (*ibid.*):

A "Even if the party summoned has no valid objection which he can raise to being rated because the facts are clear, the justice still acts judicially in making the particular order of distress, even though no other course is open to him judicially."

B The cases show that the rate itself constitutes an order to pay, though, as I have already said, they also lay down that proceedings to enforce payment cannot be commenced until there has been a demand and subsequent default. On the hearing of the application proof is required of the service of the summons, that the rate was duly made and published, that the person named was assessed at the sum mentioned, and that it has been demanded and not paid [: see Distress for Rates Act, 1849, s. 5, s. 8, and schedule, Form C1]. Various defences are open
C to the person summoned which it is unnecessary to detail. In my opinion, therefore, it is clear that there is here a "proceeding in a court of law." Does, therefore, the context require a different interpretation so that this particular proceeding does not come within the definition in s. 31 (1) of the Act of 1939? Counsel for the rating authority submitted that some limitation must be placed on the wide words of the definition. He said that they could not include, for
D instance, criminal proceedings. That is true, but criminal cases, clearly, do not fall within s. 2 which refers to proceedings for the recovery of money, nor within any other section of the Act. The penalties excluded by the section are, in my opinion, those for which what is known as a penal action can be brought. But the words of the definition show that it is intended to bring within the scope of the section proceedings to which the term "action" would be inapplicable.

E The main argument of counsel for the rating authority was that the limitation imposed by s. 2 (1) runs from the date of the accrual of the cause of action, and he contended that, as no action lies for rates, there could be no cause of action. But, if the word "action" is to embrace proceedings which are not actions in the true sense, it seems to me that for "cause of action" must be read "cause of proceeding", and the cause of the proceeding in this case is the failure to pay on demand.

F I would, accordingly, hold that time runs from the demand. I have already pointed out that, as the Case refers to the "further demand" in February, 1953, that implies that earlier demands were made though proceedings were not taken, and from the other facts found in the Case those demands must have been made not later than July, 1940. There is no special form of demand that must be served before proceedings for recovery can be taken. The common form

G which is sent to every ratepayer each half year is all that is required. Limitation of actions is imposed by positive law and courts can only refuse to enforce claims on the ground of lapse of time if there is an appropriate provision to be found in the Act, but I see no good reason for unduly limiting words which can apply to a particular case as courts always lean against stale claims. The Act of 1939 is not merely a consolidating statute. Its title shows it to be one consolidat-

H ing and amending the law, and, in my opinion, the very wide terms of the definition of "action" in s. 31 (1) show that s. 2 (1) (d) of the Act was intended to apply to all money claims made in a court. This view, I think, is to some extent strengthened by the inclusion of ecclesiastical courts in the definition section [s. 31 (1)]. The Limitation Act, 1623, made no reference to those courts, and, while I make no pretence to be familiar with the suits that can be brought in them, I cannot find that they ever dealt with any of the actions mentioned in that Act except slander. Section 30 to s. 33 of the Real Property Limitation Act,

1833, now repealed [by s. 34 (4) of, and the schedule to, the Act of 1939], dealt with actions relating to the right of presentation to a benefice and those provisions re-appear in s. 14 of the Act of 1939. The actions which would come within that section would, normally at least, be dealt with in the temporal courts, though it may be that some questions relating to rights of presentation could still be dealt with by means of the practically obsolete ecclesiastical suit of duplex querela. I hesitate to express any opinion on such matters because temporal judges are not required to be learned in ecclesiastical law. That was one of the reasons given in *R. v. St Edmundsbury & Ipswich Diocese (Chancellor)*. *Ex p. White* (10) why certiorari does not lie to those courts though prohibition may. But when I find reference both to ecclesiastical courts and to all classes of arbitration in the present Act [see s. 27], it leads me to think that the legislature meant to bring every class of litigation, before whatever tribunal it might come, within the ambit of the statute. While appreciating the careful consideration given to the case by the justices, I would allow the appeal.

SELLERS, J.: In this Special Case the question has been raised, apparently for the first time in the courts, whether the provisions of the Limitation Act, 1939, s. 2 (1) (d), apply to proceedings brought in a court of summary jurisdiction for the issue of a distress warrant for the recovery of rates. Proceedings after six years to recover rates by distress must have been rare, if they have previously been taken at all after so long delay, but there would seem to be no trace in any of the authorities of any time limit which could have been relied on prior to the Act of 1939.

The main question which arises is whether the definition of "action" in s. 31 (1) of the Act of 1939 can be applied to s. 2 (1). Section 31 (1) is as follows:

"In this Act, unless the context otherwise requires . . . 'action' includes any proceeding in a court of law, including an ecclesiastical court."

It was submitted on behalf of the rating authority that the context in s. 2 (1) did require that some restriction should be put on the words "any proceeding in a court of law" because the sub-section makes the time of limitation run from the date "on which the cause of action accrued", and, it was said, this was inappropriate to the procedure by which, and by which alone, rates can be recovered. But while, in the case of rates, it cannot be said that there is a cause of action (*Liverpool Corpn. v. Hope* (3)), there does arise a cause of proceeding in a court of law. If the appropriate proceedings are taken to enforce a debt for rates, the hearing is a judicial proceeding, and not (as the rating authority, apparently, submitted before the justices) a ministerial matter: see *Potts v. Hickman* (1). In such a judicial proceeding, matters have to be proved by the applicant and issues may be raised by a person so summoned before the court. The elements for constituting a proceeding in a court of law are present. In *Roberts v. Battersea Metropolitan Borough* (11) BUCKLEY, L.J., said (110 L.T. 568):

" 'Proceeding' would be a word with a larger meaning than 'action'.

Every action is a 'proceeding', but it is not possible to say that every proceeding is an action."

The definition in the Act of 1939 was, obviously, intended to enlarge the more normal meaning of "action", and I do not think the context of s. 2 (1) does require that the definition of "action" should not be applied to it. If the definition is applied, then the sub-section should be read to provide that the following proceedings in a court of law shall not be brought after the expiration of six years from the date on which the cause of proceedings in a court of law accrued, that is to say, (d) proceedings in a court of law to recover any sum recoverable by virtue of any enactment. That interpretation seems to me to be in harmony with the context, not repugnant to it. In *Davis v. Burrell* (6) JERVIS, C.J., said (10 C.B. 826):

"When a rate is duly made and published, it is the duty of the parties

assessed to seek out the collector and to pay it . . . The statute 43 Eliz. [c. 2] requires a personal demand before the rate can be distrained for. That shows that a demand would otherwise be unnecessary."

A The cause of the proceedings, therefore, for a rate might be said to arise when the rate is duly made and published and is not paid, but a demand as a matter of procedure has always been necessary before the recovery of the rate could be enforced. In respect of a general rate, the Rating and Valuation Act, 1925, s. 7 (1), requires that information with respect to a number of matters shall be included in the demand note on which the general rate is levied. As proceedings cannot be taken until such a demand note has been given and the demand has not been met, I think the cause of the proceedings for a rate should be held to be the failure to pay on demand and, if I am right that s. 2 (1) (d) of the Act of 1939 can be applied to the proceedings for a distress warrant, the period of six years in which the proceedings must be taken would run from the time of the demand of the rate in question. I agree that the justices came to an incorrect decision in law, and I would allow the appeal.

B **HAVERS, J.**, stated the facts and continued: The case raises a novel and difficult question, whether the Limitation Act, 1939, applies to proceedings for the issue of a distress warrant for the recovery of rates. Section 2 (1) of the Limitation Act, 1939, provides that certain actions, which are therein specified, "shall not be brought after the expiration of six years from the date on which the cause of action accrued . . ." They include, in s. 2 (1) (d):

"actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

D The ratepayer contended unsuccessfully before the justices that proceedings by a rating authority before the justices for the issue of a distress warrant for arrears of general rates are an action to recover a sum recoverable by virtue of an enactment, within the meaning of s. 2 (1) (d) of the Act of 1939. The rating authority contended that, inasmuch as no action lies for the recovery of rates (*Liverpool Corpn. v. Hope* (3)), there can be no cause of action or accrual of a cause of action within the meaning of s. 2 (1). They also contended that the justices were acting ministerially, and not judicially, in ordering the issue of a distress warrant.

E In s. 31 (1) of the Act of 1939 "action" is defined as follows:

"In this Act, unless the context otherwise requires . . . 'action' includes any proceeding in a court of law, including an ecclesiastical court."

F It is, therefore, necessary to examine the nature of rates and the means for recovering the sums assessed. The foundation of the liability to pay rates is to be found in the Poor Relief Act, 1601 (43 Eliz. c. 2). By s. 2 of that Act provision is made for the making of a poor rate and for the recovery of rates which are unpaid by the issue of a warrant for distress. The Act of 1601 does not contain a provision requiring the alleged offender to be first summoned before the justices, and for a great many years it was not the law that such a summons was necessary. G However, by the end of the eighteenth century, as a result of the decisions in *R. v. Benn & Church* (12) and *Harper v. Carr* (13), it was settled that a summons should precede a warrant of distress, as is now laid down by statute: see Distress for Rates Act, 1849, s. 5. Since 1601 a number of statutes have been passed dealing with rating which, I think, it is not necessary to consider. It is sufficient to say that since 1601 down to the Rating and Valuation Act, 1925, no statute has ever provided the local authority with any remedy for the non-payment of rates other than the remedy by distress. The Rating and Valuation Act, 1925, s. 2, which makes provision for the making of "the general rate", provides, by sub-s. H (3), that:

" . . . every general rate . . . shall be made, levied and collected, and shall be recoverable, in the same manner in which at the commencement of this

Act the poor rate may be made, levied, collected and recovered, and all the enactments relating to the poor rate which are in force at the commencement of this Act . . . shall . . . apply to the general rate."

Section 4 (1) provides that every rate made by a rating authority shall be deemed to be made on the date on which it is approved by the authority. Section 6 requires publication of the rate within the time and in the manner therein prescribed. Section 7 (1) provides that information on certain matters shall be included in the demand note on which the general rate is levied. A general rate, therefore, is not a common law liability, but is a creature of statute, and the only remedy for enforcing it is the statutory remedy by distress.

The form of the distress warrant, which was set out in the schedule to the Distress for Rates Act, 1849, indicates the various matters which have to be proved by the rating authority and found by the justices before they can issue a distress warrant. There are also various matters which it is open to the person summoned to raise by way of objection. At one time the view was held that in such proceedings the justices were acting ministerially and not judicially: see *Sweetman v. Guest* (9) and *R. v. Price* (8). However, since *Potts v. Hickman* (1), it cannot, in my opinion, now be successfully contended that an order for a warrant of distress is not made in a judicial proceeding or that justices are not acting judicially in making an order. In my opinion, an application for a distress warrant is a proceeding in a court of law. Is there any compelling reason why the context should require that these particular proceedings should not be included within the definition? In my opinion, it is clear that proceedings for the recovery of rates do not fall within the category of personal actions mentioned in s. 3 of the Limitation Act, 1623, or within any other Limitation Act which was in force prior to the Act of 1939. It is, perhaps, somewhat surprising that, if it was intended to make a change in the law for the first time since 1601 by imposing a limitation of time on proceedings for the recovery of rates, clearer language, specifically referring to rates, should not have been used in s. 2 of the Limitation Act, 1939. The Act of 1939 is, however, an amending as well as a consolidating Act, and, as the language used in s. 2 (1) (d) and s. 31 (1) is apt to cover an application to justices for the issue of a distress warrant for arrears of rates, I see no good reason why such proceedings should be excluded. My view is strengthened by a comparison between the definition of "action" in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and in s. 31 (1) of the Limitation Act, 1939. In the former, "action" means

"a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Crown."

The wide words of the definition in the Limitation Act, 1939, show that it was intended to bring within the ambit of s. 2 proceedings to which the term "action" would not normally be appropriate.

It remains to consider the meaning of "cause of action", if "action" is to be considered as including proceedings for the recovery of rates. If the word "action" is to embrace proceedings which are not actions in the ordinary sense, "cause of action" should, in my view, be read as "cause of proceeding". The cause of the proceedings, in my opinion, accrues when a ratepayer fails to pay on demand a rate duly made and published in respect of which he has been assessed, and the period of six years in which the proceedings must be taken would run from the failure to pay on demand. In my opinion, the justices came to an incorrect decision on the question of law, and I would allow the appeal.

Appeal allowed.

Solicitors: *Eric H. Davis & Co.* (for the ratepayer); *Sharpe, Pritchard & Co.*, agents for *D. H. Pritchard*, clerk to Harrow Urban District Council (for the rating authority).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

TITHE REDEMPTION COMMISSION v. RUNCORN URBAN DISTRICT COUNCIL AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 30, 1953.]

Tithe and Tithe Rentcharge—“Owner” of land—Highway authority—Liability to bear apportioned part of redemption annuity in respect of land occupied by highway—*Tithe Act, 1936* (c. 43), s. 10 (1), s. 17 (1)—*Law of Property Act, 1925* (c. 20), s. 7 (1) (as amended by the *Law of Property Act, 1926* (c. 11), s. 7 and schedule).

Highway—Highway authority—Ownership of land—Liability to apportion part of tithe redemption annuity—*Tithe Act, 1936* (c. 43), s. 10 (1), s. 17 (1)—*Law of Property Act, 1925* (c. 20), s. 7 (1) (as amended by the *Law of Property (Amendment) Act, 1926* (c. 11), s. 7 and schedule).

The Highway Acts constitute a “similar statute” within the *Law of Property Act, 1925*, s. 7 (1), and, therefore, notwithstanding that a highway authority owns the land over which a highway runs only so far as is necessary for it to carry out its duties, the highway authority, by virtue of that subsection, holds the land for an estate in fee simple absolute in possession, and is an “owner of land” within the *Tithe Act, 1936*, s. 17 (1) (a), liable under s. 10 (1) of the latter Act to bear an apportioned share of the tithe redemption annuity payable in respect of land of which the highway forms part.

AS TO TITHE REDEMPTION ANNUITY, see HALSBURY, *Hailsham Edn.*, Vol. 11, pp. 893, 894, paras. 1600-1602.

FOR THE *TITHE ACT, 1936*, s. 10 and s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 304, 314.

Cases referred to:

- (1) *Tunbridge Wells Corpn. v. Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 26 Digest 330, 618.
- (2) *Foley's Charity Trustees v. Dudley Corpn.*, [1910] 1 K.B. 317; 79 L.J.K.B. 410; 102 L.T. 1; 74 J.P. 41; 26 Digest 324, 581.
- (3) *Rolls v. St. George The Martyr, Southwark, Vestry*, (1880), 14 Ch.D. 785; 49 L.J.Ch. 691; 43 L.T. 140; 44 J.P. 680; 26 Digest 330, 627.

ADJOURNED SUMMONS to determine (i) whether, on the true construction of the *Tithe Act, 1936*, and in particular of s. 17 (1) thereof, a highway authority in whom by any statute a highway has become vested is an owner of such highway within the meaning of the *Tithe Act, 1936*, s. 17: and, if so, (ii) whether, in making an apportionment under the *Tithe Act, 1936*, s. 10, of a tithe redemption annuity charged in respect of such highway, the plaintiffs, the Tithe Redemption Commission, ought to apportion the amount so charged between such highway and the land abutting on such highway.

The tithes in the parish of Weston, in the county of Chester, were commuted under the *Tithe Acts* in 1847 and the tithe apportionment, confirmed on Aug. 27, 1847, apportioned a tithe rentcharge of £1 3s. 11d. on a certain tithe area. When the tithe rentcharge was extinguished by the *Tithe Act, 1936*, s. 1, an annuity of £1 1s. 11d., calculated in accordance with s. 3 (2) of that Act, became charged in respect of that tithe area. No question arose as to the amount of this annuity which had hitherto been paid by Imperial Chemical Industries, Ltd., the second defendant, as owners of the whole of the tithe area except such interest as the highway authority had in the highways existing on the tithe area.

Formerly the parish of Weston lay within the rural district of Runcorn, and on Jan. 7, 1930, the council confirmed a resolution declaring certain private streets in the tithe area to be public highways repairable by the inhabitants at large under the *Private Street Works Act, 1892*, s. 19, then in force in the rural district of Runcorn. Under the *Local Government Act, 1929*, s. 30 (1), the Chester County Council became the highway authority from Apr. 1, 1930, of highways in rural districts of the county, and by s. 29 (1) and (2) such highways became county

roads "vested" in the county council. In 1936 the County of Chester Review Order, 1936, was made by the Minister of Health under the Local Government Act, 1929, s. 46, whereby the parish of Weston was transferred from the Runcorn Rural District to the Runcorn Urban District and the relevant highways were vested in the Runcorn Urban District Council. The question arose whether the Runcorn Urban District Council, as highway authority, was the "owner" of these highways within the Tithe Act, 1936, s. 17 (1), and, if so, whether the annuity payable ought to be apportioned.

W. F. Waite for the plaintiffs, the Tithe Redemption Commission.

R. E. Megarry for the defendants, the Runcorn Urban District Council, the highway authority.

R. L. Stone for the defendants, Imperial Chemical Industries, Ltd., owners of the tithe area except as to the interest of the highway authority.

DANCKWERTS, J.: The question that I have to decide arises in regard to the apportionment of the tithe redemption annuities which the Tithe Redemption Commission, formed under the Tithe Act, 1936, s. 4, have to apportion under s. 10 of that Act. Tithe rentcharge was abolished by s. 1 of the Act of 1936, tithe redemption annuity being substituted by s. 3 of that Act, recoverable by the Crown and constituting a debt of the landowner. Section 10 of the Act provides:

"(1) Subject to the provisions of this Act, the commission shall, in every case in which they ascertain that an annuity is charged in respect of land in the ownership of two or more owners, apportion the annuity as between the several parts of the land that are in different ownership in such manner as appears to the commission to be just and equitable . . ."

The important definition of the word "owner" is to be found in s. 17 (1) of the Act:

"Subject to the provisions of this Act, the person who is to be deemed for the purposes of this Act to be the owner of land shall be—(a) the estate owner in respect of the fee simple thereof, unless it is subject to a long lease at a rent less than a rackrent . . ."

The sub-section then deals with the case of leaseholds, with which I need not trouble. In sub-s. (3) it is provided that

"'estate owner' has the same meaning as in the Law of Property Act, 1925, so, however, that in relation to such an agreement as aforesaid [i.e., an agreement for a lease or underlease where the right to have the lease or underlease is subsisting] that expression means the person entitled to have vested in him the legal term agreed to be created."

So we are driven to the Law of Property Act, 1925. The definition section, s. 205, contains a definition of "estate owner" which one might almost have thought was intended as a joke. Section 205 (1) (v) provides: "'Estate owner' means the owner of a legal estate . . .". That does not carry one very much further. I must also refer to s. 205 (1) (ix), which defines "land" in a manner which indicates that there may be ownership of land divided from the surface ownership. I do not think I need read the definition of "land", which is of some length, and is not particularly helpful in resolving the question which I have to decide. It is clear from the definition that "land" may include a portion of the land, either including the surface or divided from the surface.

The real question which I have to decide is whether the highway authority in the present case is an estate owner, i.e., the owner of a legal estate. There is a great deal of case and statute law on the subject of highways and the position of highway authorities. The position of a highway authority is well settled and there is really no dispute about it. The highway authority does not hold the whole of the soil on which the highway is found, i.e., down to the centre of the

earth, nor the whole area above the surface. *Tunbridge Wells Corpn. v. Baird* (1) illustrates that very well. The position of the highway authority is simply that it owns the surface of the land and so much of the land below the surface, and so much of the area above the surface, as may be necessary for the highway authority to carry out its duties in respect of highways. It was held in *Tunbridge Wells Corpn. v. Baird* (1) that a highway authority has not sufficient ownership in the soil below the highway to enable it to construct lavatories in that portion of the land. On the other hand, it was held in *Foley's Charity Trustees v. Dudley Corpn.* (2) that a highway authority had such ownership as to be made liable as terre tenant for the payment of a rentcharge issuing out of the land which included the site of the highway. It has, however, been correctly pointed out by counsel for the highway authority in the present case that that case is not conclusive of the position of a highway authority at the present time, because in 1910, when that case was decided, one might have a legal estate of a more limited character than the fee simple. The highway authority in that case might have been merely a life tenant or the owner for a term of years. The Law of Property Act, 1925, has reduced the kinds of legal estate which may exist to a fee simple absolute in possession and a term of years absolute, with the latter of which I am not concerned. Therefore, the question in this case is whether the ownership of the highway authority of the land in question is of such a kind as to amount to a fee simple absolute in possession, because, if it is, the highway authority is the owner of a legal estate and so the owner for the purpose of the Tithe Act, 1936.

It has been held in *Rolls v. St. George the Martyr, Southwark, Vestry* (3), decided in 1880, that when a highway ceases to be a highway in due course of law, i.e., by order of the justices the highway is either closed or diverted, the ownership of the land which was previously in the highway authority comes to an end. It appears, therefore, that the ownership of the highway authority of land is not necessarily for an estate in fee simple which is bound to last for ever. It is, however, an ownership which normally would last for a very long time and such ownership is only very seldom ended by the closing or diversion of the highway. It seems to me that the matter depends on the Law of Property Act, 1925, s. 7 (1), which deals with a terminable estate, and (as amended by the Law of Property (Amendment) Act, 1926, s. 7 and schedule) provides:

"A fee simple which, by virtue of the Lands Clauses Acts, the School Sites Acts, or any similar statute, is liable to be divested, is for the purposes of this Act a fee simple absolute, and remains liable to be divested as if this Act had not been passed, and a fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute."

It is argued by counsel for the highway authority that s. 7 (1) does not save the interest of the highway authority so as to make it a legal estate because the possibility of reverter in the present case is not of a kind mentioned therein. He points out that in the case of the Lands Clauses Acts and the case of the School Sites Acts there are express provisions providing that when the land ceases to be used for the purpose of a school [see, for instance, the School Sites Act, 1841, s. 2], or whatever it may be, it shall revert, for instance, to the estate of a specified person or to the adjoining tenant. The relevant conveyance does not necessarily in such case make express provision for reverter, but reverter occurs in specified circumstances by virtue of express statutory provisions. In the present case, counsel for the highway authority says that there is no express provision for reverter to be found in any of the Highway Acts and, therefore, the Highway Acts do not amount to a "similar statute" within s. 7 (1). I am not satisfied with that argument. It seems to me that the sub-section was aimed at a situation of a general kind which includes the position in regard to a highway. It seems to me that the Highway Acts are similar in that, while they do not contain an express provision for reverter, they do, as the result of the case law

which has been founded on them, amount to provisions for the vesting in highway authorities of an estate determinable in the event of the land ceasing to be a highway. That is a situation of a kind intended to be covered, and covered, by s. 7 (1) of the Act of 1925. That being so, in spite of the possibility of termination of the ownership of the highway authority by certain events, the highway authority has a legal estate. It would be extremely unfortunate if the highway authority had no legal estate. I feel convinced that s. 7 (1) was intended to cover the case of highway authorities as well as other persons who acquire land under statutory powers. Accordingly, I come to the conclusion that in the present case the defendants, the Runcorn Urban District Council, fall within the definition of "owner" in the Tithe Act, 1936, s. 17, and, therefore, are a person in respect of whom the apportionment should be made by the commission under s. 10 of the same Act.

[After discussion on the question of apportionment, HIS LORDSHIP said:] The plaintiffs ought to apportion the amount so charged between such highway and the land abutting on such highway and the land subjacent to any such highway if the relevant annuity be charged in respect of such several parts of the said land.

Order accordingly.

Solicitors: *Solicitor, Tithe Redemption Commission* (for the Tithe Redemption Commission); *Ponsford & Devenish*, agents for *T. J. Lewis*, clerk to Runcorn Urban District Council (for the highway authority); *J. W. Ridsdale* (for the defendant, Imperial Chemical Industries, Ltd.).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRACTICE DIRECTION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), November 16, 1953.]

Justices—Clerk—Presence in retiring room while justices consider decision.

LORD GODDARD, C.J.: In three recent cases* this court has had to consider the question when, and for what purposes, it is proper for a clerk to justices to accompany them when they retire to consider their decision, or to remain in their room while the case is under consideration. It is evident from letters received both by the Lord Chancellor and myself, and from correspondence in newspapers, that there is uncertainty in the minds of magistrates on this subject and, indeed, some degree of misunderstanding as to the effect of what was said in the cases to which I have referred. They are the cases concerning the East Kerrier justices (1), the Welshpool justices (2) and the Barry justices (3). I propose, therefore, to endeavour to clear up this matter, and have the authority of the Lord Chancellor to say that he concurs in the statement I am about to make, as do all the judges who were parties to the decisions I have mentioned.

There are two questions which arise in this connection. The first is: On what matters may magistrates consult their clerk? The second, and one of equal importance, is: In what manner should they consult him?

On the first question, it is clear that they may seek his advice on questions of law, or of mixed law and fact, and also on questions regarding the practice and procedure of the court. The latter are, indeed, questions of law. There are other matters on which justices may require the assistance of their clerk and on which they are entitled to ask his advice. They may, for instance, ask him for information of the sentences which have been imposed by their bench, or by neighbouring

* (1) *R. v. East Kerrier JJ. Ex p. Mundy*, [1952] 2 All E.R. 144; [1952] 2 Q.B. 719; 116 J.P. 339; 3rd Digest Supp.

(2) *R. v. Welshpool JJ. Ex p. Holley*, ante, p. 807; 117 J.P. 511.

(3) *R. v. Barry (Glamorgan) JJ. Ex p. Kashim*, ante, p. 1005.

benches, in respect of similar offences to that which they are trying. It is, indeed, most desirable that penalties for such matters as obstruction by vehicles, lack of lights and other what may be called public order offences should have some degree of uniformity. Moreover, it would be proper for the clerk himself to call the justices' attention to the fact that a question of law does, or may, arise if they do not appear to be already aware of it. It would then be for them to consider whether they wanted his further advice on that question. In no circumstances, however, may justices consult their clerk as to the guilt or innocence of the accused, so far as it is simply a question of fact, but, if a question arises as to the construction of a statute or regulation, they may consult him on whether the facts found by them constitute an offence, because that would be a question of mixed law and fact. They may also properly ask the clerk to refresh their memory as to any matter of evidence which has been given. They can take with them, or send for, any note the clerk may have taken, and if there is anything in the note which needs elucidation, or if they think something has been omitted or wrongly taken down, it would be perfectly proper for them to consult him. They must not ask his opinion as to the sentence which they ought to impose, but they may, as I have said, ask for information as to the sentences imposed for comparable offences, and they most certainly may consult him on what penalties the law allows in any particular case if they already do not know it, and on any consequential matters that may follow on conviction. One obvious instance would be with regard to certain motoring offences, whether reasons which they are prepared to give can amount to special reasons for not disqualifying a driver according to the decision of this court on that subject. They may also want to know whether it is a case in which they can require sureties for good behaviour in addition to imposing a penalty.

As regards the manner in which justices may consult their clerk, the court, I think, made it clear in the *East Kerrier case* (1) that the decision of the court must be the decision of the justices, and not that of the justices and their clerk, and that, if the clerk retires with the justices as a matter of course, it is inevitable that the impression will be given that he may influence the justices as to the decision, or sentence, or both. A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decisions to which I have referred merely by asking him in every case to retire with them, or by pretending that they require his advice on a point of law. Subject to this, it is in the discretion of the justices to ask their clerk to retire with them if, in any particular case, it has become clear that they will need his advice. If, in the course of their deliberations, they find that they need him, they can send for him. On this matter I would stress one further point, and that is, that if the clerk does retire with the justices, or is sent for by them, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence and come back into court in their turn. I wish to add that the rulings this court has given on the subject derive from, and are really part of, the rule so often emphasised that justice must not only be done but must manifestly appear to be done, and, if justices bear that in mind, I feel sure they will have no difficulty in loyally following the decisions of this court.

I should add that the rulings of this court do not apply to justices when exercising jurisdiction in matrimonial cases as they are then subject to the directions and control of the Probate, Divorce and Admiralty Division.

**BRAMFORD'S ROAD TRANSPORT, LTD. v. EVANS
(INSPECTOR OF TAXES).**

[CHANCERY DIVISION (Danckwerts, J.), October 15, 16, 1953.]

Income Tax—Deduction against profits—Wear and tear—Balancing charge—Vehicles of road haulage company—Compulsory acquisition by British Transport Commission—“Sale” of machinery or plant—“Before the trade is discontinued”—“... a person succeeds to any trade”—Treatment of machinery or plant as if sold—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 11 (2), as substituted by Finance Act, 1926 (c. 22), s. 32 (1)—Income Tax Act, 1945 (c. 32), s. 17 (1), s. 60 (1).

On May 9, 1949, the taxpayers ceased to carry on their trade of road haulage, when their undertaking was compulsorily acquired by the British Transport Commission under a notice of acquisition under the Transport Act, 1947. Ownership of their trade vehicles vested in the commission, all their employees were taken over, and their managing director became a district traffic assistant under the commission and a “unit” manager. The undertaking was for some months carried on as a unit before being merged completely in the commission’s undertaking. By s. 3 (4) of the Act of 1947 all the business of the commission was required to form one undertaking. The taxpayers were assessed to a balancing charge in respect of the machinery and plant comprising the vehicles under s. 17 (1) and (3) of the Income Tax Act, 1945.

HELD: (i) although not “sold” within the meaning of s. 17 (1) of the Income Tax Act, 1945: *John Hudson & Co., Ltd. v. Kirkness* (ante, p. 64), applied; in view of the provisions of s. 60 (1), for the purposes of the Act the plant must be treated as if it had been sold to the commission because there had been a succession to the taxpayers’ trade within the meaning of s. 60 (1), notwithstanding its merger in the undertaking of the commission under the Transport Act, 1947, s. 3 (4): *Bell v. National Provincial Bank of England* ([1904] 1 K.B. 149), applied; and notwithstanding the compulsory acquisition.

(ii) “trade” in s. 17 (1) of the Income Tax Act, 1945, meant the trade carried on by the taxpayers, and, after acquisition, by the commission, notwithstanding its loss of identity through merger in the undertaking of the commission, and the “sale” of the plant, therefore, occurred “before the trade [was] permanently discontinued” within the meaning of that enactment.

Boarland v. Madras Electric Supply Corpn. (ante, p. 467), applied.

(iii) therefore, the balancing charge was properly made.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D TO THE INCOME TAX ACT, 1918, r. 11 (2), as substituted by the Finance Act, 1926, s. 32 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 164; and FOR THE INCOME TAX ACT, 1945, s. 17 (1), see *ibid.*, p. 629.

Cases referred to:

- (1) *John Hudson & Co., Ltd. v. Kirkness*, [1953] 2 All E.R. 64.
- (2) *James Shipstone & Sons, Ltd. v. Morris*, (1929), 14 Tax Cas. 413.
- (3) *Reynolds, Sons & Co., Ltd. v. Ogston*, (1930), 15 Tax Cas. 501.
- (4) *Laycock v. Freeman, Hardy & Willis, Ltd.*, [1938] 4 All E.R. 609; [1939] 2 K.B. 1; 108 L.J.K.B. 270; 160 L.T. 41; 22 Tax Cas. 288; Digest H Supp.
- (5) *Briton Perry Steel Co., Ltd. v. Barry*, [1939] 4 All E.R. 541; 23 Tax Cas. 414; Digest Supp.
- (6) *Bell v. National Provincial Bank of England*, [1904] 1 K.B. 149; 73 L.J.K.B. 142; 90 L.T. 2; 68 J.P. 107; 5 Tax Cas. 1; 28 Digest 41, 211.
- (7) *Inland Revenue Comrs. v. West, Inland Revenue Comrs. v. Reid*, 1950 S.C. 516; 31 Tax Cas. 402; 2nd Digest Supp.

(8) *Inland Revenue Comrs. v. Barr*, [1953] T.R. 7; 46 R. & I.T. 217; 32 A.T.C. 93.

(9) *Boarland v. Madras Electric Supply Corpn.*, [1953] 2 All E.R. 467.

CASE STATED by the Special Commissioners of Income Tax under the Income Tax Act, 1952, s. 64.

The company appealed against an assessment under Case I of sched. D to the Income Tax Act, 1918, for the year 1949-50 in the sum of £6,330, less £197 capital allowances, in respect of a balancing charge which had been made under s. 17 (1) and (3) of the Income Tax Act, 1945. On May 9, 1949, the company's road haulage undertaking, including its trade vehicles, was compulsorily acquired by the British Transport Commission and became part of the commission's undertaking, and the company ceased to carry on its trade. The balancing charge was made in respect of the company's goods vehicles and trailers and was based on an aggregate figure representing the excess of the valuation of the vehicles and trailers over the expenditure thereon still unallowed at May 9, 1949, under s. 17 (3) of the Act of 1945. The company contended: (i) that, as it permanently ceased to carry on the trade of road haulage on May 9, 1949, the trade was permanently discontinued on that date within the meaning of s. 17 (1) of the Income Tax Act, 1945, irrespective of whether the commission succeeded to that trade, so that no event giving rise to a liability to a balancing charge occurred before the trade was permanently discontinued: *Inland Revenue Comrs. v. West*, *Inland Revenue Comrs. v. Reid* (7); (ii) that, in the alternative, on the evidence the commission did not succeed to the trade of road haulage previously carried on by the company; (iii) that, if the effect of the notice of acquisition given under s. 44 of the Transport Act, 1947, was to merge the carrying business previously carried on by the company into a nation-wide and integrated system of public transport administered by the commission, such a merger did not constitute a succession by the commission to the company's business within the meaning of r. 11 of the Rules Applicable to Cases I and II of sched. D; (iv) that, in the alternative, the plant, being the lorries previously the company's property, vested in the commission on May 9, 1949, by virtue of a notice of acquisition under s. 44 of the Transport Act, 1947, was not sold by the company within the meaning of s. 17 (1) (a) of the Act of 1945; and (v) that the assessment should, therefore, be discharged. For the Crown it was contended: (i) that on the evidence the trade of road haulage carried on by the company up to May 9, 1949, was not permanently discontinued on that date within the meaning of s. 17 (1) of the Act of 1945 and that *Inland Revenue Comrs. v. Reid* (7) had no application to the case; (ii) that on the evidence the commission succeeded on May 9, 1949, within the meaning of r. 11 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, to the trade of road haulage previously carried on by the company, and that the succession was the happening of an event which did not amount to the permanent discontinuance of the trade under the last paragraph of s. 17 (1) of the Act of 1945; (iii) that the company's vehicles, being plant within the meaning of s. 17 (1) of the Act of 1945, were sold on May 9, 1949, to the commission within the meaning of that sub-section; (iv) that, alternatively, even if the plant was not sold by the company, under s. 60 (1) of the Act of 1945 it was required to be treated as if it had been sold to the commission as successor to the company; and (v) that, therefore, the assessment should be confirmed. The commissioners found that the company ceased to carry on the trade of road haulage on May 9, 1949, but held that *Inland Revenue Comrs. v. Reid* (7) was not conclusive on the question to be decided in view of the terms of the last paragraph of s. 17 (1) of the Act of 1945. They found on the evidence that, after the transfer date, May 9, 1949, the company's trade went on very much as before until Sept. 30, 1949, when it was merged in a bigger unit of transport, and that the commission succeeded to the company's trade on that date and carried it on in an identifiable form thereafter. They held, therefore, that the trade was not permanently

discontinued before the transfer of the assets to the commission within the meaning of s. 17 (1) of the Act. They gave no decision on whether the plant was sold within the meaning of s. 17 (1), since it was conceded by the company that, in the case of a succession such as they had found, s. 60 (1) would apply so as to require the lorries to be treated as if they had been sold to the commission as successor to the company. They, therefore, dismissed the appeal. The company appealed.

Heyworth Talbot, Q.C., and *H. M. Allen* for the company.

The Solicitor General (Sir Reginald Manningham-Buller, Q.C.) and *Sir Reginald Hills* for the Crown.

DANCKWERTS, J.: This is an appeal from a decision of the Special Commissioners on the assessment of the company to a balancing charge under the Income Tax Acts. According to the Case Stated, before May 9, 1949, the company

"carried on, from headquarters in Leicester, a trade or business of regular service carriers between Leicestershire, Northamptonshire, Staffordshire and intermediate counties. [It] carried goods, known in the trade as 'smalls', i.e., consignments up to three hundredweights, and 'large smalls', i.e., consignments from three hundredweights up to one ton, between four main services, viz., Leicester to Stafford; Leicester to Stoke-on-Trent; Leicester to Wolverhampton; and Leicester to Northampton. The [company] was a small private company, using only one type of transport vehicle, and contracted for the maintenance of those vehicles with one service motor engineering firm. It offered its services to all customers within the area of its operation, provided the consignment of goods for carriage was of the particular type above-mentioned, but its business was, in practice, mainly confined to specialised customers. It operated a 'door to door', twenty-four hours' service and was equipped to accept exceptional traffic.

"On May 9, 1949, the whole undertaking of [the company] was compulsorily taken over by the Transport Commission (hereinafter called 'the commission') under the provisions of the Transport Act, 1947, and on the same date [the company] ceased to carry on any trade of road haulage, or any other trade. The provisions of the Transport Act, under which this transaction was effected, are s. 39, s. 40, s. 44 and s. 45. The requisite notice of acquisition was given by the commission, and, under s. 45, ownership of the trade vehicles, previously the property of [the company], vested in the commission on May 9, 1949. The general duty of the commission, as defined by s. 3 of the Transport Act, was 'to secure or promote the provision of an efficient, adequate, economical and properly integrated system of public inland transport'.

"Accordingly, on and after May 9, 1949, the undertaking previously carried on by [the company] continued for a time very much as before. The Road Haulage Executive, in addition to acquiring [the company's] vehicles, took over its stores and all its other assets, except cash, debts, a private car and some investments. The commission also used [the company's] Leicester depot from May 9 to Sept. 1, by arrangement with Mr. C. W. Bramford [managing director of the company] who was appointed a district traffic assistant under the commission. . . . [The company's] ten lorries continued on similar services, except that two which had been engaged in work for the Goodyear Tyre Co. were, shortly after May 9, 1949, taken off that work and transferred to the Stafford district. The undertaking previously carried on by [the company] continued as a unit for a few months

until Sept. 30, 1949, and the following entry appeared in the ROAD HAULAGE EXECUTIVE GAZETTEER, viz.: 'Unit E.93. Bramfords; nature of business: "Smalls," regular trunk services: Leicester/Staffordshire, Northamptonshire.' The address in the GAZETTEER, 36, Nanson Road, and the telephone number were those of the original [company's] property, but from the vesting date, May 9, 1949, vehicles other than [the company's] former lorries were supplied with fuel oil at that address, which was not the case when the business was privately operated. To officials of the Transport Commission Executive the undertaking was known as 'Unit E.93' after the vesting date, but the commission purchased for £1 the name 'Bramfords' from the company, though it never used the full name 'Bramford's Road Transport'. The name 'Bramfords' was retained for purposes of identification, for domestic purposes, and for external use and to prevent the name being used by others. The 'unit' system was for the purposes of the commission's internal accounting because there was no other framework in the early stages, although the intention from the outset was . . . to integrate the units into a group structure. The name 'Bramfords' was not used by the commission on stationery and the Road Haulage Executive's name was substituted for Bramford's Road Transport on the vehicles. All the employees of [the company] went over to the service of the commission on May 9, 1949, Mr. Charles William Bramford being engaged as unit manager in a supervisory capacity, as well as carrying out duties as traffic assistant with the Leicester-Northants office of the Road Haulage Executive.

"As from Sept. 1, 1949, the undertaking previously carried on by [the company] and, from May 9, 1949, known as Unit E.93 was merged with another concern, Bland's, which together formed a new unit, E.94. The lorries acquired from [the company] were moved from 36 Nanson Road to Frog Island, Leicester. Thereafter the Leicester to Stafford service continued to be operated, but the Leicester to Northampton service was discontinued, because another existing service undertaking had been taken over. The Leicester to Wolverhampton service continued to operate, but it was modified from one or two vehicles daily to about three weekly trips. Maintenance of the lorries ceased to be looked after by private contract, but was done for the commission at group or depot engineering establishments. The provisional valuation made by the Road Transport Executive of the goods vehicles and trailers of [the company] as at May 9, 1949, shows a figure of £13,104 (£12,750 written down value under s. 47 (1) (a) (b) of the Transport Act, 1947, plus £354 for 'better condition' under sub-s. (1) (c)). This figure appears in the 'final ascertainment' shown in exhibit B, and was an agreed figure between the commission and [the company], and arrived at vehicle by vehicle. The separate figures for each vehicle are shown in exhibit B, p. 3, and were arrived at on the basis prescribed by s. 47 of the Transport Act, 1947. There was subsequently a discussion between the two parties concerned as to the compensation payable for cessation under the provisions of s. 47 (3) of the Transport Act, 1947. The final figure of such compensation for cessation of [the company's] business was £7,459 and the total lump sum payment due by the commission to [the company] for everything taken over, including such compensation, was settled by negotiation at a sum of £20,000. The said assessment of £6,330 was based on an aggregate figure representing the excess of the said aggregate figure of £13,104 over the expenditure on such plant still unallowed as at May 9, 1949, under the provisions of s. 17 (3) of the Income Tax Act, 1945."

On those facts, the commissioners came to the conclusion that there had been such a succession as was mentioned in the relevant statute, and confirmed the assessment for 1949-50 in the sum of £6,330, less £197 capital allowances, this

being the figure agreed between the parties following the decision of the commissioners in principle. The question of law stated for the opinion of the High Court is:

"Whether on the foregoing evidence, and on the true construction of s. 17 of the Income Tax Act, 1945, a balancing charge arose on the sale by the appellant company to the commission of the plant, consisting of the said motor vehicles."

The main statutory provision with which this case is concerned is s. 17 (1) of the Income Tax Act, 1945, which provides:

"(1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not . . . "

or three other events which are not material for the purposes of this case,

" . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs."

There follow two provisos which do not apply in the present case, and at the end of the sub-section some words which are extremely material:

"Any reference in this sub-section to the permanent discontinuance of a trade does not include a reference to the happening of any event which, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D, is to be treated as equivalent to the discontinuance of the trade."

By s. 68 (4), the definition section of the Act:

"Any reference in this Act to the setting up or permanent discontinuance of a trade includes, except where the contrary is expressly provided, a reference to the occurring of any event which, under any of the provisions of the Income Tax Acts, is to be treated as equivalent to the setting up or permanent discontinuance of a trade."

It seems to me that the effect of the concluding words of s. 17 is to eliminate the general provision in s. 68 (4).

As a result of the concluding words of s. 17 (1), it is necessary to refer back to the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918. Rule 9 provides:

"(1) If a person charged under this schedule ceases within the year of assessment to carry on the trade, profession, or vocation in respect of which the assessment is made, and is succeeded therein by another person, the surveyor shall, within four months from Apr. 5 next after any such change, certify to the general commissioners for the division in which the assessment is made the particulars thereof, and the full name and residence of the person charged and of his successor and the date of the change, if the same be known to the surveyor. (2) On receipt of the certificate the commissioners shall cause notice to be given to the respective persons of a meeting of the commissioners to consider it, and after examination of the said persons, if they attend, or on other satisfactory proof of the facts, the commissioners shall adjust the assessment by charging the successor with a fair proportion thereof from the time of his succeeding to the trade, profession or vocation, and relieving the person originally charged from a like amount."

There is a reference to "successor" in that rule, but the case is really concerned with r. 11, which, as substituted by the Finance Act, 1926, s. 32 (1) provides:

A " (1) If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts."

B Then there is a proviso which enables the persons concerned to give notice requiring a different arrangement. That paragraph is not really the one with which this case has to deal, but it was referred to as contrasting the situation in the present case with the situation where there is a change of partnership and where it is said there is some common element between the persons who carried on the business before the change and those who carried on the business after the change. Paragraph (2), as substituted by the Finance Act, 1926, s. 32 (1), is the important one:

D " (2) If at any time after the said Apr. 5 any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued."

E The first question is whether there has been a sale within s. 17 (1) of the Income Tax Act, 1945. The provisions of the Transport Act, 1947, have been considered by UPJOHN, J., in *John Hudson & Co., Ltd. v. Kirkness* (1). He was not concerned with the provisions with which I am concerned, the group of sections relating to the transport of goods by road, but he dealt with the acquisition of railway wagons, and it seems to me that, for the purposes of comparison, the set of sections in the Act relating to railway wagons is on very similar lines, if not precisely parallel, to the provisions relating to the acquisition of vehicles used for the transport of goods by road. In each case the effect of the Act is to vest property in the things in question in the British Transport Commission, and in subsequent provisions to provide for the assessment and payment of compensation to the previous owner. UPJOHN, J., held that the transfer of railway wagons did not constitute a sale for the purpose of s. 17 (1) of the Income Tax Act, 1945, so as to render the company liable to a balancing charge under the section. I am bound to follow that decision, and, accordingly, my first conclusion is that there has not been a sale within s. 17 (1) (a) of the Income Tax Act, 1945, i.e., this is not a case where machinery or plant is sold.

H That, however, is not an end of the matter, because s. 60 (1) of the Income Tax Act, 1945, provides:

" Where, on or after the appointed day, a person succeeds to any trade, profession or vocation which until that time was carried on by another person and, by virtue of any of the provisions of r. 11 of the Rules Applicable to Cases I and II of sched. D, the trade, profession or vocation is to be treated as discontinued, any property which, immediately before the succession takes place, was in use for the purposes of the discontinued trade, profession or

vocation and, without being sold, is, immediately after the succession takes place, in use for the purposes of the new trade, profession or vocation, shall, for the purposes of this Act, be treated as if it had been sold to the successor when the succession takes place, and as if the net proceeds of that sale had been the price which that property would have fetched if sold in the open market: Provided that no initial allowance shall be made under any of the provisions of this Act by virtue of the provisions of this sub-section."

The result is that, if I come to the conclusion that there has been a succession by the British Transport Commission to the trade of the company, the provisions relating to the result of a sale of the vehicles in question which are contained in s. 17 (1) come in again for consideration so that a balancing charge may be payable.

It is necessary, therefore, first to consider whether there has been any succession in this case. The provisions of the rules to which I have referred have been the subject of a large number of decisions in the courts, and I was referred to *James Shipstone & Sons, Ltd. v. Morris* (2), *Reynolds, Sons & Co., Ltd. v. Ogston* (3), *Laycock v. Freeman, Hardy & Willis, Ltd.* (4) and *Briton Ferry Steel Co., Ltd. v. Barry* (5). The circumstances in those cases were not very similar to the facts of the present case, but certain discussions of the principles involved, it was suggested, led to the conclusion that, because, as it was said, the business of the company was no longer identifiable in the hands of the commission, but had become merged in its general undertaking, there was not a succession for the purposes of the material statutory provision.

Counsel for the company relied on s. 3 (4) of the Transport Act, 1947, which provides:

"All the business carried on by the commission, whether or not arising from undertakings or parts of undertakings vested in them by or under any provision of this Act, shall form one undertaking, and the commission shall so conduct that undertaking and, subject to the provisions of this Act, levy such fares, rates, tolls, dues and other charges, as to secure that the revenue of the commission is not less than sufficient for making provision for the meeting of charges properly chargeable to revenue, taking one year with another."

But it seems to me that the observations of the Court of Appeal and others in the cases cited do not lead to the conclusion that there has not been a succession in the present case and that the British Transport Commission has not succeeded to the company's trade. In the first place, it seems to me that the statute is not referring to the trade in the sense of the trade of the company, so that, when the company goes out of business that is an end of the matter, although the same business may be carried on by another. The provisions of r. 11 (2) of the Rules Applicable to Cases I and II clearly show that the words "succeeds" and "succession" as used in the Income Tax Acts envisage the idea that, though one person may go completely out of business, the trade in question continues if it is carried on by some other person. If, therefore, the word is used in the sense which is in the minds of the legislature, the mere fact that the company or some previous owner of the business in question may have ceased to carry it on and gone out of business does not provide any ground for saying that there had not been a succession.

The matter would appear to be covered by the decision of the Court of Appeal in *Bell v. National Provincial Bank of England* (6), in which the National Provincial Bank, a bank with a large capital, purchased in 1899 the business and premises and other assets of a small bank, the County of Stafford Bank, which carried on business only at Wolverhampton. The National Provincial Bank opened for the first time a branch on the premises so purchased ([1904] 1 K.B. 149):

" . . . and there carried on business with the manager and staff previously

employed by the County of Stafford Bank. The profits and expenses of the business so carried on at Wolverhampton by the respondents were merged in those of their concern as a whole, and there were no means of ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of the respondents' bank, which had arisen from the business purchased as aforesaid. In the three years respectively subsequent to 1899, the respondents, in computing the average of their profits under r. 1 of Case I in s. 100, sched. D, of the Income Tax Act, 1842, did not include any profits earned by the County of Stafford Bank. Additional assessments were made upon them so as to include such profits, on the ground that there had been a succession by them to the business of the County of Stafford Bank within the meaning of r. 4 applicable to Cases I and II of sched. D."

A

B It was held in the Court of Appeal:

" . . . that there had been such a succession, and therefore the additional assessments were rightly made."

That seems to me to be not far from the present case, and the decision of the Court of Appeal is one which I should apply. MATHEW, L.J., puts the matter clearly (*ibid.*, 163):

C

" The respondents purchased the whole concern of the County of Stafford Bank, its premises, the goodwill of its business, and its assets; and they continued to carry on the business on the same premises and with the same staff and customers as before. It seems to me that such a case is within the terms of the rule. A difficulty was raised on the ground that it is impossible now to ascertain what are the profits of the Wolverhampton business taken separately. There was no difficulty in ascertaining those profits while the County of Stafford Bank still continued to exist, and I cannot see why there need be any difficulty now. It does not follow that, because the respondents have chosen to treat that business as merged in their business as a whole in the manner stated in the case, that merger can prevent the respondents from being liable under r. 4 to additional assessments. The question raised by the case appears to me to be whether there was, upon the facts as stated by the commissioners, a succession to a business within the meaning of r. 4."

D

E

It was held that there was such a succession.

That case also really disposes of the point raised by counsel for the company on s. 3 (4) of the Transport Act, 1947. As I understand it, that point was that, because the section required all the business carried on by the commission to form one undertaking, it was impossible for any individual business taken over by the commission to be identifiable any longer; it must be merged in the undertaking of the commission so that the commission could no longer be a successor in respect of it. That seems to me to be disposed of by the *National Provincial Bank* case (6) because the business of the County of Stafford Bank purchased by the National Provincial Bank was merged in the undertaking of the National Provincial Bank, and yet it was held that there was a succession. The fact that that method of dealing with the matter was made compulsory by the Transport Act, 1947, to my mind, does not alter the position in any way. It seems to me, therefore, that in the present case there was a succession and that the British Transport Commission succeeded to the business of the company.

G

H

The last point concerns s. 17 (1) of the Act of 1945, which requires, as one of the conditions of the application of the section, that the event in question—the succession in this case—should occur before the trade is permanently discontinued. It was argued by counsel for the company that the discontinuance of the trade by the company was coincident with the succession or the sale, whatever it might be, and that consequently the terms of the section are not fulfilled. In *Inland Revenue Comrs. v. West*, *Inland Revenue Comrs. v. Reid* (7), there had been a sale of the fishing boat, *Girl Eileen*, which on the sale had

been removed from Fraserburgh, where she had been previously used, and employed in fishing from the port of Lerwick. It was held by the Court of Session that there had been a permanent discontinuance of the trade simultaneous with the sale of the vessel. LORD KEITH said (31 Tax Cas. 420):

"I have no doubt that there was here a true sale of plant within the meaning of the Income Tax Act, 1945. It may be said that each of the respondents sold his respective shares in the vessel and it is contended that this brings the case into the same category as the sale in the *Mistress Isa* by one of several co-owners of his individual shares. But the position is clearly different. The result of all the share owners combining at one time in the sale was to transfer the whole vessel to separate ownership and so far the statute, in my opinion, applies. But the nature of the transaction raises another point under the statute. By s. 17 of the Income Tax Act, 1945, a balancing charge only arises if the sale occurs before the trade is permanently discontinued. The contention for the Revenue is that the trade has not been permanently discontinued because the vessel sold is still engaged in trade. But it is clear in my opinion that s. 17 is looking not to the continuance of the machinery or plant in trade but to the continuance of the owner of the machinery or plant in trade. The section shows that a balancing charge or balancing payment is intended to provide a readjustment of initial allowances or wear and tear allowances made to 'a person carrying on a trade' and when reference is made to 'the trade' being permanently discontinued I have no doubt that the trade is the trade of the person to whom the other allowances had previously been made. The respondents' trade with the *Girl Eileen* has been permanently discontinued and it is not suggested that they are continuing to trade with any other ships. A different case might arise in the case of co-owners trading with a fleet of ships and selling one of the fleet. But that case does not arise . . ."

On the facts, that case is different from the present one, but those observations might have some application here. In *Inland Revenue Comrs. v. Barr* (8) the facts were very similar to those of the present case ([1953] T.R. 7):

"The respondent carried on business under the name of Henry & Galt, and sold the business as a going concern, and the business continued to be carried on by the new owner. Included in the assets of the business was some machinery and plant. The Inland Revenue contended that there had been a sale of machinery and plant, and that a balancing charge could in the circumstances be made. It was contended for the respondent that the sale of the machinery and plant had not taken place before the permanent discontinuance of the business, as is required by s. 17 of the Income Tax Act, 1945, but had taken place simultaneously with the notional discontinuance of the business. *Held*, that the respondent's contention was correct, and that no balancing charge could be imposed."

The opinion was extremely short, and it is rather unsatisfactory in that it seems to have been accepted that the previous decision of the Court of Session was necessarily one to be applied to the facts in this case. LORD CARMONT said (*ibid.*):

"In this case, in which the Commissioners of Inland Revenue are the appellants, the question is raised as to liability to a balancing charge under s. 17 of the Income Tax Act, 1945, and whether it arose on the sale by the respondent of the plant and machinery of a firm called Henry & Galt. I need only refer to the fact that the business was sold as a going concern to one, Thomas Reid, and that a new firm acquired the concern and is running it. The general commissioners who heard the appeal had before them the case of *Inland Revenue Comrs. v. West* (7), which was decided by this court in 1950. It was held in that case that no balancing charge was exigible in circumstances which the appellant, in opening his appeal

before us, said he could not distinguish from the facts in the present case. Accordingly, as the case cannot be argued on the footing that *West* (7) is distinguishable, the judgment of the court in that case applies in such circumstances as we have now before us, and there is no alternative open to us but to answer the question put in the negative, and I so move your Lordships."

- A This matter was considered by UPJOHN, J., in *Boarland v. Madras Electric Supply Corpn.* (9). He pointed out that apparently the concluding words of s. 17 (1) of the Income Tax Act, 1945, had never been brought to the attention of the Court of Session in the two cases cited. He, therefore, felt at liberty to decide the matter according to his own judgment, and did not feel bound to follow the decisions of the Court of Session. It was unfortunate, perhaps, that
- B the question whether the concluding words would alter the result was apparently not argued at all strenuously on behalf of the taxpayer in that case, and not in the way in which counsel for the company has argued the matter in the present case, but it seems to me that I should apply the decision of UPJOHN, J., particularly as I consider that the conclusion he reached was right, and that the conclusion of the Court of Session is one with which I could not agree and which
- C I would not wish to apply unless compelled to follow it. Accordingly, I propose to apply the decision of UPJOHN, J., on this final point, and I hold that "trade" in the concluding words of s. 17 (1) of the Income Tax Act, 1945, means, not simply the trade of the company which would come to an end when it went out of business, but the trade carried on by it and acquired by the British Transport Commission. Therefore, the "event", i.e., the acquisition by the
- D commission, did occur before the trade was permanently discontinued, and this is a case in which the section applies, and the commissioners reached a proper conclusion. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re D. (an infant).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), October 29, 30, 1953.]

Justices—Custody—Access—Variation of order—Jurisdiction of court of summary jurisdiction where applicant resides—Guardianship and Maintenance of Infants Act, 1951 (c. 56), s. 1 (1)—Children Act, 1948 (c. 43), s. 53.

On Dec. 15, 1952, Eastbourne justices gave to the mother the custody of the child of the marriage, ordered the father to pay £1 a week for his maintenance, and granted the father access to the child one half day each week. In March, 1953, the father applied to Wallington justices, within whose jurisdiction he then resided, for a variation of the order of the Eastbourne justices by granting him care and control of the child for a period of seven continuous days in every ten weeks.

HELD: section 1 (1) of the Guardianship and Maintenance of Infants Act, 1951, gave to the court of summary jurisdiction having jurisdiction in the place in which the applicant resided at the time of the application, power to vary an order made under s. 5 of the Guardianship of Infants Act, 1886; on the facts, the father resided within the jurisdiction of the Wallington justices; and, therefore, those justices had power to hear his application and to vary the order of the Eastbourne justices.

Semle: The jurisdiction conferred by s. 53 of the Children Act, 1948, to enforce, vary, or revoke in like manner as an affiliation order an order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886, is limited to that part of the order which concerns money payments, and does not extend to such a term of the order as the grant of access at specified times to the parent of an infant whose custody is given to the other parent.

Colchester v. Peck ([1926] 2 K.B. 366) and *R. v. Copestake. Ex p. Wilkinson* ([1927] 1 K.B. 468), applied.

Pratt v. Pratt (1927) (96 L.J.P. 123) and *Markham v. Markham* ([1946] 2 All E.R. 737), questioned.

FOR THE GUARDIANSHIP OF INFANTS ACT, 1886, s. 5 and s. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 943, 945.

FOR THE GUARDIANSHIP AND MAINTENANCE OF INFANTS ACT, 1951, s. 1 (1), see *ibid.*, Vol. 30, p. 188.

FOR THE CHILDREN ACT, 1948, s. 53, see *ibid.*, Vol. 12, p. 1140.

Cases referred to:

(1) *Pratt v. Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; 27 Digest, Replacement, 726, 6938.

(2) *Markham v. Markham*, [1946] 2 All E.R. 737; 176 L.T. 19; 111 J.P. 29; 27 Digest, Replacement, 727, 6939.

(3) *Colchester v. Peck*, [1926] 2 K.B. 366; 95 L.J.K.B. 1038; 135 L.T. 32; 90 J.P. 130; Digest Supp.

(4) *R. v. Copestake. Ex p. Wilkinson*, [1927] 1 K.B. 468; 96 L.J.K.B. 65; 136 L.T. 100; 90 J.P. 191; Digest Supp.

APPEAL by the mother from a decision of ROXBURGH, J., dated July 8, 1953.

On Dec. 15, 1952, the Eastbourne justices, on the application of the mother, made an order under the Guardianship of Infants Acts, 1886 and 1925, granting her the legal custody of the child of the marriage, born on Nov. 3, 1950, ordering the father to pay to the mother the sum of £1 per week for the maintenance of the child while under the age of sixteen years, and directing that the father "shall have access to the said [child] one half day in each and every week." In March, 1953, the father applied to the Wallington justices under the Guardianship of Infants Act, 1925, s. 3 (4), as being the court of summary jurisdiction for the place in which he was then residing, for the discharge of the Eastbourne justices'

order, or for its variation, inter alia, by deleting the provision as to the access and substituting the provision that he should have the care and control of the child "for a continuous period of seven days in every ten weeks." At the hearing on Apr. 24, 1953, before the Wallington justices, the then solicitor for the wife objected to the court's jurisdiction and at the end of the case asked for an adjournment. This was refused by the justices who made an order as follows:

- A "It is adjudged that the complaint [of the father] is true and it is hereby ordered that the said order [of the Eastbourne justices] be varied as follows, that is to say, that the [father] shall have the complete care and control of the said [child] for a continuous period of seven days in every ten weeks."

The mother appealed to ROXBURGH, J., on the grounds (i) that the Wallington justices had no jurisdiction to hear the case, and (ii) that on the merits their order ought to be discharged. ROXBURGH, J., held as to (i) that he was bound by *Pratt v. Pratt* (1) and *Markham v. Markham* (2) to hold that the Wallington justices had jurisdiction, and (ii) that there was no ground on the merits for upsetting their order, and, accordingly, he dismissed the appeal. The wife now appealed.

- B
C *Comyn* for the mother.
M. R. Hoare for the father.

SIR RAYMOND EVERSLED, M.R., stated the facts and continued:

I do not complain that the time of the court has been taken in considering a point of jurisdiction in a difficult matter. I venture, however, to express the view that, generally speaking, this court will not encourage appeals in matters relating to the guardianship of infants. I pointed out during the argument that, if the mother succeeded, there would (so far as I can see) be nothing to prevent the father making another application to justices, either at Wallington or elsewhere, and, if the mother failed, there would be nothing to prevent her making another application to appropriate justices.

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E On the question of jurisdiction it is obvious that ROXBURGH, J.'s view, apart from the decided cases, would have been, on the facts and the matters put before him, contrary to the conclusion at which, by force of the authorities, he felt compelled to arrive. He, therefore, it is right to say, encouraged the appeal and expressed the hope that the matter might have the consideration of this court. I must point out, however, that, henceforth, the question which we have considered is likely to be academic, for the relevant statutory provisions on which the whole argument below turned have now been superseded or repealed. In the course of the case attention was drawn to the terms of the Guardianship and Maintenance of Infants Act, 1951, s. 1, and it was also observed that the Emergency Laws (Miscellaneous Provisions) Act, 1947, sched. II, paras. 5 to 8 inclusive (and para. 6 is a most important paragraph in the present case), have been repealed by the Magistrates' Courts Act, 1952, s. 132 and sched. VI: see, however, s. 53 of the Act of 1952. It is not, perhaps, to be wondered at that these various statutory changes have eluded the observation of the persons concerned in this case. They are not easy to find, and the repeal of the relevant paragraphs of sched. II to the Emergency Laws (Miscellaneous Provisions) Act, 1947, indicates the prophetic inexactitude of the heading of that schedule, which is: "Permanent enactment of provisions of certain Defence Regulations".

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H I will now deal with the point of jurisdiction as considered by ROXBURGH, J., and as it has now emerged before us, for the elucidation of which we have considered the Guardianship and Maintenance of Infants Act, 1951. Neither that Act nor the Magistrates' Courts Act, 1952, was brought to the attention of ROXBURGH, J. The case as the judge considered it and the ground on which the jurisdiction of the Wallington justices was alleged to be founded was under the Children Act, 1948, s. 53, which reads:

"An order of a court of summary jurisdiction for the payment of money

under the Guardianship of Infants Act, 1886, whether made before or after the commencement of this Act, may be enforced varied or revoked in like manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly, with the necessary modifications."

The question, as it was debated before the learned judge, was whether or not the order made by the Eastbourne justices could properly be described as

"an order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886."

At first sight it does not, perhaps, appear so, since its main object was to deal with the custody of a child, but it did contain a provision for the payment of money, namely, payment by the father of 20s. per week to the mother. I would add that the reference to the Guardianship of Infants Act, 1886, seems not very happy since the order was in fact made, not by virtue of that Act, but by the combined effect of the Guardianship of Infants Acts, 1886 and 1925. I do not, however, want to indulge in the unprofitable, and, I venture to think, often unfair, exercise of criticising Parliamentary draftsmen, though the extreme complexity of this case does lead me to express the hope that in these very important matters relating to children, which affect a large number of people in relatively humble circumstances, the statutory provisions will be made (as occasion offers) as simple and readily understandable as possible.

Before, however, I come to consider the validity of the argument that the order of the Eastbourne justices was an order "for the payment of money", it is necessary to see what is meant in s. 53, by the words

"An order . . . may be . . . varied . . . in like manner as an affiliation order."

To discover in what manner an affiliation order may be varied the court must refer to the Criminal Justice Administration Act, 1914, which dealt with a variety of subjects other than affiliation; and any connection in s. 30 (3) with affiliation orders is by no means obvious. However, that sub-section, as amended by the Money Payments (Justices Procedure) Act, 1935, s. 9, s. 16, and schedule, provides:

"Any order made either before or after the commencement of this Act by a court of summary jurisdiction for the periodical payment of money may, upon cause being shown . . . to the satisfaction of the court, be revoked, revived, or varied by a subsequent order."

It will be noted that there is a similarity (though not an exact parallel) of language between that sub-section and s. 53 of the Children Act, 1948, in that both relate to an order of "a court of summary jurisdiction for the payment of money", and provide (inter alia) for means of varying such orders. The third relevant provision on this part of the case—the Emergency Laws (Miscellaneous Provisions) Act, 1947, sched. II, para. 6, which was to be permanently enacted, but which has now been repealed, is headed: "Provisions reproducing reg. 17 (c) of Defence (Administration of Justice) Regulations, 1940," and reads:

"(1) The following provisions shall have effect as respects complaints under s. 30 (3) of the Criminal Justice Administration Act, 1914, or s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended . . . for the revocation, discharge, revival, alteration or variation of an affiliation order or a maintenance order. (2) A complaint may be made to a court of summary jurisdiction having jurisdiction in the place where the complainant is for the time being, instead of to the court which made the order (hereafter in this paragraph referred to as 'the original court')."

There follow, in the next two sub-paragraphs, provisions designed to ensure (i) that the respondent to the complaint should be given due notice of an application, and (ii) to give to the original court certain powers (on information which has to be conveyed to it) to state whether it is appropriate that the original court or the court chosen by the complainant should hear the matter. I need not refer

to those latter sub-paragraphs beyond stating that, since the Wallington justices were advised that their jurisdiction rested on this paragraph, they did comply with all the provisions.

It will be observed that, first, if the order in question was an order "for the payment of money", then, following the analogy directed by s. 53 of the Children Act, 1948, it would be competent for the father to apply to the court of summary jurisdiction having jurisdiction in the place where he was for the time being. The paragraph does not say "resides", but simply "is", and he must, therefore, show only that at the time he makes the application he is in a place within the jurisdiction of the court in question. It is not in doubt, and no point has been taken to the contrary, that the husband in the present case "was" at a place within the jurisdiction of the Wallington justices. He gave his address in making his application, and it is referred to in the order as 56, North Street, Carshalton, Surrey, and nobody has questioned that that was within the jurisdiction of those justices. But there remains the question: Was this an order "for the payment of money"? That it was an order containing a direction for the payment of money is not in doubt, but it was plainly not an order exclusively for the payment of money. It appears to me, I must confess, that the insertion into s. 53 of the Children Act, 1948, of the phrase "for the payment of money" should have a restrictive effect on the words which precede and follow it. It is plain that the jurisdiction conferred by the Guardianship of Infants Acts comprehends many types of order, many types of direction, other than those of mere payment of money; and treating this matter, therefore, as *res integra*, I should myself have formed the view that the formula

"an order of a court of summary jurisdiction for the payment of money under the Guardianship of Infants Act, 1886 . . . may be . . . varied . . ."

indicates that the subject-matter which may be varied in such orders is that part or those parts which relate to money payments. That was plainly the view taken also by ROXBURGH, J., treating the matter as *res integra*. But the matter is not *res integra*. Until the present case no court has been asked to consider the exact meaning of an order "for the payment of money under the Guardianship of Infants Act, 1886", but I must briefly allude to four cases—*Pratt v. Pratt* (1) and *Markham v. Markham* (2) (which were of an analogous character, relating to maintenance payments under the Summary Jurisdiction (Married Women) Act, 1895) and two which were not referred to by ROXBURGH, J., but which, since they relate to affiliation orders, seem to me to be more germane, namely, *Colchester v. Peck* (3) and *R. v. Copestake. Ex p. Wilkinson* (4).

Pratt v. Pratt (1) came before a Divisional Court of the Probate, Divorce and Admiralty Division, consisting of LORD MERRIVALE, P., and BATESON, J. That was an appeal by the husband against an order made by the Leicester city justices reviving a separation order which had been discharged on the ground of the wife's adultery. The only relevance of that case is whether or not a separation order, the main purpose of which was to provide for the parties living separate and apart, but which did contain a direction that the husband was to pay a certain sum for the wife's maintenance, was an order "for the periodical payment of money" within the terms of the Criminal Justice Administration Act, 1914, s. 30 (3). It must be confessed that the point does not seem to have been the subject of any close examination or argument, but it is plain that the two learned judges treated the order as falling within the sub-section. The argument for the husband was opened with the statement that s. 30 (3) of the Act of 1914 was inapplicable to the case. That argument was rejected, and the case, therefore, is a direct decision on that point.

In *Markham v. Markham* (2) the matter was fully considered by a Divisional Court consisting of LORD MERRIMAN, P., and BYRNE, J. An order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, had ceased to be operative because the parties had resumed cohabitation, but the wife applied

to have that order revived and also varied on the ground of persistent cruelty after the resumption of cohabitation. The question then arose: Was this order which was sought to be revived and which had contained provisions other than those of mere money payment, an order within the terms of the Criminal Justice Administration Act, 1914, s. 30 (3)? LORD MERRIMAN, P., drew attention to the affiliation cases (*Colchester v. Peck* (3) and *R. v. Copestake. Ex p. Wilkinson* (4)), and he, like ROXBURGH, J., in the present case, indicated plainly his own view that the order could not fairly be described as an order for the periodical payment of money. LORD MERRIMAN, P., referred ([1946] 2 All E.R. 741) particularly to the language of SHEARMAN, J.* in *Colchester v. Peck* (3), but he came to the conclusion that, so far as the Divisional Court of the Probate, Divorce and Admiralty Division was concerned, he could not possibly distinguish *Markham v. Markham* (2) from *Pratt v. Pratt* (1), and must, therefore, treat the matter as one in which he was bound to hold, following *Pratt v. Pratt* (1), that this was an order within the terms of s. 30 (3). As I have said, we are not concerned either directly or by reference with an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, as amended. Section 53 of the Children Act, 1948, refers to affiliation orders. It does not, therefore, seem to me that a court, which might otherwise be bound by the decisions in *Pratt v. Pratt* (1) and *Markham v. Markham* (2), need necessarily hold itself precluded by those two decisions.

I pass now to the two affiliation cases. *Colchester v. Peck* (3) came before a Divisional Court of the King's Bench Division, consisting of LORD HEWART, C.J., AVORY and SHEARMAN, JJ. On the application of the mother, justices had made an order in bastardy adjudging that the appellant was the father of her illegitimate child, and had ordered him to make her a periodical payment. Subsequently the father, under the Criminal Justice Administration Act, 1914, s. 30 (3), sought a variation or revocation of that order. The justices refused to hear the application, holding that they had no power to deal with that part of the order which adjudged the paternity, and the Divisional Court held that they were right. It is, I think, plain that, in so far as the application then made sought to revoke the previous order, the justices were held not to be given jurisdiction by s. 30 (3) by the mere circumstance that the order was at the same time an order for payment of money. SHEARMAN, J., said ([1926] 2 K.B. 373):

"I have felt great difficulty in thinking that the power conferred on the justices of revoking an order for the periodical payment of money does not include the power to deal with the question whether or not the order was justly made. But I am now satisfied that we are entitled to interpret s. 30 (3) of the Act of 1914, as intending that the justices shall only deal with the periodical payment."

In other words, it was his view, and that of the court, that the qualification in s. 30 (3) for periodical payment limited the jurisdiction (to revoke, revive or vary) to that part of an order which related to money payments. In *R. v. Copestake. Ex p. Wilkinson* (4), after a bastardy order had been made against the appellant by the justices in petty sessions adjudging him to be the putative father of a seven months' child, and ordering him to pay a weekly sum, he sought to obtain a revocation of the order under the Criminal Justice Administration Act, 1914, s. 30 (3) by adducing fresh evidence to show that the child was a full-time child at birth, thus placing the act of coition two months earlier than the date alleged by the mother. The justices refused his application and the Court of Appeal held that s. 30 (3) of the Act, while giving a court of summary jurisdiction power to revoke or vary a bastardy order made by it so far as that order related to periodical payments, conferred no jurisdiction on that court to revoke the order so far as it contained an adjudication of paternity and approved the decision in *Colchester v. Peck* (3).

* Not SANKEY, J., as stated ([1946] 2 All E.R. 741).

A It is true, as counsel for the father pointed out, that, if you are dealing with affiliation, the only order, apart from the actual adjudication of paternity, that can be made is one for the payment of money, and he says that these two cases decided that s. 30 (3) did not entitle one to go to another court of summary jurisdiction to revoke the adjudication as regards paternity, as distinct from revoking or varying the order as to payment of money. Counsel for the father, therefore, distinguishes those two cases from the present, for here there is no question of "adjudication"—the "order" of the Eastbourne justices consists of a series of "orders" in the sense of directions relating to custody, to money payments, and to access—and he says that when the analogy of the Criminal Justice Administration Act, 1914, is applied, according to s. 53 of the Children Act, 1948, you are not limited in the same way as you are in regard to affiliation orders themselves, but that you may avail yourself of the sub-section to obtain a revocation or variation of any part of such an "order", whether it is that part strictly concerned with money payments or, as in the present case, that part dealing with access; and he cites *Pratt v. Pratt* (1) and *Markham v. Markham* (2).

B In the circumstances which will presently appear it is not strictly necessary for this court to decide this matter. It is obviously open to counsel for the father to justify his claim that the Wallington justices had jurisdiction on any ground, whether under this section (which was the one particularly invoked) or otherwise. As at present advised, I am bound to say that I cannot accept his argument. I do not wish to suggest or to state that *Pratt v. Pratt* (1) and *Markham v. Markham* (2) ought to be treated as wrongly decided. *Pratt v. Pratt* (1) has now stood for over a quarter of a century, and we have not considered all the detailed provisions in the Summary Jurisdiction (Married Women) Act, 1895, and the amending statutes. There may be matters in those statutes which would give rise to different or special considerations. But so far as orders made under the Guardianship of Infants Acts, 1886 and 1925, are concerned, I take the view that s. 53 of the Children Act, 1948, by including the reference to orders "for the payment of money", meant to limit the jurisdiction there conferred to that part of the order which did concern money payment, and the specific reference to affiliation orders (and Parliament must have had in mind in making that reference the interpretation contained in *Colchester v. Peck* (3) and *R. v. Copestake. Ex p. Wilkinson* (4)) leads me to conclude that that limitation ought to be observed in cases under the Guardianship of Infants Acts. It is, no doubt, true that orders for money payment are often closely intermingled with other provisions, and it may well be that the power to vary should not be so limited as to prevent a court varying, not only the money payment, but also other provisions which may fairly be treated as merely ancillary to money payment. But that consideration would not help counsel for the father in this case. That, on any view of it, there are inconveniences, so far as I can see, is inescapable, but I have felt unable to be moved by references by counsel for the father to MAXWELL ON INTERPRETATION OF STATUTES relating to the argumentum ab inconvenienti. For, if counsel is right, it seems strange that jurisdiction to vary an order as to access would depend on whether there happens to be in it an order of some sort for somebody to pay some money to somebody else.

G But I need not pursue that matter further. During the course of the argument JENKINS, L.J., drew the attention of counsel to the provisions of the Guardianship and Maintenance of Infants Act, 1951, s. 1. The long title of that Act opens with these words:

H "An Act to extend jurisdiction under the Guardianship of Infants Acts, 1886 and 1925, to certain county courts and courts of summary jurisdiction . . ."

Section 1 (1) reads:

"Subject to the following provisions of this section, the expression 'the court', for the purposes of the Guardianship of Infants Acts, 1886 and 1925,

means in England and Wales the High Court or the county court of the district, or a court of summary jurisdiction having jurisdiction in the place, in which the respondent or any of the respondents or the applicant or the infant to whom the application relates resides . . .”

Unless the effect of that sub-section is that it applies only as regards the first application and as a means (so to say) of defining what is called in the Emergency Laws (Miscellaneous Provisions) Act, 1947, sched. II, para. 6 (2), “the original court”, it would appear that, if an application to vary is made to a court of summary jurisdiction having jurisdiction in the place where the applicant resides at the time he makes his application, that court would have jurisdiction.

[HIS LORDSHIP said that on the facts the court could and should infer that when he made his application the father was “residing”, within the common-sense meaning of that phrase, within the jurisdiction of the Wallington justices and so (subject to the point already indicated) those justices had jurisdiction by virtue of the Guardianship and Maintenance of Infants Act, 1951, s. 1 (1), and he continued:] By the Guardianship of Infants Act, 1886, s. 5, it is provided:

“The court may, upon the application of the mother of any infant . . . make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent . . . and may alter, vary, or discharge such order on the application of either parent . . .”

By s. 9:

“In the construction of this Act the expression ‘the court’ shall mean—In England the High Court or the county court of the district in which the respondent or respondents or any of them may reside . . .”

The statutory jurisdiction to make application for access, and so forth, is limited to the mother, though in s. 5 it is provided that an order to vary may be made on the application of either parent. But there is, it will be observed, no provision for money payments, and the court is limited in any case to the High Court and the county court. But I interpret s. 5 and s. 9 together (so far as relevant) in this way. For the purposes of varying an order the county court of the district in which the respondent or respondents or any of them might for the time being resided had jurisdiction. In other words, I interpret s. 5 as conferring on the appropriate court jurisdiction to vary an order—the appropriate court not being, necessarily, the “original” court, viz., the court which made the original order sought to be varied. The Guardianship of Infants Act, 1925, filled in, so to speak, certain of the gaps which I indicated in the jurisdiction conferred by the Act of 1886. Thus, s. 3 provided:

“(2) Where the court under [s. 5 of the Act of 1886] as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable . . . (4) Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order.”

Section 7 (1) of the Act of 1925 amends the interpretation provisions of s. 9 of the Act of 1886, thus:

“For the purposes of the Guardianship of Infants Act, 1886, as amended by this Act, the expression ‘the court’ shall include a court of summary jurisdiction.”

There is also a power to make rules, but nothing of assistance is to be derived from the rules.

I, therefore, interpret the matter thus. Up to 1951, for the purpose of applying to vary an order, a court of summary jurisdiction, among other courts, having

jurisdiction in a place where a respondent for the time being (that is, at the time of the application) resided was given jurisdiction. That would exclude the father in the present case because he was the applicant and not the respondent. But that exclusion was, in my judgment, removed by the Guardianship and Maintenance of Infants Act, 1951, s. 1 (1), which gives jurisdiction to the court, not only where the respondent resides, but also where the applicant resides. Reading that sub-section together with the earlier legislation to which I have referred, I am unable to construe it as being limited to "the original court" in the sense in which I have used that phrase. I think, therefore, that any court the jurisdiction of which from time to time can be invoked by the residence qualification in that sub-section has power to make a variation order contemplated by s. 5 of the Act of 1886 as amended and expanded. The result, therefore, is that inferring as a fact, as I do, the necessary residence qualification, the Wallington justices had jurisdiction, not, indeed, by virtue of s. 53 of the Children Act, 1948 (about which I express no final conclusion), but on s. 1 (1) of the Act of 1951. Accordingly, the appeal fails and must be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I also agree.

Appeal dismissed.

Solicitors: Haslewood, Hare, Shirley Woolmer & Co., agents for Mayo & Perkins, Eastbourne (for the mother); Warmingtons (for the father).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

S.A. MARITIME ET COMMERCIALE OF GENEVA v. ANGLO-IRANIAN OIL CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), November 5, 1953.]

Shipping—Charterparty—Construction—Charterparty for series of voyages by named ship—Clause giving owners liberty to substitute another ship—Right of owners to make more than one substitution.

A charterparty for several voyages by a named vessel provided: "Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention." Before the voyages commenced, the owners substituted another identical vessel for the one named in the charterparty. Before the last voyage, the substituted vessel having become inefficient, the owners proposed to substitute for it the original vessel. On the question whether the owners had the right to make the second substitution,

HELD: in considering the provision in the charterparty which permitted substitution it was necessary to examine the commercial reason for that provision, which, in the present case, was to provide a ship that would perform the voyages which the charterers wanted performed; the clause was inserted to prevent an accident to a particular ship bringing the charterparty to an end; the substitution of an identical ship could not affect adversely the position of the charterers; and, therefore, on its true construction the clause gave the owners liberty to substitute more than once, and the original substitution was not a final election that the ship then substituted should complete the charterparty.

AS TO SUBSTITUTION CLAUSE IN CHARTERPARTY, see HALSBURY, Hailsham Edn., Vol. 30, p. 283, note k to para. 481.

Cases referred to:

- (1) *Brightman & Co. v. Bunge y Born*, [1924] 2 K.B. 619; 93 L.J.K.B. 1070; 132 L.T. 188; *affd.* H.L. *sub nom.* *Bunge y Born Co. v. Brightman (H.A.) & Co.*, [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; 41 Digest 442, 2776.

- (2) *Fitzgerald v. "Lona" S.S. Owners*, (1932), 148 L.T. 166; 44 Lloyd's Rep. 212; Digest Supp.

SPECIAL CASE stated by an arbitrator.

The arbitrator stated the case in the form of alternative awards depending on the construction of cl. 38 of a charterparty which provided:

"Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention."

The charterparty was for a series of voyages to be undertaken by a named vessel, the *Driade*, but before any of the voyages was undertaken, acting under cl. 38, the owners substituted an identical vessel called the *Nayade*. Before the last voyage was undertaken, the *Nayade* having become inefficient, the owners proposed to substitute the ship originally named in the charterparty—the *Driade*. The charterers contended that the owners had no power under the charterparty to make the second substitution, and as a result they refused to load the *Driade*. The point reserved by the arbitrator for the consideration of the court was whether or not, on the true construction of the charterparty, the original substitution of the *Nayade* for the *Driade* constituted a final exercise of the option to substitute conferred on the owners by the provisions of cl. 38.

Sir Robert Aske, Q.C., and *B. B. W. Goodden* for the owners.

Megaw, Q.C., and *M. R. E. Kerr* for the charterers.

DEVLIN, J.: This case raises a short point which I have heard argued tersely but fully on both sides, and it is so much a matter of impression (as these short points of construction usually are) that there would be no value in my hearing further argument on it or considering it further. It turns on the construction of a clause in a charterparty which provides for a series of consecutive voyages. The clause, No. 38, is in the following terms:

"Owners have the liberty of substituting a coiled vessel of similar size and position at any time before or during this charterparty and owners undertake to give charterers reasonable notice of such intention."

The facts, so far as they are relevant, are that the charterparty was for a named vessel, the *Driade*, but before any of the voyages was undertaken the owners substituted for the *Driade* a vessel called the *Nayade*, a vessel of absolutely the same dimensions and same class. They are, in fact, the umpire says, identical ships. Before the last of the voyages was undertaken, the *Nayade* became inefficient, and, as it appeared to the owners that she might remain inefficient for some time longer than they had originally supposed, they proposed to substitute the *Driade*, i.e., to go back to the ship named in the charterparty. The charterers contended that the owners had no power so to do, and treated the charterparty as repudiated.

The short point of construction is this. Does cl. 38 give a liberty which can be exercised only once—if so, then the owners exercised it at the very beginning of the charterparty—or does it give a liberty which the owners can exercise from time to time during the course of the charterparty? I do not think that the language of the clause gives any indication, on the face of it, one way or the other. I say "on the face of it" because counsel for the charterers has analysed it and he relies on certain words as supporting his construction; but there is nothing on the face of it, no clear phrase, that is a signpost to one meaning or the other. In those circumstances, I think it is right to begin, as counsel for the owners began, by inquiring what is the object of a clause of this sort.

This sort of problem does not arise, or would be much less likely to arise, in the case of the ordinary charterparty. It is most unlikely that in a charterparty for one voyage the owners would want to make more than one substitution, but here is a charterparty for a number of consecutive voyages and the question is: What is the object of providing for substitution in such a charterparty? Counsel

for the owners says that one can divide these clauses into one of two types, and he concedes, I think, that if this were a clause which provided for an election, in the strict sense of the word, then his argument must fail because the law is that where a man has made his election he cannot approbate and reprobate. He cannot go back on his election and decide that, after all, he will make his choice the other way. But there is a distinction between that type of clause, counsel argues, and the type of clause which provides for alternative modes of performance. A contract may permit a party to perform the contract in one way or another way or, perhaps, in a number of ways, and he can make his choice or change his choice as he wants. Having made his choice one way on one day, he is not in any way prohibited from making a different choice on the next day. Counsel for the owners submits that this clause falls into that category, and I think that it does. He cited two cases on the way in which that sort of clause can operate in contracts of this type. In *Brightman & Co. v. Bunge y Born* (1), where a charterer had the option of loading wheat and maize or other sorts of grain, it was held that that was a matter for him. He had not to make his election in advance and thereby bind himself. Indeed, the matter went against him because the contract contained a prohibition of wheat and his argument was that he intended to load wheat which meant that he was prohibited from loading the cargo that he proposed to load. But the court took the view that he could load some other cargo for which the contract provided. Similarly, in *Fitzgerald v. "Lona" S.S. Owners* (2), there was a right, at the option of an assignee, to select one out of a number of different methods of discharge, and *ROCHE, J.*, held that the fact that he had chosen one that had become impossible or difficult did not mean that he could not switch to another.

Those cases are decided on their own facts and I do not derive more help from them than that they are useful illustrations of the type of clause within which counsel for the owners argues this clause falls and they show the way in which such a clause works in practice. An example that counsel put was that if a man undertook to transport a client by motor car on so many days of the week within a certain period and the contract provided for the car which was to be used but reserved the right to substitute another car of similar size and make, no one would contend that because he exercised his right to use a different car on one day he would be obliged to continue using that car for the remainder of the contract period. What, I think, makes the psychological approach, if I may so put it, to a clause of this sort a little different is that, whereas on the land anybody who was undertaking to provide a car would probably merely undertake to provide a car of a particular type out of a fleet which he had, that is not a way in which it is customary, or convenient, to enter into charterparties. It is convenient to enter into charterparties by providing for a named ship and giving a liberty to substitute, but, when one examines the essence of the matter, I do not think it is really different, or it need not necessarily be different, from a contract which requires the owner to provide one of a fleet of cars. The fundamental question, as it seems to me, is, from the commercial point of view, looking at the object of the contract: Does it matter which vessel is used? If it does, then immediately there is a sound commercial reason for reading in a restriction; but if it does not, one asks oneself at once: "What is the commercial reason which could have been operating on the parties' minds for restricting the exercise of the choice to one occasion only?"

In this case the proposed substitution inflicted no inconvenience on the charterers. I think it reasonable to infer that they did not mind one way or the other whether they had the *Driade* or the *Nayade*, but freights had fallen and the result was that they could get another ship more cheaply, and, of course, they are quite entitled to say: "If you cannot fulfil the literal terms of your contract and we can get another ship more cheaply, then we shall do so. That would be your misfortune". When one looks at the commercial object of the

clause one must begin by taking oneself back to the time when the contract was made and assume that both parties want the contract fulfilled. The object of the charterparty, therefore, is to provide for a ship that will, at the agreed rate, perform the voyages which the charterers want performed. The object in putting in liberty to substitute is, I should have thought, to make sure that an accident to one particular ship will not necessarily bring the charterparty to an end if the owners have at their disposal another identical ship which can do the work just as well. In form, being a liberty to the owners, it might be said to be for the benefit of the owners. It is difficult to see how it would benefit them, except in the sense that it is to their benefit, just as it is to the charterers' benefit, to implement the charterparty. The clause has to be put in the form of a liberty to the owners because one could not, commercially speaking, give the charterers the right to investigate the arrangements of the owners and say: "Well, it is a pity you cannot provide the *Driade*, but we do not see why you cannot provide the *Nayade*. What are you going to do with that for the next two or three months?" One can understand the sound commercial reasons why the liberty is kept in the hands of the owners. It may, for all that, be something which would benefit the charterers, as was shown by the two cases which I have already cited. If the *Driade* alone had been named and the *Driade* had been sunk, the charterparty would, of course, come to an end, but it might well be that the charterers in this case could say, if they so desired: "You have an option to perform the charterparty in some other way and you do not excuse yourself from further performance of the charterparty merely by saying that the named ship has been sunk. You must show also that you have no other ship available with which you can perform the charterparty." It is not, however, necessary that I should decide that point.

What I have said is, I think, enough to explain why I think that cl. 38 is fundamentally a clause inserted so that the charterparty can be kept alive in the event of an accident or something untoward happening to one particular vessel out of a series of identical vessels. I think also that it must be within the commercial object of the clause that a ship should be substituted for a comparatively short period. It will limit the right of the owners very much if, let us say, at the very beginning of the charterparty, or after one voyage, something were to happen to the named ship and they were not at liberty to substitute some other ship which was free at the moment for the next voyage until the named ship were repaired. But, on the argument of counsel for the charterers, they cannot do that. The charterers argue that the owners must make up their minds that the ship which they substitute is to be used for the whole of the rest of the charterparty period. I can see no commercial reasons for giving that construction to the clause, and one comes back in the end, where a clause gives a right to elect, to the question: Does the other party mind which way you decide? It may be he has to make his own arrangements according to the way in which you elect. In the ordinary case of an election, e.g., to buy shares by a certain date, the vendor must know where he is so that if one elects not to buy them he can put the shares on the market. He cannot permit constant changes of mind. However, there is no such reason here that could persuade the court to consider this clause as being of the election type rather than as one dealing with the method of performance. There is no commercial reason why the charterers should mind what sort of vessel they have for any particular voyage. It might be said that in that case there is no reason why the clause should provide for the giving of reasonable notice, and I observe that, in neither of the two cases to which I have referred, was there provision for notifying the other side of the way in which the charterer or assignee had made up his mind. I think that that point, if taken by itself, might be one which would point to the clause's being of the election type rather than of the other type. It might be asked why, if it is a matter of indifference to the charterer which vessel is used, does he have to be told and given reasonable notice of what

is going to be done ? That provision as to reasonable notice would operate both ways, and whether there is a right to substitute once or the right to substitute twenty times the argument is still: Why should he require to have reasonable notice ? I think the answer is that it does not make any difference to the charterer what vessel is going to be substituted, or how many times it is going to be substituted, so long as he knows whether the owners are going to exercise their right or not. If, for example, in this case the *Driade* became inefficient, the charterers cannot know whether the *Nayade* will be available or not and cannot know whether the owners have some other ship which may or may not be available. They may be met with the answer: "The *Driade* has gone out of action and we have no other ship. So that is an end of the charterparty." The provision as to reasonable notice protects the charterers and they know whether there is to be a substitution or not. The owners cannot delay indefinitely.

B The owners must notify—as they did when the *Nayade* went out of action—whether they are going to seek to make a substitution or not.

Counsel for the charterers, I think rather naturally—because, in my view, there is really only one view that one can take of the commercial object of a clause of this sort—was disposed to emphasise the words themselves, and he made a number of points on them which are well worth attention. He pointed out, first,

"Owners have the liberty of substituting a coiled vessel of similar size",

one asks oneself: Substituting for what ? The answer must be, substituting for the named vessel. If the parties had it in mind, and if they were drafting the clause with a lawyer's care and, if they had wanted to achieve the end which counsel for the owners contends they have achieved, they could have put in

D "substituting for the named vessel or for any vessel that is substituted therefor."

But that is the sort of thing which commercial men do not do. They do not apply themselves to that sort of detail. It is a sound point of construction provided one can accept the view that people who draft these clauses approach them with that sort of point in mind. I do not think that they do.

E Similarly, I do not think that one can lay very much emphasis or derive very much advantage from an analysis of the phrase

"at any time before or during this charterparty."

F Counsel for the charterers rightly emphasises the word "or" and says it must mean at any time before or at any time during, and that if there was meant to be more than one time they would have said: "and/or"—or words to that effect. Similarly, they could have said: "at any time or times". I do not think these points, which are sometimes of great value when one is construing a statute, are of so much value, when one is construing a commercial document. As counsel for the charterers pointed out, the phrase is quite inaccurate from the lawyer's point of view. To say that the owners had the right under the charterparty to do something "before . . . this charterparty" is legally quite inaccurate. The charterparty came into effect at once. The parties obviously mean "before the first voyage under the charterparty", or something of that sort. I think that that shows that it is not of much value trying to give a meticulous analysis of the words which the parties have used in a clause of this sort. Looking at it broadly, it seems to me that the phrase "at any time", in so far as it gives an indication one way or the other, is the sort of phrase that one uses when one wants to indicate that it can be done either once or twice, just at any time which one chooses. A commercial man does not put in "at any time or times."

H For these reasons, therefore, I think that the approach to the clause which counsel for the owners has presented is the right one and that it should be construed in the light of those considerations. Construed in the light of those

considerations, I find no difficulty in holding that it is intended to allow a substitution, in effect, as often as the owners desire a substitution. It is not intended to be a clause providing for an election which once made is completely exhausted. Accordingly, I would answer the question which is addressed to me in the negative and uphold the alternative award.

Case remitted to the umpire to assess the damages.

Solicitors: *Stokes & Mitcalfe* (for the owners); *William A. Crump & Son* (for the charterers).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

BREWER STREET INVESTMENTS, LTD. v. BARCLAYS WOOLLEN CO., LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 15, 16, 19, 1953.]

Landlord and Tenant—Repair—Repair done by landlord at request of prospective tenant—Breakdown of negotiations—Fault of tenant—Work done for tenant's benefit—Liability for cost of work.

Building—Control—Licence—Licence for specific work—Extra work within licence-free limit—Necessity for further licence.

During the course of negotiations for a lease the defendants, the prospective tenants, requested the plaintiffs, the landlords, to make certain alterations to the premises before they entered into occupation, and by letter agreed to accept responsibility for the cost of the work, which proceeded. When negotiations broke down, the defendants having insisted on their being granted an option to purchase, a term to which they knew the plaintiffs would not agree, the uncompleted work of alteration was discontinued and the plaintiffs sought to recover from the defendants the cost of such work.

HELD: the negotiations having broken down through the fault of the defendants, and they having agreed to accept responsibility, the defendants were liable to pay for the cost of the work; even if the blame for the breakdown of negotiations could not be placed on either side, the work had been carried out to meet the defendants' requirements and for their benefit, and, therefore, the plaintiffs were entitled to recover.

The alterations ordered by the landlords, the plaintiffs, to be carried out at the request of the prospective tenants, the defendants, included the making and fitting of an extra door to a lift at a cost of £48 10s., for which work no licence had been obtained. The negotiations for a lease having broken down, the plaintiffs claimed (inter alia) the cost of the door from the defendants. The defendants argued that the work was illegal and that in any event, therefore, the plaintiffs could not recover.

HELD: the cost of the door was within the limit up to which no licence for the work was required; a sum equivalent to the licence-free amount could not be added to the limit permitted by the licence for the alterations generally; although an extra item of work might be so involved with the work within the original specification as to be covered by that rule, an extra item was prima facie outside the rule; the defendants had not discharged the onus of proving its application in relation to the door; and, therefore, they were liable to the defendants for its cost.

Dennis & Co., Ltd. v. Munn ([1949] 1 All E.R. 616), considered.

Cases referred to:

(1) *Jennings & Chapman, Ltd. v. Woodman, Matthews & Co.*, [1952] 2 T.L.R. 409; 3rd Digest Supp.

(2) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

(3) *Muir v. James*, [1953] 1 All E.R. 494; [1953] 1 Q.B. 454; 117 J.P. 126.

(4) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

APPEAL by the defendants from an order of MORRIS, L.J., sitting as a judge of the Queen's Bench Division, dated Mar. 6, 1953.

A During the course of negotiations for a lease of certain premises, it was orally agreed that the plaintiffs should grant to the defendants a lease for a term of twenty-one years at a rent of £2,750 per annum. By letter dated Jan. 9, 1951, the defendants confirmed these terms and requested that they should be granted an option to purchase the premises in the following terms:

B “ . . . We have considered these matters [i.e., the agreed terms] carefully and would agree to take a lease at £2,750 subject to contract, the contract to include a clause to the effect that we shall have the right to purchase [the property] within sixty days of the signing thereof at the price of £40,000.”

C By letter dated Jan. 10, 1951, the plaintiffs agreed, subject to contract, the length of the term and rent of £2,750, but offered the defendants a first refusal instead of an option to purchase the property as follows:

“ . . . [we] have agreed to embody in the contract that should [we] at any time contemplate selling the property [we] will give you first refusal at an agreed figure of £40,000 for the mentioned freehold, subject to contract.”

D On Jan. 22, 1951, the defendants' surveyor wrote to the plaintiffs' surveyor requesting certain alterations to be made to the premises before the defendants took possession thereof, and by letter dated Jan. 26, the defendants agreed to accept responsibility for the cost of the work which was to be done by the plaintiffs' contractors and duly proceeded. In addition to the alterations mentioned above the defendants made a separate request for an extra door in the lift to be made, and installed by an independent contractor for the sum of £48 10s.

E On Jan. 23, 1951, the plaintiffs submitted to the defendants a draft lease incorporating as a term thereof a first refusal to the defendants to purchase the property within two years of the date of the draft. The draft was amended by the defendants, and on Feb. 6 the plaintiffs returned a copy of the draft re-amended into its original form. Negotiations between the parties broke off subsequently, the defendants being unwilling to accept a lease without an option to purchase and the plaintiffs being unwilling to grant anything more than a first refusal. The plaintiffs then discontinued the uncompleted work of alteration on the premises and sought to recover the cost of that work from the defendants in the present action. The defendants contended that their liability to pay the cost of the alterations was subject to the grant to them of a lease, or, alternatively, that the plaintiffs could not recover unless they could show that they were at all times ready and willing to grant a lease on the terms set out in their letter of Jan. 10, 1951. MORRIS, L.J., held the defendants liable and gave judgment in favour of the plaintiffs.

H *M. Waters* for the plaintiffs.
Dare for the defendants.

SOMERVELL, L.J., stated the facts and continued: The learned judge decided that the defendants were liable and, on the claim as a whole, counsel for the defendants takes two points. He submits, first, that the contract for these alterations should be read as subject to a lease being granted. His second submission is that, assuming he is wrong on the first point, the plaintiffs could

not recover unless they could show that they were at all times ready and willing to grant a lease on the terms set out in their original letter of Jan. 10, 1951, viz., the first refusal at £40,000 over the period of the lease and that the contract which they themselves submitted showed that they were not ready and willing to do that. The plaintiffs rely on the fact that the defendants did not ask them to do that, but re-inserted, in effect, a provision for an option. On the first point, which was taken in the pleadings and which the learned judge decided against the plaintiffs, I think the learned judge was plainly right. I cannot see any reason for implying into this contract a term that the defendants were to be under no liability unless there was a lease, or, in other words, that the confirmation of their responsibility should be read as subject to their entering into a lease. As was pointed out by ROMER, L.J., in the course of the argument, the whole matter of the lease being subject to contract, the defendants could have resiled without giving any reason. It seems to me, at any rate, impossible that they could have expected the plaintiffs to continue with this work on the basis that they would have to pay for alterations which the defendants wanted if the defendants entirely on their own motion decided not to go on with the transaction. That point, I think, fails.

One then approaches the question, as I think, on the basis whether any facts are shown which would entitle the defendants to say that they were not in the events which had happened liable to fulfil the responsibility which they undertook by the letter of Jan. 26. The learned judge said:

"In approaching the present case it may be useful to consider two situations just to test the matter. Supposing the work had all been done, and supposing the defendants had then said they had changed their mind and they were not going to take a lease at all. There was no binding contract, and they would have been entitled for no reason or for a bad reason to refuse to enter into a lease. It would seem strange if, in those circumstances, the defendants were not obliged to pay. Take another case: supposing the work was all done and the defendants remained willing to take a lease on the terms in principle agreed, and then supposing the plaintiffs said: 'Well, we have changed our minds: we are not going to grant you a lease', or 'We have found someone else who will pay more', it would seem strange if, in those circumstances, the defendants were obliged to pay. It seems to me that much turns on the reason why the whole of this matter came to an end, and the correspondence seems to me to show the reason was that the defendants insisted on having an option although an option had never been promised, so for that reason the whole of the negotiations came to an end. I think the basis of the promise entered into by the defendants might well have been that the plaintiffs should remain in principle agreeable, subject, of course, to contract, to grant a lease on the general lines of the letter of Jan. 10. The implied term as pleaded in this case, to which I have referred in my judgment, wholly fails. There could not have been an implied term on such a wide basis. The highest that it could be stated from the point of view of the defendants was as I have put it, viz., that the promise was on the basis of the plaintiffs' remaining of the same mind as they had revealed before the promise to pay for items of work was made. Although the plaintiffs by the first draft of their lease were seeming to depart from it, the correspondence seems to me to show that the real reason why this matter went off was that the defendants were insisting on an option."

With regard to the correspondence, counsel for the defendants criticised the statement of the learned judge in the earlier part of his judgment when he was dealing with the amendments of the draft lease and when he referred to the letter of Feb. 6, 1951, which accompanied the lease as re-amended. The judge said that that was very close to what the plaintiffs had said in the letter of

Jan. 10. I agree with counsel for the defendants that when one looks at the lease as re-amended by the plaintiffs it was not very close to what was said in their letter of Jan. 10. It was as far removed from that as was the draft originally submitted. So, with respect I will assume that the learned judge took a more favourable view of that counter-counter-offer than the document in fact justified and I will consider the course of the correspondence independently of that finding. The learned judge said:

A “Although the plaintiffs by the first draft [and also by the second draft] of their lease were seeming to depart from it the correspondence seems to me to show that the real reason why this matter went off was that the defendants were insisting on an option. They had never been promised an option. It had been made clear that no option would be given, and, therefore, on that part of the case, in my judgment, the defendants have failed to show that they have a defence to this claim.”

B I agree with that construction of the correspondence, but if one considers the matter in principle, the defendants undertook responsibility for this work at a time when they knew that either side could resile and decide not to conclude a lease. The only question of law, therefore, would be whether the events which have happened by reason of some implication entitle the defendants to raise a defence. The learned judge clearly thought that, if the matter had gone off because the plaintiffs had changed their minds or had found someone else who would pay more, the defendants would have such a defence. It is unnecessary to decide that point in this case, although I am bound to say, speaking for myself, there seems to be a strong argument for the view which the learned judge took. I think it is plain, as the learned judge found and as I hold, that it went off through the defendants' own course of conduct in adhering to the condition that they should obtain an option when it had been made clear to them that the plaintiffs were not willing to grant an option. If counsel for the defendants is right in saying that, in the alternative, the lease went off by reason of circumstances for which neither party can be held responsible, i.e., in the ordinary course of negotiation, I still consider that that would not afford a good defence to the claim in this case. I wish to guard the words I use because an earlier case [*Jennings & Chapman, Ltd. v. Woodman, Matthews & Co.* (1)] which came before this court shows that it is a somewhat difficult matter. Each case must be judged on its own facts and there might be a case in which the circumstances, and the benefits conferred on the landlord if the matter went off, were such that, even although it was not through the deliberate action of the landlord that the negotiations failed, the proposed tenant might still have a defence. It is an area in which one should not seek to anticipate circumstances which may arise. For these reasons, I think that on the main claim the learned judge was right and the appeal fails.

G It was then argued that there was a defence in respect of the extra door of the lift in that no licence was obtained, that that work was, therefore, illegal, and, on principles which have been applied more than once in reported cases, that the plaintiffs could not recover for it. [HIS LORDSHIP considered this argument, concluded that the defendants had not discharged the onus of proving illegality, and continued:] Counsel for the plaintiffs took a further point to which the learned judge did not refer. This sum of £48 10s. H in respect of the extra door is within what I will call the free allowance, that is the amount of work which can be done under the regulations without a licence. It was decided in *Dennis & Co., Ltd. v. Munn* (2) that where a licence had been granted for a certain amount on a specification and that amount had been exceeded, the builder could not claim that the amount of the free allowance should be added to the amount covered by the licence. In a later case [*Muir v. James* (3)] the question was raised as to the application of that principle to what I will call extras, i.e., something not in terms covered by the

original specification but separately ordered. It is quite clear, to my mind, that there may be cases in which an extra may be separately ordered and may be sufficiently separable from the original work to be covered by the free allowance. It may be that, although the extra is separately ordered outside the terms of the specification, it is so involved in the specification as to fall under the principle of *Dennis v. Munn* (2). In my view, an extra is *prima facie* outside the principle of *Dennis v. Munn* (2) and there are no facts proved here which negative that position, the onus being on the defendants. For these reasons, in my opinion, this appeal should be dismissed.

DENNING, L.J.: This case raises questions of considerable interest. The parties were in negotiation for a lease and had agreed on many of the principal matters to be contained therein. In particular, they agreed on a term of twenty-one years at a rent of £2,750 a year, but it was all subject to contract. Neither side, therefore, was bound, but the negotiations had proceeded so far and with such mutual confidence that both parties assumed without question that a lease would be granted. The prospective tenants wanted some alterations to the premises before they went in. The plaintiffs agreed to make these alterations, and the defendants agreed to be responsible for the cost. The alterations were put in hand and a good deal of the work had been done when most unfortunately the negotiations for a lease broke down. No lease was granted, and the work on the alterations was stopped. The plaintiffs have had to pay to their own contractors the cost of those alterations up to the time when they were stopped. Now they seek to recover from the prospective tenants the moneys which they have had to pay to their own contractors. The question is whether they can do so.

It is not easy to state the legal basis of the plaintiffs' claim. Although the defendants agreed to pay the cost of the alterations, nevertheless, those alterations were never completed. The work was abandoned before it was finished. Once the negotiations for a lease broke down, both sides realised that the work must be stopped. It was a sensible course to adopt, but it means that the plaintiffs cannot sue for the price as on a completed contract, nor can they sue the defendants for damages for breach of contract, because the defendants have not been guilty of a breach. Let me give an instance. One item of the work was a lift door to be made, fixed and installed for £48 10s. At the time when the work was abandoned, the lift door had been made in the provinces, but it had not been transported to London, or fixed or installed. Nevertheless, the plaintiffs have had to pay to their contractors the full sum, presumably by way of damages, and they now seek to recover it from the prospective tenants. They clearly cannot recover on a quantum meruit as ordinarily understood. The only way they put their claim in the statement of claim on this item and the others is that it is for money paid on request. The defendants, however, in fact made no request to the plaintiffs to pay the money; their request, if any, was to pay on completion of the work, and it was not completed. In these circumstances, the proper way to formulate the claim is, in my view, on a request implied in law, or, as I would prefer to put it in these days, on a claim in restitution.

On the facts which I have stated, it is clear that the parties proceeded on a fundamental assumption—that the lease would be granted—which has proved to be wrong. The work done has been wasted and on whom is the loss to fall? The parties themselves did not envisage the situation which has emerged and did not provide for it; and we do not know what they would have provided had they envisaged it. Only the law can resolve their rights and liabilities in the new situation, either by means of implying terms, or, more simply, by asking on whom the risk should fall. That is how the court approached a similar question in *Jennings & Chapman, Ltd. v. Woodman, Matthews & Co.* (1), and I think we should approach the question in the same way. **MORRIS, L.J.**, who tried the case, gave a reserved judgment in which he put the matter in a

way which appeals to me. He asked himself: What was the reason that the negotiations broke down? If it were the fault of the landlords as, for instance, if they had refused to go on with the lease for no reason at all, or because they had demanded a rent higher than that which had been already agreed, then they should not be allowed to recover any part of the cost of the alterations. Even if the plaintiffs derived no benefit from the work, they should not be allowed to recover the cost from the defendants since it was by their fault that the defendants were deprived of it. On the other hand, if it were the fault of the defendants that the negotiations broke down, as, for instance, if they had sought a lower rent than that which had been agreed, then the defendants should pay the cost of the alterations up to the time when they were stopped. They promised to pay for the work, and they should not be able to break their promise through their own fault, even though the alterations were not completed. It is a very old principle laid down by LORD COKE, C.J., that a man shall not be allowed to take advantage of a condition brought about by himself. I do not think, however, that in this case it can be said that either party was really at fault. Neither party sought to alter the rent or any other matter which had been agreed. They differed on a point which had not been agreed at all. From the beginning the prospective tenant had wanted an option to purchase whereas the plaintiffs were prepared to give him only the first refusal. Each in the course of negotiations sought on this point more favourable terms—the defendants to obtain a firm option to purchase, the plaintiffs to give a first refusal of little value—but their moves in the negotiations can hardly be considered a default by one or the other.

What, then, is the position when the negotiations go off without the default of either? On whom should the risk fall? In my opinion, the prospective tenants ought to pay all the costs that have been wasted. The work was done to meet their special requirements, and prima facie it was for their benefit and not for the benefit of the plaintiffs. If and in so far as it is shown to have been of benefit to the plaintiffs, credit should be given in such sum as may be just, but subject to such credit, the defendants ought to pay the cost of the work, because in the first place they agreed to take responsibility for it. There is no finding here that the work was of any benefit to the plaintiffs and in the circumstances the defendants should, I think, pay the amount claimed.

Counsel for the plaintiffs argued that the test laid down in *Jennings v. Woodman* (1) was wrong. It was not right, he said, to ask whose fault it was, or on whom should the risk fall, because each side had an absolute right to withdraw from the negotiations and could not be said to be at fault in doing so. He referred to *Luxor (Eastbourne), Ltd. v. Cooper* (4), and argued that, even if the plaintiffs demanded a higher rent and thus caused the negotiations to fail, they could still recover the cost of the alterations. I do not think that is right. Estate agents are employed on the footing that they are paid a large commission if a sale is completed but nothing if it is not. They take the risk of the transaction failing. The cases on the subject are, therefore, illustrations of the same test: On whom in all the circumstances should the risk fall? In this case I think the risk should fall on the prospective tenants and they should pay the costs of the alterations. On the question of illegality I have nothing to add to what SOMERVELL, L.J., has said. I agree that the appeal should be dismissed.

ROMER, L.J.: I agree and there is little which I wish to add. As SOMERVELL, L.J., has pointed out, this case falls to be decided on its particular facts and circumstances. On those facts and circumstances, I hope I shall not be regarded as unsympathetic to the defendants if I say that, in my opinion, they have only themselves to blame for the judgment which was delivered against them. The truth of the matter is that they were in a great hurry to enter into occupation of these premises because the lease of their own premises was running out and owing to that haste they did things which in the normal course they would

not have done. On Jan. 9 they made an offer, subject to contract, to take a lease of these premises for twenty-one years at £2,750 a year, the contract to include a clause giving them an option to purchase within sixty days for £40,000. On Jan. 10 they received a counter-offer which departed in many respects from the original offer, the principal respect being the withdrawal of the option, that being the element which subsequently caused the whole of the negotiations to break down. In those circumstances, on Jan. 23, the landlords' solicitors sent a draft lease to the defendants for approval. The option was not included in the instrument. The work was ordered, and on Jan. 24 the plaintiffs' surveyor asked for an assurance from the defendants' surveyor that they would accept the responsibility of payment for the work which was to be done. On Jan. 26 Mr. Freud on behalf of the defendants wrote the letter which SOMERVELL, L.J., has read unequivocally accepting responsibility for the cost of the work as mentioned. I am myself unable to read that letter as amounting in any sense to a conditional acceptance of responsibility. They knew what the position was in regard to the lease, they knew that this formidable difference had already arisen between themselves and the plaintiffs with regard to the option, but they wanted the work done. I am satisfied that they were prepared to risk the matter of the lease not coming to a satisfactory conclusion. If one is asked to imply something into the acceptance, for example, that the responsibility should arise or be enforceable only if a lease were to be granted, two questions suggest themselves: First, what lease (because none had been agreed)?, and, secondly, what would have been the reaction of the owners had that condition been introduced in terms? I for myself have no doubt that had the defendants said: "We want you to put this work in hand but we are only going to pay for it provided we eventually get a lease which will be agreed between us", the plaintiffs would not have had the work done at their own risk as to cost. Taking the whole of the circumstances, the dates, the urgency of the matter, the fact that the defendants themselves paid unequivocally and directly for part of the electrical work without any suggestion of their liability in that regard being conditional, I have no doubt but that in common phraseology they were "taking the risk" for their own purposes, in the hope that they would have the benefit of it if, as they hoped and expected, a lease was finally agreed and granted. As it was not settled, solely because the defendants insisted to the end on getting what they had been already told the plaintiffs were unwilling to give, viz., an option, I cannot see how they can escape responsibility by seeking to put the blame on the shoulders of the plaintiffs. It may well be that if, after this work had been done, the plaintiffs had got the benefit of it, assuming it to be work which improved the value of the property, and then they had refused to grant a lease, the defendants would not have been without remedy. That was not the position in this case. The facts, as I have stated, led to an entirely different result. I, accordingly, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Arnold Lee & Co.* (for the plaintiffs); *Lucien Fior* (for the defendants).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

Re W. (an infant).

[COURT OF APPEAL (Jenkins and Morris, L.J.J.), October 28, 1953.]

Court of Appeal—Custody of infant—Jurisdiction to entertain appeal from Chancery judge hearing appeals from justices—Interlocutory appeal—Guardianship of Infants Act, 1886 (c. 27), s. 5—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (i).

A An appeal to the Court of Appeal lies from a decision of the Chancery judge nominated by the Lord Chancellor to determine appeals from courts of summary jurisdiction in cases relating to the custody of infants under the Guardianship of Infants Acts, 1886 and 1925. Such appeals are interlocutory, and, semble, no leave to appeal is necessary by reason of s. 31 (1) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925.

B Case referred to:

(1) *Chinchen v. Chinchen*, [1950] W.N. 22; 2nd Digest Supp.

APPEAL from an order of ROXBURGH, J., dated July 8, 1953, dismissing an appeal from an order made by justices as to the custody of the infant*.

Comyn for the appellant.

C *C. W. Abrahams* for the respondent.

JENKINS, L.J.: In opening the case counsel for the appellant very properly raised the question whether this court had jurisdiction to entertain an appeal in proceedings of this sort—that is to say, proceedings under the Guardianship of Infants Acts, 1886 and 1925, initiated in a court of summary jurisdiction. He very properly did that because his researches have not disclosed any previous case in which there had been such an appeal. He referred us to the relevant provisions of the Guardianship of Infants Acts, the Supreme Court of Judicature (Consolidation) Act, 1925, and the Rules of the Supreme Court. The effect of those provisions, taken together, is such as to leave no doubt whatever in my mind that an appeal to this court does lie in such cases, and I was fortified in this conclusion by the Chief Registrar, who was able to produce an order in which a similar appeal had been entertained by this court and also assured me that within his recollection there was at least one other instance of that being done. It was not disputed on the respondent's side that this court did have jurisdiction, and it seems to me abundantly plain that it has. Accordingly, I pass from that question. In the circumstances I have not thought it necessary to refer in detail to the sections, for I think that the matter, though properly raised by counsel for the appellant, is one which really admits of no doubt.

Another preliminary point raised by counsel for the appellant was whether this case was rightly treated as an interlocutory appeal. That, again, I think, admits of no doubt as appears from the judgment of BUCKNILL, L.J., in *Chinchen v. Chinchen* (1). In that judgment the learned lord justice said ([1950] W.N. 23) that

“at the outset of the appeal a point had arisen whether the order for custody, against which the appeal was brought, was an interlocutory order and, that being so, the appeal was properly in the interlocutory list.”

He went on to express the opinion that

H “orders for custody were interlocutory orders and appeals from them were properly in the interlocutory list”,

and he referred to s. 31 and s. 68 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, and the note to R.S.C., Ord. 58, r. 3, concluding thus (ibid):

“A custody order did not finally dispose of the rights concerned.”

* The appeal was heard in camera, and is reported, on the points of practice decided, by direction of the court.

So that leaves no room for doubt that this is an interlocutory appeal.

MORRIS, L.J.: I agree.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *E. J. Watson, Cox & Counsell*, Bristol (for the appellant); *Henry B. Sissmore & Co.*, agents for *Laurence Williams & Co.*, Bristol (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* TECHNALOY, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Havers, JJ.), October 7, 8, 1953.]

Master and Servant—Trade dispute—"Issue"—Difference as to observation of recognised terms and conditions—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 9 (2).

The applicants, iron-founders, were not members of the Engineering and Allied Employers' National Federation which, in November, 1951, came to an agreement with the Confederation of Shipbuilding and Engineering Unions whereby it was agreed that they would pay certain rates of wages to members of the confederated unions. On discovering that the applicants were not paying the agreed rates to members of one of the confederated unions, that union referred the matter to the Minister of Labour, who referred it to the Industrial Disputes Tribunal for adjudication, as a "dispute". On a motion by the applicants for an order of prohibition to issue against the tribunal,

HELD: the Industrial Disputes Order, 1951, distinguished between "issues" and "disputes" and laid down different procedures for the consideration by the tribunal of each; the question to be determined was whether the applicants were bound by the agreement to which they were not parties, which was an "issue" within the terms of art. 9 (2) of the order; and, as the matter had been referred to the tribunal as a "dispute", the order of prohibition would go.

FOR THE INDUSTRIAL DISPUTES ORDER, 1951, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 7, p. 166.

Case referred to:

- (1) *R. v. Industrial Disputes Tribunal. Ex p. Practical Banking, Ltd.*, [1952] 1 All E.R. 1370; [1952] 2 Q.B. 662; 3rd Digest Supp.

MOTION for an order of prohibition.

Employers moved for an order of prohibition directed to the Industrial Disputes Tribunal to prohibit them from further proceeding on a reference made to them by the Minister of Labour on Dec. 4, 1952. The particulars of the dispute were in the following terms:

"Employers: Technaloy Limited, iron-founders. Workers: Members of the Amalgamated Union of Foundry Workers of Great Britain and Ireland in the employment of the said employers. Description of the dispute: The dispute arises out of a claim made by the said workers that the company should implement the agreement between the Engineering and Allied Employers' National Federation and the Confederation of Shipbuilding and Engineering Unions dated Nov. 29, 1951, relating to wages and holidays with pay . . . The dispute was reported to the Minister on Nov. 20, 1952, by the Amalgamated Union of Foundry Workers of Great Britain and Ireland on behalf of their workers."

The tribunal heard the case and made an award on Jan. 8, 1953. That award was brought before the Divisional Court on a motion of certiorari and quashed on the grounds that it was bad on its face as the tribunal had given an increase of wages retrospectively beyond the date covered by the agreement. For the purposes of the present case it was assumed that the tribunal had power to proceed with the hearing of the reference though their first award had been declared a nullity.

- A The reference to the tribunal arose in the following circumstances. On Nov. 29, 1951, an agreement was reached in the iron-founding trade between members of the National Federation and the Confederation whereby an increase of 3d. per hour was to be granted to all members of the confederated unions by all members of the federation. Terms were also agreed for the provision and calculation of holidays. Shortly after this agreement an official of the Foundry Workers Union
- B visited the offices of the employers in the present case, and found that members of the union employed by the employers were not being paid the extra 3d. per hour. The attention of the employers was drawn to this fact. The employers were not members of the National Federation and so were not parties to the agreement of Nov. 29, 1951, and they contended that they were paying their workmen at least as much and in some cases more than other employers who were parties
- C to the agreement, even after the 3d. per hour had been added.

Beney, Q.C., and *N. Lawson* for the employers.

Pritt, Q.C., and *D. J. Turner-Samuels* for the Foundry Workers Union.

S. B. R. Cooke for the tribunal.

- LORD GODDARD, C.J.**, stated the facts and continued: The first
- D ground on which prohibition is sought is that there never was any dispute between the workers and the employers. Secondly, if there was anything in the nature of a dispute which, to use a neutral expression, I will call a difference, it was a difference which is described in the order as an issue and not as a dispute, the importance of that being that the machinery for hearing the matters which must be taken into account by the tribunal in dealing with an issue
- E is different from that which obtains on the hearing of a dispute.

- Dealing with the first point, all the members of the court, having read the affidavits, feel that it would be impossible to hold that in December, 1952, when the reference was made by the Minister, there was not a difference of some sort between the employers and the men who were then in their employment. Whether there is any difference today between the men who are at present
- F employed by the company and the company is an entirely different matter. But, as counsel for the trade union forcibly pointed out, assuming that there was a difference in December, 1952, when the tribunal sat, or even when the reference was made, men who had since left the employment of the employers might be entitled to claim that the wages found by the tribunal should be paid to them.

- We are, therefore, going to approach this case on the footing that in December,
- G 1952, there was a prevailing difference between the employers and some of the workmen. It is, therefore, necessary to look carefully at the terms of the Industrial Disputes Order, 1951, which took the place of a much wider and more comprehensive order passed in 1940. The object of these orders is the prevention of strikes. Part I of the order of 1951 is headed: "Reporting of Disputes and Issues", which seems clearly to recognise that there are two different things,
- H disputes and issues. Article 1 provides:

"Where a dispute exists in a trade or industry or section of trade or industry or in an undertaking and that dispute is reported to the Minister in accordance with this order by—(i) an organisation of employers, on behalf of employers who are parties to the dispute; (ii) an employer, where the dispute is between that employer and workers in the employment of that employer; or (iii) a trade union, on behalf of workers who are parties to the

dispute . . . that dispute shall be dealt with in accordance with the subsequent provisions of this order."

Article 2 deals with the reporting of issues concerning recognised terms and conditions of employment and provides:

"Where—(a) in any trade or industry or section of trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry or section of trade or industry in that district (hereinafter referred to as 'recognised terms and conditions'); and (b) an issue as to whether an employer in that district should observe the recognised terms and conditions (hereinafter referred to as 'an issue') is reported to the Minister in accordance with this order by an organisation of employers or a trade union; and (c) the Minister is of opinion that the organisation of employers or trade union reporting the issue habitually takes part in the settlement of terms and conditions of employment in the trade or industry or section of trade or industry concerned; that issue shall be dealt with in accordance with the subsequent provisions of this order."

When one turns to the definition article (art. 12) one finds that

"'dispute' does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union but, save as aforesaid, means any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen."

One finds that

"'issue' has the meaning assigned to it in art. 2 of this order",

which is no definition at all. You have to go back and see what art. 2 deals with, and the effect of that article seems to be that the disputes with which that article deals are called "issues".

Before I deal with the matter of construction, it is necessary to point out that art. 8 deals with references of disputes and how the tribunal is to deal with them. Article 9 deals with the reference of issues to the tribunal, and one of the important things—from the present point of view, the most important—is that art. 9 (2) provides:

"Where an issue has been referred by the Minister to the tribunal and the tribunal is of opinion that there are recognised terms and conditions applicable to the case and that the employer concerned is not observing those terms and conditions or terms and conditions of employment which, in the opinion of the tribunal, are not less favourable than those terms and conditions, it may by its award require the employer to observe the recognised terms and conditions or such terms and conditions of employment as may be determined by it to be not less favourable than the recognised terms and conditions."

The trade union concerned in the present case considered that it would be desirable that the employers should observe the terms that had been negotiated what I may call nationally. I think that is the same point that arose in *R. v. Industrial Disputes Tribunal. Ex p. Practical Banking, Ltd.* (1). In that case the employers were the proprietors of a weekly newspaper known as the "Muswell Hill Record", an increase in wages had been granted to printers, or, at any rate, some persons employed in printing newspapers, and it was sought to impose on the proprietors of the "Muswell Hill Record" an obligation to pay the same rate of

wages as had been paid by the Newspaper Society. But, the employers said: "We are not members of that society", and, to use a colloquialism, the trade union said: "That is just the trouble; we are asking that the terms which have been agreed by the Newspaper Society should be imposed on you, which this order gives the tribunal power to do".

A It seems to the court clear that the difference between the parties in the present case was whether the employers should obey the national terms and conditions that had been negotiated between the two big organisations. The court, therefore, cannot see how it can successfully be said that this does not fall exactly within para. (b) of art. 2. What was reported to the Minister was a question whether or not the employers should abide by, implement and perform the terms of this national agreement.

B Counsel for the trade union has argued strenuously that none the less there is a dispute. Of course there is a dispute if there is an issue. If two parties are at issue, they are at issue because they are disputing about some matter. The joinder of issue between parties to a law suit shows that there is a dispute between them, but we think that as a matter of construction this order, which refers both to disputes and issues, means to distinguish between them. For the purpose of the order certain disputes are called issues, and, if there is an issue between C the parties, it ought to be referred as an issue and art. 9 applies. The importance of it in this case is that the employers seek to say, rightly or wrongly—that is not a matter for us—"We were giving either as good terms or better terms. We were giving at any rate terms not less favourable to our workmen than they would get under the provisions of this national agreement". It will be observed that when they have that point to consider, the tribunal may find that, D although in some respects there is a difference between the nationally agreed terms and the terms under which the employees are working, taken as a whole the terms and conditions of employment are not less favourable than they would get under the national agreement. However, that is a matter for the tribunal. It appears from the affidavit of the managing director of the employers that when they were before the tribunal in January of this year, the tribunal refused to go E into the question of the amount of wages paid by the company, stating that the only question to be determined was whether or not the company should be bound by the agreement. If that was the question, it was an issue, and it ought to be determined according to the provisions of art. 9 of this order. For these reasons, as the matter was referred to the tribunal as a dispute when, in our opinion, it should have been referred to the tribunal as an issue, this order of prohibition F must go.

SELLERS, J.: I agree.

HAVERS, J.: I agree.

Order of prohibition.

Solicitors: *Hardman, Phillips & Mann* (for the employers); *W. H. Thompson* (for the trade union); *Solicitor, Ministry of Labour and National Service* (for the tribunal).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

Re BROWN (*deceased*). DISTRICT BANK, LTD. AND
ANOTHER *v.* BROWN AND OTHERS.

[CHANCERY DIVISION (Harman, J.), November 3, 4, 1953.]

Will—*Forfeiture clause*—*Restraint on alienation*—*Absolute gift of property to four sons as tenants in common*—*Forfeiture in event of assurance or mortgage by a son to person "other than a brother or brothers of such son."*

Ry his will, dated June 4, 1936, the testator, who died on Sept. 9, 1942, devised and bequeathed his "business properties" to trustees on trust for his wife during her life, and after her death on trust, until his youngest son should attain the age of twenty-one or die under that age, to divide the rents and profits thereof in equal shares between such of his four sons, whom he mentioned by name, as should be then living and the survivors and survivor of them, and, from and after the attainment by the youngest son of the age of twenty-one or his death under that age, on trust "for such of my said sons . . . as shall be then living and if more than one in equal shares as tenants in common", with a substitutional clause in favour of the children of sons who failed to survive the vesting date. The testator then declared that, if any of his four sons "shall execute any assurance or mortgage whereby but for this present provision the share of my business properties or of the income thereof or any part thereof hereinbefore devised or bequeathed to him would or might become vested in or payable to any person or persons other than a brother or brothers of such son", then the share of that son in the business properties and the income thereof were to be held by the trustees on trust to pay or apply the income, at their discretion, for the benefit of the son, his wife and children, during the remainder of the son's life, and, subject thereto, on trust, as to both capital and income, for the son's children who should attain the age of twenty-one. The testator disposed of the residue of his real and personal estate. On Oct. 18, 1947, the wife died, and on Dec. 25, 1947, the youngest son attained the age of twenty-one. On the question whether the restraint on alienation was good,

HELD: as the class to whom a son might alienate consisted, at first, of only three named persons and would, in the course of time, diminish, there was, in substance, a general prohibition on alienation, which was an attempt to fetter the natural qualities of the absolute interest already given, and, therefore, the restraint was void and could be disregarded.

Attwater v. Attwater (1853) (18 Beav. 330), applied.

Re Macleay (1875) (L.R. 20 Eq. 186), distinguished.

AS TO RESTRAINT ON ALIENATION, see HALSBURY, Hailsham Edn., Vol. 25, pp. 220-224, paras. 375-377; and FOR CASES, see DIGEST, Vol. 44, pp. 447-451, Nos. 2708-2738.

Cases referred to:

- (1) *Muschamp v. Bluet*, (1617), J. Bridg. 132; 123 E.R. 1253; 44 Digest 448, 2713.
- (2) *Doe d. Gill v. Pearson*, (1805), 6 East, 173; 102 E.R. 1253; 44 Digest 450, 2727.
- (3) *Re Macleay*, (1875), L.R. 20 Eq. 186; 44 L.J.Ch. 441; 32 L.T. 682; 44 Digest 451, 2730.
- (4) *Danyel v. Ubley*, (1626), Benl. 178 (73 E.R. 1038); Lat. 134 (82 E.R. 311); *sub nom. Daniel v. Ubley*, W. Jo. 137 (82 E.R. 73); *sub nom. Daniel v. Upton*, Noy. 80 (74 E.R. 1047); 44 Digest 450, 2726.
- (5) *Attwater v. Attwater*, (1853), 18 Beav. 330; 23 L.J.Ch. 692; 22 L.T.O.S. 150; 52 E.R. 131; 44 Digest 450, 2728.
- (6) *Jacobs v. Brett*, (1875), L.R. 20 Eq. 1; 44 L.J.Ch. 377; 32 L.T. 522; 34 Digest 531, 50.

(7) *Re Rosher*, (1884), 26 Ch.D. 801; 53 L.J.Ch. 722; 51 L.T. 785; 44 Digest 451, 2731.

(8) *Corbett v. Corbett*, (1888), 14 P.D. 7; 58 L.J.P. 17; 60 L.T. 74; 44 Digest 450, 2724.

ADJOURNED SUMMONS to determine questions arising under the will of the testator, Reginald William Southall Brown.

A By his will dated June 4, 1936, the testator appointed executors and trustees for the purposes of the Settled Land Act, 1925, and, by cl. 4, he bequeathed his business of a butcher and farmer to his wife for her life, with remainder to his four sons, Reginald William Southall Brown the younger, Harry Knight Brown, Arthur James Brown, and Geoffrey Knight Brown (referred to hereafter as "the youngest son"). By cl. 5 he devised and bequeathed the real properties referred to therein as his "business properties" to his trustees on trust for his wife during her life, and after her death

B "Upon trust until [the youngest son] attains the age of twenty-one years or dies under that age to pay and divide the net rents and profits thereof . . . subject as hereinafter appears in equal shares between such of my said sons . . . as shall be then living and the survivors and survivor of them and from and after the attainment by [the youngest son] of the age of twenty-one years or his death under that age . . . Upon trust subject as hereinafter appears for such of my said sons . . . as shall be then living and if more than one in equal shares as tenants in common . . ."

C

There was then a substitutional clause in favour of the children of sons who failed to survive the vesting date, and a proviso giving the wife power to mortgage. Clause 6 of the will was as follows:

D

"I hereby declare that if any of . . . Reginald William Southall Brown the younger Harry Knight Brown Arthur James Brown or Geoffrey Knight Brown shall execute any assurance or mortgage whereby but for this present provision the share of my business properties or of the income thereof or any part thereof hereinbefore devised or bequeathed to him would or might become vested in or payable to any person or persons other than a brother or brothers of such son then I direct that the share of such son in my business properties and the income thereof shall be held by my trustees in trust to pay or apply the income during the residue of the life of such son to or for the maintenance and benefit of such son and any wife child or children of his or the maintenance and benefit of any one or more of such persons to the exclusion of the other or others in such manner and form in every respect as my trustees may (without being liable to account for the exercise of such discretion) in their absolute discretion think fit And subject thereto upon trust as to both capital and income for the children of such son who attain the age of twenty-one years and if more than one in equal shares . . ."

E

F By cl. 9 of the will the testator disposed of the residue of his real and personal estate.

G

The testator died on Sept. 9, 1942, and the wife died on Oct. 18, 1947. The youngest son attained the age of twenty-one on Dec. 25, 1947. By an assignment dated Aug. 16, 1949, one of the sons, Harry Knight Brown, assigned to the other three sons absolutely, in equal shares, as tenants in common, all his one-fourth share or interest under the will of the testator.

H

The court was asked to determine whether, on the true construction of the will and in the events which had happened, each of the three sons, Reginald William Southall Brown the younger, Arthur James Brown, and Geoffrey Knight Brown (referred to hereafter as "the sons") was now entitled (a) to one equal third share in the testator's business properties as tenant in common with the other two sons absolutely free and discharged from the provisions contained in cl. 6

of the will; or (b) to one equal third share in the properties as tenant in common subject to defeasance in the event of his executing any assurance or mortgage as specified in cl. 6; or (c) to some other and, if so, what interest in the properties.

F. B. Alcock for the plaintiffs, the trustees.

J. A. Armstrong for the first and second defendants, two of the testator's sons, and the fourth defendant, a grandson of the testator (his father being one of the trustees).

J. Willcock for the third, fifth, seventh and ninth defendants, persons beneficially interested under the will who supported the sons' claim that the restraint on alienation was bad.

R. J. S. Thompson for the sixth and eighth defendants, infant grandchildren of the testator.

HARMAN, J.: This is a point on which, it appears, the authorities give no certain guide. The point is a narrow one, and it is whether or not a restriction on alienation, appended to an absolute devise of real estate, is good. The first instinct, I think, of any equity lawyer is to say that all restraints on absolute interests which tend to negative the rights attached to those interests are abhorred by the law and disallowed. That is a general rule, stated in *JARMAN ON WILLS*, 8th ed., vol. 2, p. 1477, as follows: "A power of alienation is necessarily and inseparably incidental to an estate in fee". One starts, therefore, I think, with the view that anything which seeks to deprive the feoffee (so to call him) of his rights is void, but there is no doubt that some degree of restriction may be imposed. One could, for instance, under the old law, impose a prohibition against assigning in mortmain, because that was a thing which the law did not allow, but, according to the early cases, one could not do by indirect means that which one could not do directly. The feoffee must not, in substance, be prevented from alienating, while, in form, he is given a chance to do so. For instance, he will not be bound by a fetter forbidding alienation to any but one named person or to a specified person who is an undischarged bankrupt, for that would be, in substance, though not in form, an absolute bar. I think that is illustrated by *Muschamp v. Bluet* (1).

[HIS LORDSHIP stated the facts and the provisions of cl. 4 and cl. 5 of the will, and continued:] It will be observed that the sons' interests in the business property are contingent until the time arrives for the vesting in possession, and that, when there is that vesting in possession, it is an absolute vesting in them as tenants in common. By reason of the modern doctrine that there cannot be undivided shares in land, when the land ceased to be settled land at the date of vesting a statutory trust for sale was imposed, and the interests of the four sons became interests in the proceeds of sale [: see Real Property Act, 1925, s. 1 (6), s. 34, and Settled Land Act, 1925, s. 36 (6)]. I think, however, that that fact can make no difference, as the principles in regard to the right of alienation apply to personalty as well as to realty. There is a residuary gift in cl. 9 of the will. The trouble in this case is caused by cl. 6. [HIS LORDSHIP read cl. 6, and continued:] That is a strange provision. If a son disposes of his interest to persons other than his brothers, there will be a kind of discretionary trust during his lifetime, and a remainder to his children, if he has any, and, if not, his share will fall into residue. If, on the other hand, a son does nothing to work a forfeiture, then he may, I suppose, leave his share of the property by will away from his children, which seems strange.

In 1949 one of the four sons assigned his share in the business properties absolutely to the other three, who now wish to know whether a forfeiture will ensue if one of them assures his share outside the magic circle. As I have said, the first instinct of any lawyer is to say that the restriction is not good, as it is inconsistent with an absolute interest in real estate (or in proceeds of sale, for that matter). But counsel for infant grandchildren of the testator was

able to persuade me that there is a great deal to be said for the view that a restriction of this sort may be good, because it does not amount to a total restriction. He referred to COKE'S COMMENTARY UPON LITTLETON, Charles Butler ed., vol. 2, s. 360 and s. 361. Section 360 reads:

A "Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void."

That is to say, it is repugnant to the gift. Section 361 reads:

B "But if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good."

C That merely says that a prohibition against alienating to a certain person (or, I suppose, to certain persons) is good. The question is: To how many persons may one extend that prohibition? According to *Doe d. Gill v. Pearson* (2) and *Re Macleay* (3), one may extend it to all the world except a certain class of people, but that seems to me a curious way of reading the doctrine of COKE, which merely says that one may exclude A. or B. from the world of people to whom the feoffee may alienate.

D *Doe d. Gill v. Pearson* (2) is a decision of the Court of King's Bench, the judgment being given by LORD ELLENBOROUGH, C.J. In that case the testator gave certain lands to

E "my said daughters Ann and Hannah, their heirs and assigns for ever, as tenants in common, and not as joint tenants; upon this special proviso and condition, that in case my said daughters Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them except to her sister or sisters, or to their children."

F Therefore, the class to whom alienation was permitted was confined to sisters and the children of sisters. That is a narrow enough class, though one does not know how large it actually was. There were five daughters, and all of them, except Ann, had children, but the report does not say how many. Ann made over her share to her husband. In an ejectment action, one of the heirs having entered on Ann's moiety after her death on the footing that there was an intestacy, LORD ELLENBOROUGH, C.J., said (6 East 180):

G "In this case three questions have been made: first, whether the conditions annexed to the estates of Ann Collett and Hannah Collett be good in point of law? . . . As to the first, we think that the condition is good; for according to the case of *Danyel v. Ubley* (4), though the judges did not agree as to the effect of a devise 'to a wife, to dispose at her will and pleasure, and to give to which of her sons she pleased'; JONES, J., thinking it gave an estate for life, with a power to dispose of the reversion among the sons; the other judges, according to his report, thinking it gave her a fee simple in trust to convey to any of her sons: yet in that case it was not doubted, H but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken . . ."

LORD ELLENBOROUGH, C.J., is, therefore, purporting to follow *Danyel v. Ubley* (4), a case which, as appears from his recital of it, would now be decided on the footing that the devisee was given a mere life estate with a power of appointment. In *Doe d. Gill v. Pearson* (2), therefore, the Court of King's Bench

decided that a condition not to alienate except to a class consisting of four sisters and their children was good. This was a decision of the full court, of which LAWRENCE, J., was a member.

That case was considered by SIR JOHN ROMILLY, M.R., in *Attwater v. Attwater* (5), but he refused to follow it. In *Attwater v. Attwater* (5) the limitation was:

"I bequeath to Gay Thomas Attwater, jun., eldest son of my niece, the family estate at Charlton, Wilts., to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but, if sold at all, it must be to one of his brothers hereafter named."

There were five brothers named in the will. SIR JOHN ROMILLY, M.R., held that the restriction on alienation was inoperative. He said (18 Beav. 336):

"The meaning is, I think, plain, that the testator intended to impose this fetter: that if the brother will not buy, the devisee was not to be at liberty to sell the property to anyone. The question is, whether such a condition is a valid one? Notwithstanding the case of *Doe d. Gill v. Pearson* (2), this appears to me to be a condition repugnant to the quality of the estate given. It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person, who alone is permitted to purchase, might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all. It appears to me also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family', are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shown by the two last clauses of a similar character, relating to the devises to William and Edward Attwater, which, in referring to this clause, state that the property is not to be sold out of the family, as before specified. It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property, and it appears to me that this proviso is distinctly at variance with the rules laid down by LORD COKE (Co. Litt. 223a), and which have always been considered and treated as good law. I am of opinion, therefore, that this clause is merely inoperative."

That is a decision on a limitation exactly in *pari materia* to the one before me. I should feel no difficulty, I think, about following it rather than *Doe d. Gill v. Pearson* (2), but for the fact that, in *Re Macleay* (3), the great authority of SIR GEORGE JESSEL, M.R., appears to be on the other side. In that case, the devise was "to my . . . brother John . . . on the condition that he never sells it out of the family". SIR GEORGE JESSEL, M.R., said (L.R. 20 Eq. 187):

"I have no doubt the family in question means her blood relations. Looking at the will, I have no doubt that there is a condition annexed to the gift in fee, and that, under the word 'property', the vendor will get the fee of the freehold manor in question, and mansion-house and lands, on the condition that he never sells it away from his blood relations. First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness. It has been suggested, however, that it is void as being repugnant to the quality of the estate, that is to say, that you cannot restrict the right of an owner in fee of alienating in any way in which he may think fit. If that were the law, the condition would be plainly void. But, with the exception of one authority, a case decided by my immediate predecessor, I am not aware that the law has ever been laid down in that way."

After citing the passages from COKE UPON LITTLETON [s. 360 and s. 361], and referring to *Muschamp v. Bluet* (1), *Attwater v. Attwater* (5), and *Jacobs v. Brett* (6), SIR GEORGE JESSEL, M.R., said (*ibid.*, 189):

"So that, according to the old books, SHEPPARD'S TOUCHSTONE being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form."

A After discussing *Attwater v. Attwater* (5), with a certain amount of disparagement, and *Doe d. Gill v. Pearson* (2), he came to the conclusion that, in the case before him, he did not think the words sufficiently restrictive to be regarded, in substance, as an absolute prohibition against alienation. His reason was that the "family" was a larger term than "sister or sisters" [in *Doe d. Gill v. Pearson* (2)] and that the restriction was against selling, and not against disposing. He, therefore, came to the conclusion that the limitation in the case before him was a good one.

B *Re Macleay* (3), therefore, supports the view put forward, in the case before me, by counsel for the infant grandchildren, but in *Re Rosher* (7) PEARSON, J., felt it necessary to make a most elaborate attack on SIR GEORGE JESSEL's decision. In *Re Rosher* (7) the decision was that, as a matter of construction, the restriction was, in effect, an absolute one, but PEARSON, J., delivered a long judgment explaining why he could not agree that *Re Macleay* (3) was well decided. The restriction in *Re Rosher* (7) was that, if the devisee wished to sell during the lifetime of the testator's widow, he should offer a property worth £15,000 to the widow at a price of £3,000. PEARSON, J., held that that, in effect, meant that the devisee could not sell during the life of the widow, because no one was going to give away £15,000 worth of property for £3,000. Although *Re Rosher* (7), qua its decision, does not help much, it does show the view of PEARSON, J., that *Re Macleay* (3) was wrongly decided.

D I do not think that I need take the law any further. I have to choose one way or the other, unless I can take the way out suggested to me by counsel for the sons, which was that the prohibition against alienation applies only during the period of contingency, i.e., the widow's lifetime and the infancy of the youngest son. It would be a comfort if I could come to that decision, but cl. 6 is a separate clause and its operation appears to end only with the death of the last surviving son, and I cannot hold that it operates only during the period of contingency. If I could, the will would read more easily. It is well known that, during a suspense of vesting—even during a suspense of vesting in possession—one may impose a bar on alienation. What one may not do is to impose a bar, if it be a general bar, after a vesting in possession. In *Corbett v. Corbett* (8), a decision of the Court of Appeal on appeal from the Probate Division, it was possible to limit such a prohibition to the period of contingency: see the observations of BOWEN, L.J. (14 P.D. 13). I do not feel able to take that way out, and I must face the problem.

E F G H It seems to me pertinent to remember, as counsel for the sons pointed out, that the class to whom a son may alienate begins with three for any one share, and that the prohibition goes on, not only during the lives of all the sons, but during the lives of the survivors of them, and, eventually, during the life of the survivor. Therefore, a period will be reached when there are two persons, and then only one person, and lastly no one, to whom alienation is allowed. If there is only one, that, in substance, is equivalent to none: see *Muschamp v. Bluet* (1) (J. Bridg. 137. If one be bad, is two good? It seems to me that, as a son may alienate only to a class of this kind, which is bound to be a diminishing class, there is, in substance, a general prohibition on alienation. In my view, it is the kind of restriction which the law views with dislike. It is exactly the same kind of condition as in *Attwater v. Attwater* (5), and I think that I would be at liberty to follow that case. But I do not think that I need follow any case, because the cases on the

point are inconsistent with one another, and I am entitled to follow my own view. It is, however, pertinent, I think, that a number of named persons of this kind is, in essence, different from a class consisting, for instance, as in *Re Macleay* (3), of members of the family, which may be a large and indeterminate class and one which may increase as time goes on, whereas, if alienation is allowed only to three or four named persons, the class is bound to diminish as death takes its toll of the members. Therefore, I hold that the restriction in the present case is an attempt to fetter the natural qualities of the interest given and is void and can be disregarded.

Order accordingly.

Solicitors: *Doyle, Devonshire & Co.*, agents for *Abberley & Walker*, Burslem, Staffs. (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

DEEBLE v. ROBINSON.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), October 12, November 10, 1953.]

Landlord and Tenant—Shop—Renewal of tenancy—Dairy business—Premises used for storage of milk bottles and refrigerator—No sales on premises—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (2) (c), s. 20 (1).

The applicant carried on a retail trade as a milk roundsman, selling milk from door to door, and was the tenant of premises in which no milk was sold, but from which he conducted his business, and which included, inter alia, a shed where he stored his spare milk bottles and refrigerator, and a stable where he kept his horse and float. On an application for a new tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (2) (c),

HELD (DENNING, L.J., dissentiente): in view of the definition of "shop" in s. 20 (1) of the Act, to be entitled to a new tenancy the applicant must show that a retail trade or business was carried on in the premises; the mere occupation of premises for the purpose of sales effected elsewhere was not sufficient; and, therefore, the applicant was not the occupier of a "shop" within s. 20 (1) and was not entitled to a new tenancy.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 (2) and s. 20 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 30, p. 207 and p. 216.

Cases referred to:

- (1) *R. v. Pearce*, (1880), 5 Q.B.D. 386; 49 L.J.M.C. 81; 37 Digest 204, 25.
- (2) *Frawley (M. & F.), Ltd. v. Ve-Ri-Best Manufacturing Co., Ltd.*, [1953] 1 All E.R. 50; [1953] 1 Q.B. 318.
- (3) *Wallace v. Dixon*, [1917] 2 I.R. 236; 24 Digest 928, p.
- (4) *Summers v. Roberts*, [1943] 2 All E.R. 757; [1944] K.B. 106; 113 L.J.K.B. 109; 170 L.T. 130; 108 J.P. 52; 2nd Digest Supp.
- (5) *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E.R. 368; [1937] 2 K.B. 642; 106 L.J.K.B. 398; 157 L.T. 423; 101 J.P. 307; Digest Supp.
- (6) *Dennis v. Hutchinson*, *Trafford v. Same*, [1922] 1 K.B. 693; 91 L.J.K.B. 584; 126 L.T. 669; 86 J.P. 85; 24 Digest 930, 209.

APPEAL by the applicant from an order of His Honour JUDGE CAPORN at Doncaster County Court dated June 24, 1953, by which it was ordered that the application for a new tenancy be dismissed on the ground that the applicant's

dairy from which he carried on the retail trade of a milk roundsman was not a "shop" within the meaning of s. 20 (1) of the Leasehold Property (Temporary Provisions) Act, 1951.

Drabble, Q.C., and *H. S. Pears* for the applicant, the tenant.

A. S. Orr and *W. H. Greenwood* for the respondent, the landlord.

Cur. adv. vult.

A Nov. 10. The following judgments were read.

SOMERVELL, L.J.: In these proceedings, the applicant applied for the grant of a new tenancy of certain premises on the ground that a "separate part" was occupied for the purpose of retailing milk. The application was made under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (2) (c).

B I will read the relevant parts of s. 10 :

"(1) The provisions of this Part of this Act shall have effect for enabling the occupier of a shop under a tenancy to which this section applies (hereinafter referred to as 'the expiring tenancy') to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy where apart from the next following section the expiring tenancy would come to an end immediately before the date of the commencement of this Act or within the period of two years beginning with that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit given by the landlord, whether before or after the commencement of this Act. (2) This section applies to a tenancy the subject of which—(a) consists of a shop, or (b) consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop, or (c) includes a separate part which consists of a shop or which consists of a shop and of such living accommodation as is mentioned in the last foregoing paragraph . . . (4) In the case of an expiring tenancy the subject of which falls within para. (c) of sub-s. (2) of this section and not within para. (b) thereof, any new tenancy granted under this Part of this Act shall if the landlord so requires be a tenancy of the whole of the subject of the expiring tenancy, and otherwise a tenancy of the separate part consisting of the shop or consisting of the shop and of living accommodation, as the case may be."

F The applicant has a milk round, delivering to customers at their houses some seventy-five gallons a day. His premises consist of two dwelling-houses and a yard. In that yard there is a shed used for the applicant's "spare bottles, refrigerator, and other articles". This is the "separate part" primarily relied on. If the applicant is right with regard to the shed, the stable where he keeps the horse that draws the milk float might also be covered. Some six to eight pints are sold on the premises, not at the shed, but these can, in my view, be disregarded, and no reliance was placed on them. The learned judge came to the conclusion that the shed was not a shop within the meaning of the Act. The applicant was carrying on a retail trade. This trade was not carried on in the shed. The shed was used for the trade. The shed, I think, quite plainly, was not a shop in the ordinary sense of the word. It is submitted, however, that it is within the definition to be found in s. 20 (1) of the Act. The definition of a shop H in that section is as follows:

"'Shop' means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business."

Section 20 also provides:

"'retail trade or business' has the same meaning as in the Shops Act, 1950, except that it does not include the sale of intoxicating liquor,"

The Shops Act, 1950, s. 74, provides:

" 'retail trade or business' includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, the business of lending books or periodicals when carried on for purposes of gain, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement."

The argument is as follows. The definition of "shop", it is said, covers premises used for the purpose of retail trade although not a shop in the ordinary meaning of the word. An example would be the head office of a company running a number of retail shops. This would not be a shop in the ordinary sense, but it is said it would be

"used for the purposes of a retail trade or business",

and, therefore, included by the definition.

Many observations can be found in reported cases on interpretation clauses. In *R. v. Pearce* (1) LUSH, J., said (5 Q.B.D. 389):

"But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."

LUSH, J., was dealing with a clause in the form "X includes". I agree with what is stated in CRAIES ON STATUTE LAW, 5th ed., p. 197, that

"... where the word defined is declared to 'mean' so and so, the definition is explanatory and prima facie restrictive."

He goes on to say that

"... where the word defined is declared to 'include' so and so, the definition is extensive."

I agree, but applying the principle laid down by LUSH, J., one would not, unless forced, even when the definition is in the form "includes", carry the extension beyond border-line or doubtful cases. Applying these observations, the form of words here is inapt to include premises which, like the shed, are plainly not shops.

Reliance was placed on the fact that in the Shops Act, 1950, s. 74,

" 'shop' includes any premises where any retail trade or business is carried on."

These latter words do not occur in the present definition. The two Acts were dealing with different subject-matters. The Shops Act, 1950, was dealing with hours and conditions of work, Sunday trading, and so on. One would have expected the definition to make clear that it applied to any premises where any retail trade was carried on. The present Act is dealing with leases. The restrictive words at the beginning of the definition limit the definition to premises wholly occupied for business purposes. I agree that the definition might have ended with some such words as "carried on therein". On the other hand, if the legislature had intended the wider meaning, I would have expected the words "whether carried on in the premises or not". The definition has to be read in the context of the Act. Section 10 (2) and s. 10 (4) of the Act of 1951 both contain the words "the retail trade or business carried on in the shop". This phrase is difficult to reconcile with a definition which makes "shop" include premises in which the retail trade or business is not carried on. There is a further consideration. It has often been laid down that plain words are necessary to establish an intention to interfere with common law or contractual rights. I do not think that the shed in question is plainly covered by the relevant sections. For these reasons I would dismiss the appeal.

DENNING, L.J.: Mr. Deeble, the applicant, has a milk round. He sells milk to people at the doors of their houses. He conducts his business from a dairy

building where he keeps his equipment, refrigerator, spare milk bottles, and so forth, and a stable where he keeps his horse and float. His round is in seven streets adjoining the premises. He has no shop as ordinarily understood. His lease of these premises is coming to an end, and he wants to stay there. This depends on whether the premises come within the definition of a "shop" in the Leasehold Property (Temporary Provisions) Act, 1951. In s. 20 (1) Parliament has expressly ordained that in that Act the expression "shop" has this meaning:

- A "premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business."

I think that definition covers both the dairy and the stable. The trade of a milk roundsman carried on by the applicant was plainly a "retail trade" and he occupied these premises for the purposes of that trade. It seems clear to me that "the purposes of a retail trade or business" include not only the actual selling of the goods, but also the buying and storing of them, the office work, and other ancillary things necessary for the carrying on of the business.

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Counsel for the landlord conceded that the dairy was within the definition of "shop" in the Act of 1951 if that definition is literally interpreted, but he urged us to limit the statutory definition by reference to the general conception of a shop. There must, he said, be something which would popularly be considered to be a shop before the Act can apply. I do not agree with this contention. When Parliament has specifically declared what the expression "shop" means in the Act, I do not think it is open to the court to say that it means something else. Nor is it permissible to cut down its statutory meaning by reference to its popular meaning. Just as mathematicians, in order to facilitate their reasoning, frequently use one symbol to denote a complicated expression, so also Parliament,

- D in order to simplify its language, often uses one short word to denote a complex subject-matter. It saves writing it out in full every time. In such a case, whenever a question arises on the interpretation of the statute, the word is to be given its statutory meaning as if it were written out in full. It is very different, of course, when Parliament says that a familiar word is to "include" some specified thing, as in the Shops Act, 1950, s. 74, where the word "shop" includes

- E any premises where any retail trade or business is carried on, and the expression "retail trade or business" includes the business of a barber or hairdresser. In such a case, the word or expression must be given its ordinary meaning (which is not defined) and in addition it must, in relevant cases, be given the special meaning which the statute says is to be included, which I will call the "included meaning". The included meaning may be inserted out of caution, so as to make sure that it is included in the ordinary meaning, or it may be inserted as supplemental, so as to add something to the ordinary meaning. But in cases where the included meaning is not applicable or relevant, or is doubtful or ambiguous, the ordinary meaning must prevail. A good instance is *M. & F. Frawley, Ltd. v. Ve-Ri-Best Manufacturing Co., Ltd.* (2), where it was held that a builder's business was not within the ordinary meaning of a "retail trade or business". In the present

- F case, in relation to the word "shop" Parliament has not said that it "includes" so and so. It has said that it "means" so and so. When Parliament has been thus specific we are not at liberty to depart from it. I readily concede, however, that if the statutory definition were obscurely worded or led to patent injustice, it would be quite permissible to ignore the literal interpretation and seek a reasonable one, and it would be quite right to seek guidance from the popular meaning of the word. But in this case the literal interpretation coincides with what is just and reasonable. Let me give some illustrations. Take a case where a shopkeeper owns the shop himself but has a tenancy of a store at the back which is essential to his business. It would be a grave defect in the Act if he were not protected in regard to the store. Take next a case where a coal merchant rents an office in which he takes orders, but delivers the coal direct from the station yard to his customers. The office can hardly be called a shop in ordinary

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- H building where he keeps his equipment, refrigerator, spare milk bottles, and so forth, and a stable where he keeps his horse and float. His round is in seven streets adjoining the premises. He has no shop as ordinarily understood. His lease of these premises is coming to an end, and he wants to stay there. This depends on whether the premises come within the definition of a "shop" in the Leasehold Property (Temporary Provisions) Act, 1951. In s. 20 (1) Parliament has expressly ordained that in that Act the expression "shop" has this meaning:

parlance, but surely he should be protected in regard to it. Take last a case where a fruiterer and greengrocer has a store in which he keeps his goods, but he does all his business by going round from door to door. He should be protected even though he has no place which would ordinarily be called a shop. These illustrations convince me that there is no reason why we should not give this statute its literal interpretation, and every reason why we should do so. In further support of the literal interpretation, I would mention that the legislature seems in this Act to have departed deliberately from the definition of "shop", which appears in all the Shops Acts, 1912 to 1950, and to have done so with the intention of bringing in cases such as those I have mentioned instead of leaving them in doubt as they were before: see *Wallace v. Dixon* (3), discussed in *Summers v. Roberts* (4). The only argument to the contrary derives from a phrase in s. 10 (2) (b) and s. 10 (4) (a) of the Leasehold Property (Temporary Provisions) Act. Those provisions give protection to living accommodation if it is occupied by a person who is employed for the purposes of

"the retail trade or business carried on in the shop."

It would look at first sight as if the draftsman in using that phrase had in mind the ordinary meaning of a shop, but I see no difficulty in giving the word "shop" in that phrase its statutory meaning. A retail trade or business does not consist merely of selling over the counter. It is carried on, not only in the selling portion of the premises, but also in the storage portion. In the present case, the retail trade is carried on "in" the dairy, even though sales are not actually made there. If Mr. Deeble himself lived in rooms over his dairy or his roundsman lived there, he would be protected in respect of the living accommodation as well as of the dairy. I see nothing in this contrary to the intention of Parliament, but everything in favour of it. It is said, however, that there is much significance in the word "in". The retail trade must, it is said, be carried on "in" the shop, not "from" it. This seems to me to give an altogether excessive emphasis to a preposition and to create an anomaly which the statutory meaning avoids. I think it is our duty to give the word "shop" in this statute the meaning which Parliament says it is to have, and not to give it a meaning of our own.

In my opinion, the dairy and the stable were each a "shop" within the Act and I would allow the appeal accordingly.

ROMER, L.J.: The argument for the applicant in this case has at least the merit of simplicity. He points to the definition of "shop" in the Leasehold Property (Temporary Provisions) Act, 1951, s. 20 (1), and says that his dairy falls within it and that, therefore, he is entitled to a new tenancy in accordance with the provisions of s. 10 of the Act. The definition of "shop" in s. 20 (1) is:

"'Shop' means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business."

To the suggestion that premises do not constitute a shop unless trade is carried on in them—and not merely from them—the applicant's answer is that the legislature's deliberate departure from the definition of "shop" contained in the Shops Act, 1950, s. 74, establishes a contrary intention. There is some force in this contention and it is (although, as **SOMERVELL, L.J.**, has pointed out, the statutes were dealing with different subject-matters) perhaps strengthened by the fact that the definition of "retail trade or business" in the Act of 1950 is substantially and expressly preserved in the Act of 1951. Nevertheless (although the question at issue by no means depends solely, in my opinion, on the way in which "shop" is defined), there are certain considerations which tend to a narrowing of the apparent width of the definition of "shop" in s. 20. In *M. & F. Frawley, Ltd. v. Ve-Ri-Best Manufacturing Co., Ltd.* (2) **SOMERVELL, L.J.**, said ([1953] 1 All E.R. 52) that:

"The general character of the word to be defined must colour the definition."

What, then, is the general character of a shop? There is, on this question, some judicial authority.

“ . . . the essential element in a shop is that people can shop in it ”

(per GREENE, L.J., in *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee* (5) ([1937] 2 All E.R. 377).

“ Prima facie a shop is a place where goods are sold by retail and stored for sale . . . ”

(per LORD TREVETHIN, C.J., in *Dennis v. Hutchinson, Trafford v. Same* (6) ([1922] 1 K.B. 697).

“ It seems to be quite clear that the ordinary dictionary meaning of ‘shop’ is a place where ordinary retail selling and the serving of customers takes place . . . ”

B (per AVORY, J. (*ibid.*, 698)). Further, in the *Ve-Ri-Best* case (2) JENKINS, L.J., said ([1953] 1 All E.R. 53) that the expression “retail trade” clearly connotes in its primary sense a business of selling goods to members of the public who resort to the shop or premises where the business is carried on for the purpose of making purchases. In these circumstances, one would approach any statutory definition of shop with some sort of expectation, at all events, that what GREENE, C L.J., described in the above citation as the “essential element” would not be wholly abrogated; and had it not been for the argument founded on the jettisoning of the definition in the Shops Act, 1950, I should see no reason to suppose that that element was not preserved by s. 20 of the Act of 1951.

As I have previously indicated, however, the question before us on this appeal does not, in my opinion, fall to be determined wholly according to whether the applicant's dairy does or does not come within the definition of “shop” in s. 20 (1) of the Act of 1951. That question is only a part of the broader problem which we have to decide, viz., whether the applicant has succeeded in bringing his case within s. 10 (2) (c) of the Act, for, if he has not succeeded in this endeavour, he has no claim to the new tenancy for which he is asking. The definition of “shop” in s. 20 (1) is incorporated in s. 10 (2) (c) and is, undoubtedly, an element of importance in construing the latter provision. Nevertheless, in accordance with well-established principles, the provision has to be interpreted in the light of the whole of the language used. In order to arrive at a conclusion as to the meaning and effect of s. 10 (2) (c), it tends to clarification, I think, to write it out in extenso, incorporating in express language the ingredients which appear in the provision only referentially. So written it provides as follows: “This section applies to a tenancy the subject of which includes a separate part which consists of premises occupied wholly for business purposes and so occupied wholly or mainly for the purposes of a retail trade or business (as defined in the Shops Act, 1950) or which consists of such premises as aforesaid and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the said premises”. Now, whatever might be the true meaning and effect of the definition of “shop” in s. 20 of the Act, if taken by itself, it appears to me that the concluding words introduce GREENE, L.J.'s “essential element” into s. 10 in no uncertain terms. The words show, in my opinion, that the draftsman was envisaging premises *on* which, not *from* which, a retail trade or business was being carried on. That this must be so is, as I think, established by considering what the position would be if the applicant had on his premises some living accommodation which was occupied by one of his roundsmen. If the applicant is right in his argument on this appeal, he could get a new tenancy of the dairy itself even though his sales were effected elsewhere. It seems plain, however, that he could not get a renewal of the living accommodation, for he would be unable to show that it was occupied by a person who was employed by him

“for the purposes of the retail trade or business carried on in the shop.”

The applicant's argument thus involves a somewhat remarkable anomaly, if accepted—an anomaly which would, perhaps, be even stranger if, in the circumstances supposed, the living accommodation was occupied, not by a roundsman, but by the applicant himself. On the construction, then, of s. 10 it appears to me that in order to qualify for a renewed tenancy a lessee must show that a retail trade or business is carried on in his premises, or a separate part thereof, and that the mere occupation of premises for the purpose of sales which are effected elsewhere is not enough. This view, if right, excludes the applicant's dairy from the Act—a result which is not, I think, altogether surprising, for nobody would think of describing the dairy as a shop within the ordinary acceptance of that word.

The conclusion at which I have arrived is, I think, in conformity with the decision of this court in the *Ve-Ri-Best* case (2). In that case the court held that the words "retail trade or business" might include the rendering of certain categories of services as well as the sale of goods. The application by the tenants for a renewal of their tenancy was, however, rejected on the ground that the services which they rendered were performed not on the demised premises but elsewhere, viz., at the homes or houses of their customers and that the demised premises, therefore, did not constitute a "shop". By parity of reasoning, where the retail trade or business consists of selling goods, the premises are not, in my opinion, a "shop" for the purposes of the Act unless the goods (at all events in the main) are sold to the customers on the premises themselves. This was, indeed, the view of JENKINS, L.J., in the *Ve-Ri-Best* case (2) where, in the course of his judgment, he said, ([1953] 1 All E.R. 52) with reference to s. 10 (2):

"That provision is, perhaps, indirectly relevant as showing that the Act contemplates that the retail trade or business by virtue of which the shop qualifies as such under the definition will be carried on in the shop."

I respectfully agree with that view, and, for the reasons which I have stated, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook*, agents for *Dawson & Burgees*, Doncaster (for the applicant); *Sharpe, Pritchard & Co.*, agents for *Ernest Briggs & Co.*, Doncaster (for the respondent).

[Reported by MISS PHILIPPA PRICE, *Barrister-at-Law.*]

R. v. PAGE.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Havers and Glyn-Jones, JJ.), October 26, November 10, 1953.]

Court-Martial—Jurisdiction—Murder—Murder of foreign national abroad—Victim not within the Queen's peace—Army Act, s. 41.

A The appellant, a serving soldier stationed in the Suez Canal Zone, was convicted by a court-martial assembled at Fayid, Egypt, of the murder in an Egyptian village of an Egyptian national. It was contended on his behalf that the conviction could not stand because the murdered man was not within the Queen's peace, and that a court-martial could only try a case of murder if that crime came within the common law definition of murder set out in COKE'S THIRD INSTITUTE as follows: "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature . . . under the King's peace with malice aforethought".

B HELD: under s. 41 of the Army Act a court-martial could try a person subject to military law for any offence, wherever committed, which would be an offence against the law of England, subject only to the reservation that the section provided for the trial of a prisoner before a civil court instead of a court-martial in the special circumstances set out in the provisos to the section, and, therefore, the appellant was rightly convicted.

C Per curiam: In the MANUAL OF MILITARY LAW, 1951 ed., pp. 131, 132, it is stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the army carries the Queen's peace with it wherever it goes. So far as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace we cannot assent to it, at least unless the territory has been effectively occupied by her forces.

D AS TO THE JURISDICTION OF THE ENGLISH CRIMINAL COURTS IN RESPECT OF CRIMES COMMITTED OUT OF ENGLAND, see HALSBURY, Hailsham Edn., Vol. 9, pp. 62-65, paras. 68-80.

E Cases referred to:

- (1) *R. v. Sawyer*, (1815), 2 Cal. & Kir. 101; Russ. & Ry. 294; 1 RUSSELL ON CRIMES & MISDEMEANOURS, 8th ed., 29, n.; 175 E.R. 41; 14 Digest 133, 1060.
- F (2) *R. v. Serva*, (1845), 2 Car. & Kir. 53; 6 State Tr. N.S. 197; 10 J.P. 134; 1 Cox C.C. 292; 175 E.R. 22; *sub nom. R. v. Majavel*, 6 L.T.O.S. 188; 14 Digest 140, 1125.
- (3) *R. v. Helsham*, (1830), 4 C. & P. 394; 172 E.R. 754; 14 Digest 133, 1061.
- G (4) *R. v. Azzopardi*, (1843), 1 Car. & Kir. 203 (174 E.R. 776); 2 Mood. C.C. 288 (169 E.R. 114); 6 State Tr. N.S. 21; 2 L.T.O.S. 287; 1 Cox C.C. 28; 14 Digest 133, 1062.

APPEAL against conviction of murder by a general court-martial.

H The appellant, Harry Richard Page, an acting corporal in the Royal Corps of Signals, was convicted by a general court-martial assembled at Fayid in the Suez Canal Zone of the murder of an Egyptian national in an Egyptian village. He was sentenced to death, but the confirming officer commuted the sentence to one of imprisonment. Leave to appeal against the conviction was granted by a single judge of the court on a question of law, namely, whether a court-martial had jurisdiction to try the appellant when the person killed was not within the Queen's peace. No other issue was raised in the appeal, and counsel for the appellant conceded that in like circumstances the killing would have justified a verdict of murder had the appellant been tried before an English court.

Diplock, Q.C., and J. M. Buckland for the appellant.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and E. Garth Moore for the Crown.

Cur. adv. vult.

Nov. 10. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant, an acting corporal in the Royal Corps of Signals, was tried and convicted by a general court-martial assembled at Fayid in the Suez Canal Zone of the murder in an Egyptian village of an Egyptian national. He was sentenced to death, and the sentence was commuted by the confirming officer to one of imprisonment. There was abundant evidence to justify the conviction, and the summing-up of the judge advocate is not open to criticism, apart from his citation of a passage in the **MANUAL OF MILITARY LAW** with which we deal later in this judgment. The appellant was granted leave to appeal by a single judge of this court on a question of law, namely, that the conviction could not stand for the reason that the murdered man was not within the Queen's peace. The argument submitted by counsel on his behalf was that the common law definition of murder is that stated in **COKE'S THIRD INSTITUTE**, c. 7, at p. 47, where he says:

"Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature . . . under the King's peace with malice aforethought."

He contended that a court-martial could only try a case of murder if it came within this common law definition and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable and punishable in this country.

As will be seen hereafter the case really depends on the true construction of s. 41 of the Army Act. Considering that s. 9 of the Offences against the Person Act, 1861, provides that where any murder is committed by any subject of Her Majesty on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed is the subject of Her Majesty or not, the offence may be dealt with in all respects as if it had been committed in England in any county or place where the suspected person is apprehended or is in custody, it is not strictly necessary for the purposes of this case to consider the old law on the subject. All that it is necessary to ascertain is whether the law as now laid down in that section can be applied by a court-martial. In deference, however, to the learned and careful argument of counsel for the appellant we will deal shortly with the position as it was before that statute.

It is, no doubt, true that the general rule of English law is that offences committed by British subjects out of England are not punishable by the criminal law of this country. We need not explore the origin of this doctrine. Suffice it to say that it depends partly on the law of nations which would regard an offence committed on the soil of one nation as, at least primarily, the concern of the sovereign of that country, but one can also see the procedural difficulty which would have occurred to a medieval lawyer who would be unable to understand how the jury presentment consisting of persons taken from the vicinage could have knowledge of crimes committed abroad sufficient to present them to the sovereign's courts. It is enough to say that, certainly from the reign of Henry VIII, this rule has been subject to statutory exceptions. Crimes of the present day which can be tried in England though committed abroad are treason, homicide, bigamy, and offences against the Foreign Enlistment Act, 1870. There may be others, but these instances will suffice.

The first Act which dealt with a crime committed abroad was, we believe, 33 Hen. 8, c. 23. This enabled persons charged with treason or murder to be tried in any county in whatsoever time or place within the King's dominions or without the offence was considered to be committed. It is curious that although

COKE in his definition speaks of a killing within any county of the realm he makes no mention of this statute. We can find no reference in the chapter on murder to the Act or any observations as to the possibility of trying a person in this country for a murder committed abroad. In our opinion, this lends considerable force to the view which has often been advanced in arguments in cases on this subject and by some text writers that his reference to the King's peace in his definition is meant only to except from murder killing in the course of war and,

A possibly, rebellion.

That Act was considered in *R. v. Sawyer* (1), but a much more detailed report appears in a note to *R. v. Serva* (2). The prisoner there was indicted for the murder of a woman in Portugal who was said to have been "in the peace of God and our Lord the King". The argument which took place was on the sufficiency of the indictment which, it was said, should have contained an averment that both the prisoner and the victim were British subjects. The case was reserved for the consideration of the twelve judges and, in delivering their opinion, LE BLANC, J., said (2 Car. & Kir. 113):

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"As to the second objection, that it is not alleged that they were British subjects, the statute 33 Hen. 8, c. 23, nowhere requires that; but, taking it that the jurisdiction only extended to British subjects, the judges are of opinion that sufficient is stated on the indictment to put the other party on showing the contrary. It states the deceased to be in the peace of our Lord the King, and that the offence was against his peace . . ."

It is to be observed that they gave no opinion whether, if the deceased had not been a British subject, the conviction would have been bad, though it seems that their view was to the contrary by the reference to the statute of Henry VIII which we have quoted. It is also to be observed that in the course of the argument LORD ELLENBOROUGH, C.J., said (*ibid.*, 112):

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"'Against the peace of the King' applies to the offender: it relates to his capacity to commit the crime."

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That, of course, is entirely intelligible. Nobody would suggest that an English court could try an alien for an offence not committed on British soil.

That case was heard in 1815, and in 1828 was passed the Offences against the Person Act of that year which provided for the "trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without". Now, it is true that in *R. v. Helsham* (3), BAYLEY, J., after conferring with BOSANQUET, J.,

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directed an allegation that the prisoner and the deceased were subjects of His Majesty to be inserted in the bill. There was no judgment as to the necessity of the allegation that the deceased was a British subject and the note of the summing-up only shows that it was left to the jury to say whether they were satisfied that the prisoner was a British-born subject. On the other hand, in 1843 in *R. v. Azzopardi* (4), the prisoner, a British subject being a native of Malta, murdered a Dutch woman in Smyrna. He was tried in this country and the objection was taken that the victim was a foreigner, but the conviction was affirmed. It was, no doubt, to allay any doubts that there may have been on this subject that s. 9 of the Offences against the Person Act, 1861, is in the wide terms to which we have already referred. It is, therefore, abundantly clear, and, indeed, counsel for the appellant admitted, that, had the appellant been brought to this

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country and tried here, the question as to the nationality of the victim could not have arisen. We have no doubt that when the word "murder" is found in a statute it has the meaning which has always been attached to it throughout the ages, namely, an unlawful killing with malice aforethought.

We turn now to s. 41 of the Army Act. It is in these terms:

"Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned,

every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows . . .”

Then there follow in separate paragraphs five offences, treason, murder, manslaughter, treason-felony, and rape for which the punishment is prescribed. Paragraph 5 deals with any other offences which, when committed in England, are punishable by the law of England, and provides that a person subject to military law shall

“be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England.”

There is then a proviso that a person subject to military law shall not be tried by court-martial for any one of the five specified offences committed in any place within His Majesty's dominions other than the United Kingdom and Gibraltar unless the offender was on active service or the place where the offence was committed was more than one hundred miles from any town in which he could be tried by a competent civil court. The object of this proviso, and, indeed, of the regulations as mentioned in the first part of the section, is to ensure that persons charged with these grave offences shall be tried when possible by a civil court and not by a court-martial. It is to prevent any conflict of jurisdiction between civil and military courts.

In our opinion, the plain meaning of the section is that a court-martial can try a person subject to military law for any offence, wherever committed, which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of court-martial in the circumstances set out in the section and regulations.

Our attention has been called to passages in the *MANUAL OF MILITARY LAW*, ch. 6, 1951 ed., pp. 131, 132. It is there stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the army carries the Queen's peace with it wherever it goes. So far as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace we cannot assent to it, at least unless the territory has been effectively occupied by her forces. Nevertheless, the legislation to which we have referred enables a subject of Her Majesty to be tried and punished in the courts of this country, or, if subject to military law, by a court-martial abroad, for murder whoever the victim and wherever committed. COKE's definition of murder applies to those cases which were triable in the common law courts of his day, namely, where murder was committed within the realm, though we have already pointed out that that very learned person had, strangely enough, omitted to notice the statute of Henry VIII.

Appeal dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[*Reported by T. J. KELLY, Esq., Barrister-at-Law.*]

COMPANIA DE NAVIGACION ZITA, S.A. v. LOUIS DREYFUS
ET COMPAGNIE.

[QUEEN'S BENCH DIVISION (Devlin, J.), October 29, 30, November 9, 1953.]

Shipping—Charterparty—Lay days—Loading—Calculation of lay days.

A A charterparty provided for the calculation of lay time for loading as follows: "Cargo to be loaded and stowed free of expense to owners at an average rate of not less than 150 metric tons per available workable hatch per weather working day (Sundays and holidays excepted) provided vessel can receive at this rate . . ." The vessel in question had five holds, each served by one hatch. At the first port of loading all five hatches were available and workable and were used, but at the second port only three hatches were available and workable, holds Nos. 3 and 5 having been completed at the first port of loading, and later, only two hatches were available and workable, No. 1 hold having by then been completed. On a dispute as to the correct method of calculating the total lay time permitted by the charterparty for loading, the charterers contended that it should be calculated by dividing by one hundred and fifty the largest quantity of cargo loaded into any one of the vessel's holds. The owners contended that the lay time should be calculated by reference to the number of available and workable hatches in the vessel, e.g., so long as there were five available and workable hatches, loading should have proceeded at the average rate of seven hundred and fifty metric tons a day.

D HELD: the clause did not prescribe a method of loading, but set a standard, and the formula used produced a number of days and hours based on the quantity of cargo actually loaded; hatches not available for loading were outside the formula and a matter for separate calculation; and, therefore, the charterers' method of calculating the lay time allowed for loading was correct.

Dictum of HILL, J., in *The Sandgate* (1929) (99 L.J.P. 13), applied.

E AS TO TIME FOR LOADING, see HALSBURY, Hailsham Edn., Vol. 30, pp. 337, 341, paras. 519, 522; and FOR CASES, see DIGEST, Vol. 41, pp. 452, 453, Nos. 2836-2840.

Cases referred to:

- (1) *Van Liewen v. Hollis Brothers & Co., Ltd.*, [1920] A.C. 239; 89 L.J.P. 86; 122 L.T. 659; 41 Digest 547, 3747.
F (2) *Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.*, [1916] 2 A.C. 527; 86 L.J.P.C. 1; 115 L.T. 415; 41 Digest 310, 1712.
(3) *The Sandgate*, (1929), 99 L.J.P. 10; *affd.* C.A., [1930] P. 30; 99 L.J.P. 49; 142 L.T. 356; 35 Com. Cas. 221; Digest Supp.

SPECIAL CASE stated by an umpire.

G By a charterparty dated June 25, 1952, the claimants, as owners of the steamer Corfu Island, and the respondents, as charterers, agreed that the vessel should proceed to one or two safe ports in Algeria and there load a full and complete cargo of nine thousand metric tons of barley in bulk five per cent. more or less at master's option, the charterers to supply a sufficient quantity of cargo in bags for safe stowage as required by the master, but not exceeding five per cent. of the entire cargo, such quantity to be declared in writing by the master before commencing to load. The vessel, being so loaded, was to proceed to one safe port in the United Kingdom and there deliver the cargo. Clause 5 of the charterparty provided:

"Cargo to be loaded and stowed free of expense to owners at an average rate of not less than 150 metric tons per available workable hatch per weather working day (Sundays and holidays excepted) provided vessel can receive at this rate . . .",

Clause 22 provided:

"Dispatch money at the rate of £125 per day or pro rata for part of a day is payable to the charterers for all lay time saved at loading and discharging ports."

Between July 19 and Aug. 5, 1952, the vessel loaded, under the charterparty, 7,950 metric tons of barley at Philippeville and a further fifteen hundred metric tons at Bougie. It was agreed that the lay time used at the two loading ports was eleven days, twenty hours, twenty minutes. There were no interruptions by weather. The charterers deducted from the freight due to the owners £515 8s. 11d. in respect of dispatch money due to them for lay time saved at the loading ports. The owners contended that the charterers were only entitled to £344 ls. 11d. by way of dispatch money, and claimed £171 7s. as freight due and owing to them by the charterers. The dispute between the parties was limited to the question of the correct method of calculating the total lay time permitted by the charterparty for loading. There were five cargo holds in the vessel, each served by one hatch. During the whole of the course of the loading at Philippeville each of the five hatches was available and workable, and was used. During the loading of the first nine hundred metric tons out of the fifteen hundred metric tons of barley loaded at Bougie, only three hatches were available and workable, and were used since loading into the other two holds had been completed at Philippeville. During the loading of the last six hundred metric tons of barley at Bougie only two hatches were available and workable, and were used, a further hold having been completed during the loading of the nine hundred metric tons. The largest quantity of barley loaded into any one of the vessel's five holds was 2,361·768 metric tons. The charterers contended that the lay time for loading should be calculated by dividing by one hundred and fifty the largest quantity of cargo loaded into any one of the vessel's holds, namely, 2,361·768 metric tons, thus giving a total permitted lay time of fifteen days, seventeen hours, fifty-three minutes. On this basis three days, twenty-one hours, thirty-three minutes, of permitted lay time were saved in loading, and the charterers would be entitled to £487 2s. 8d. by way of dispatch money, the difference of £28 6s. 3d. between this sum and the £515 8s. 11d. deducted from freight being due to small differences in calculating the lay time actually used at the two loading ports. The charterers admitted that the owners were entitled to the £28 6s. 3d. The owners contended that lay time for loading should be calculated by reference to the number of available and workable hatches in the vessel. As long as there were five hatches available and workable, loading should have proceeded at the average rate of seven hundred and fifty metric tons a day. When only three hatches were available and workable loading should have proceeded at the average rate of four hundred and fifty metric tons a day, and with only two hatches available and workable the average rate of loading should have been three hundred metric tons a day. Accordingly, they calculated that the permitted lay time for loading was fourteen days, fourteen hours, twenty-four minutes. On this basis, two days, eighteen hours, four minutes, of permitted lay time were saved, and the charterers would be entitled to £344 ls. 11d. only by way of dispatch money. Both parties referred to *The Sandgate* (3), and the charterers based their case primarily on the last part of the last sentence in the judgment of HILL, J., where he said (99 L.J.P. 13):

" . . . if he [the shipowner] took the quantity in the hold which contains the largest quantity and divided that by 125. That would give you the period in which the discharge had to be carried out, and you would then deduct Sundays and holidays ",

from which there was no dissent in the Court of Appeal. The owners contended that the remarks there made were obiter, and, as a matter of mathematics, were only correct if the rate of discharging (or loading) was the same and remained

constant at every hatch so long as each was available and workable. Apart from that sentence, the owners argued that the judgments in *The Sandgate* (3), so far as relevant, supported their case and that under cl. 5 it was the whole cargo, and not only the largest quantity of cargo in any one hold, that had to be loaded at the average rate of not less than one hundred and fifty metric tons per available working hatch per day. Neither party suggested that there was any relevant difference in meaning between "working hatch" in *The Sandgate* (3), and "available workable hatch" in the present case. The question of law for the decision of the court was whether, on the facts found and on the true construction of the charterparty, the charterers' method of calculating the lay time allowed for loading was correct. The umpire found that if the court should decide this question in the negative, then the charterers should pay the owners £171 7s. Alternatively, if the court should decide the question in the affirmative, then the charterers should pay the owners £28 6s. 3d.

M. R. E. Kerr for the owners.

Eustace Roskill, Q.C., and *T. G. Roche* for the charterers.

Cur. adv. vult.

Nov. 9. **DEVLIN, J.**, read the following judgment. The charterparty in this case provides, by cl. 5, for the calculation of the lay days in the following terms:

"Cargo to be loaded and stowed free of expense to owners at an average rate of not less than 150 metric tons per available workable hatch per weather working day (Sundays and holidays excepted) provided vessel can receive at this rate . . ."

Other clauses provide in the usual way for the payment of demurrage for time lost and dispatch money for time saved. The question for determination is how, under cl. 5, the lay time should be calculated.

The other material facts are as follows. The vessel is described as carrying about 9,450 metric tons of deadweight cargo. The obligation of the charterers is to load a full and complete cargo of nine thousand metric tons of barley in bulk, five per cent. more or less in master's option, the charterers to supply a sufficient quantity of cargo in bags for safe stowage as required by the master, but not exceeding five per cent. of the entire cargo, such quantity to be declared in writing by the master before commencing to load. The vessel has five holds differing in size, the largest having a capacity of 2,361 tons.

It is well settled that, unless the charterparty otherwise provides, the charterer's obligation to load is that he must do so within a reasonable time. If the charterparty provides for loading within a fixed time, that is, within a specified number of days, it must do so in plain and unambiguous terms: *Van Liewen v. Hollis Brothers & Co., Ltd.* (1). The charterparty need not specify the number of lay days so long as it specifies the means by which the number can be calculated; thus, a charterparty which specifies a rate at which the loading is to be done is to be treated as a fixed lay day charter: *Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.* (2) ([1916] 2 A.C. 535).

The shipowner's desire is to achieve a quick turn-round; time is money for him. The object of fixing lay days and providing for demurrage and dispatch money is to penalise dilatoriness in loading and to reward promptitude. When a number of lay days is specified, it is, no doubt, calculated on some estimate of the period within which the charterers, working diligently, should be able to load a known quantity of cargo. But it is common enough to find that, although a full and complete cargo is required, the quantity to be loaded cannot be known until it is seen how the stowage is working out; in the present case the weight of cargo may vary by at least as much as ten per cent. according to stowage factors which are in the discretion of the master. A fairer and more accurate method of fixing the lay time is, therefore, to fix a daily rate of loading. The clause in

this case introduces a further refinement. Instead of providing simply for a rate per day, it provides for a rate per hatch per day. If all the holds were of equal capacity this refinement would be unnecessary. If they were loaded at the same working rate they would then all be finished simultaneously, and with five holds you might just as well say seven hundred and fifty tons per day as one hundred and fifty tons per day per hold. But if they are not of the same capacity one hold will be finished before the others. If when, say, half the holds are filled, the charterer had to carry on at the same daily rate, he would have to double the rate on each of the unfilled holds, and that would be unreasonable, if not impossible; thus, the necessity for the rate per "workable hatch".

It is common ground that the word "workable" is intended to describe the state of a hatch that can still be worked because its hold is not yet full: see *The Sandgate* (3). By this means the daily rate is reduced by one hundred and fifty as each hold is filled. It follows, however, that if all goes smoothly and all the hatches are "available"—i.e., there is nothing to prevent their being used—the time taken to load the ship will be the time taken to load the largest hold. So the charterers say that the calculation required by cl. 5 can be conveniently expressed by saying that you get the lay time by dividing by one hundred and fifty the largest quantity of cargo loaded in any one hold. For this they have the authority of HILL, J., in *The Sandgate* (3), where he says (99 L.J.P. 13):

"I suppose, worked out most accurately, you would take those several quantities [the quantity in each hold] and start with 500 and go on reducing to 375 [the rate in that case was 125 tons per working hatch per day], reducing to 250, and finally 125, but you get exactly the same result, and the shipowner would have no difficulty in doing the arithmetic, if he took the quantity in the hold which contains the largest quantity and divided that by 125. That would give you the period in which the discharge had to be carried out, and you would then deduct Sundays and holidays."

Counsel for the owners objects that HILL, J.'s simplification—or at any rate the application of it to the clause in this case—is incorrect. It is based, he says, on two assumptions, neither of which is justified by the terms of the clause. It assumes, first, that all the holds are always available, and, secondly, that they will all be loaded at the same rate at the same time. In the course of his excellent argument, counsel for the owners produced a set of figures to illustrate what would happen if either of these assumptions was vitiated. These hypothetical figures are conveniently arranged in multiples of one hundred and fifty. They show a far greater discrepancy between the capacities of the different holds than would be likely in practice, but the magnification helps to clarify the point. The figures assume a total capacity of three thousand tons divided as follows: No. 1, three hundred; No. 2, four hundred and fifty; No. 3, six hundred; No. 4, seven hundred and fifty; and No. 5, nine hundred. On these figures, it would take six days to load the largest hold, and, on the charterers' construction, that would be the lay time. But if No. 5 hold was not available for, say, the first five days, the ship could not be loaded under eleven days; nevertheless, on the charterers' formula they would have to pay demurrage for all days over six. The accuracy of the formula depends, therefore, counsel says, on an unwarrantable assumption of availability.

The other assumption which counsel says is unwarranted is that the loading of all the holds will be started simultaneously and continued uninterruptedly until they are filled. There may be sound commercial reasons why the charterers should concentrate at first on one or two holds, and there is nothing in cl. 5 to prohibit their doing so. If they were to load each day at the contract rate—i.e., at seven hundred and fifty a day, reducing by one hundred and fifty as each hold was filled—and take the holds in order from No. 1 upwards, it would be five days before they reached No. 5, so that the result would be the same as if No. 5 were unavailable for the first five days, namely, eleven days. Of course,

that is an extreme example, but, says counsel, it is inevitable in ordinary working that there will not be exactly simultaneous loading; therefore, you must not assume that the holds will be loaded evenly but must ascertain how, on any given occasion, they are, in fact, loaded, and make your calculation in accordance with what actually happens and not with an impracticable assumption of what may happen. The owners' calculation on the facts of this case is set out in the case.

A There is, I think, an overwhelming objection to the owners' construction of the clause. It is that, on that construction, the number of lay days depends on the way in which the charterers choose to load the vessel. There may possibly be good reasons why they should load one hold after the other, but there may also be bad ones, and on the owners' construction there is no way of distinguishing between excusable delay and wanton delay. The charterers may adopt the method of loading hold by hold through defective organisation or indolence, or for no better reason than that they want to irritate the owners by delaying the ship, and they may thereby detain her unnecessarily for a substantial period without being liable for demurrage. That is to defeat the whole object of the clause. Counsel for the owners concedes that, under his construction, the charterers could be lacking in diligence without being made to pay for it (counsel for the charterers put forward a number of examples to illustrate this), but says that, as that is the only meaning of the words the parties have adopted, there is an end of the argument. I do not accept that. The paramount object of the clause is to penalise the charterers for wasting time and reward them for saving it, and, if the literal construction of the words permits them to waste time with impunity, I should be tempted to hold that the clause could not satisfy the test of plainness and unambiguity which the authorities lay down. But I am not driven to that conclusion, for I think that the criticisms of counsel for the owners of the charterers' construction are misconceived. The fundamental error in them is that they treat cl. 5 as if it were laying down a method of loading. If it were, it would be appropriate to suggest that it should not be construed as requiring the charterers to load each hold each day at exactly the same rate and for exactly the same time. Clause 5, in my opinion, is not prescribing a method but setting a standard; it is drawing a notional line above which there will be a bonus and below a penalty. It is as irrelevant to try to verify the standard by reference to actual experience as it would be to search for physical objects to verify the line of the equator. There is nothing in the language of cl. 5 to require the charterers to load all the hatches together any more than there is to require them to load each hold individually, or to prohibit them from taking either course. But it is reasonable to think that the standard set will be one which assumes that, as far as possible, work will go on simultaneously on all the holds, because that is the way that is most economical of the ship's time. It is unreasonable to think that the standard set would allow the charterers to load in any way they chose, because it would then give no incentive to them to choose a time-saving method. Of course, in practice, there will be hitches and an even flow will never be attained, but that is not really saying any more than that lay days are never exactly filled, and the voyage has yet to be made in which the charterer neither earns any dispatch money nor pays any demurrage.

H The criticism that the formula does not take into account the possibility that a hold will not be available is met by the answer of counsel for the charterers that it is not meant to. The formula produces a number of days and hours based on the quantity of cargo actually loaded: it takes the place of a number fixed in advance on the quantity of the cargo estimated to be loaded. Both figures are arrived at on the assumption of good weather and are equally at the mercy of such events as bad weather or the unavailability of hatches. Unavailability is, therefore, outside the formula and a matter for a separate calculation. One

takes the formula figure just as one would take a specified number of lay days and make the appropriate deductions, where necessary, for Sundays and holidays and bad weather and unavailability of hatches. It is not irrelevant to observe that the unavailability must be something that matters, i.e., it must interfere with the work. If, for example, a hatch broke down after a hold had been completely loaded, it clearly would not matter. If, on the figures of counsel for the owners, No. 1 hatch broke down at the beginning for, say, four days, equally it would not matter, for it would not be long enough to prevent the loading of the hold within the standard time.

The final objection of counsel for the owners is that, if the lay time is the time it takes to fill the largest hold at the rate of one hundred and fifty tons a day, it would be simple to say so. Why does not the clause confine itself to that hold? I can certainly think of ways—particularly in relation to the effect of the non-availability provision—in which the clause might have been expressed more clearly. I do not think, however, that it could be done simply by a reference to the largest hold. If any other hold is initially unavailable, the loading of that hold and not of the largest hold may become the determining factor. It is not, therefore, a case of a simple statement being inexplicably avoided, and the fact that the charterers' meaning could have been more artistically expressed is not, in a charterparty, an argument against it. It is, as expressed, a difficult clause, as SCRUTTON, L.J., said in *The Sandgate* (3) (99 L.J.P. 50); but it has remained in use for over twenty years since then, and the charterers' construction gives effect to it in the terms stated by HILL, J., and in terms which, for the reasons given, I think are consistent with the nature and language of the clause.

For these reasons I answer in the affirmative the question stated in the Case and uphold the alternative award, the charterers to have the costs of the setting down and hearing of the Case.

Solicitors: *Holman, Fenwick & Willan* (for the owners); *Richards, Butler & Co.* (for the charterers).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

GRIFFITHS v. EVANS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), October 21, 22, 23, November 10, 1953.]

Solicitor—Negligence—Solicitor consulted by injured workman in respect of accident—Advice as to workmen's compensation—Failure to advise in respect of common law rights.

Workmen's Compensation—Election—Claim by workman's solicitor for compensation under Workmen's Compensation Acts—Workman not informed of common law remedy—Right to recover damages at common law—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1).

On Feb. 3, 1947, a workman, in the course of his employment, suffered injuries to his foot and leg caused by the breaking of the wire rope of a lift. Thereafter, his employers made him weekly payments of compensation under the Workmen's Compensation Acts, 1925 to 1943. In or about March or April, 1947, the workman consulted a solicitor professionally to advise him in respect of the accident. The solicitor took the view that he was being asked only to advise as to the amount of the compensation under the Workmen's Compensation Acts, 1925 to 1943, and he subsequently claimed compensation on the basis of the partial incapacity of the workman and entered into negotiations for a lump sum payment in settlement. The workman was dissatisfied with the result of the negotiations, and consulted other solicitors. The workman now claimed that the solicitor was negligent in not advising him as to his rights at common law.

HELD (DENNING, L.J., dissentiente): it could not be said that the solicitor, being asked to advise specifically on compensation under the statutes, was negligent in not advising as to common law rights.

Per DENNING, L.J.: a claim to compensation under the Workmen's Compensation Acts, 1925 to 1943, made by a solicitor on behalf of a workman constitutes an election by the workman under s. 29 (1) of the Act of 1925 so as to preclude a claim at common law, even though the solicitor has not informed the workman of his possible alternative remedy at common law.

Medcalf v. Samuel Jones & Co., Ltd. ([1951] 1 T.L.R. 832), approved.

AS TO LIABILITY OF SOLICITORS FOR NEGLIGENCE, see HALSBURY, Halsham Edn., Vol. 31, pp. 131-139, paras. 178-183; and FOR CASES, see DIGEST, Vol. 42, pp. 107, 108, Nos. 1013-1028.

Cases referred to:

- (1) *Selwood v. Townley Coal & Fireclay Co., Ltd.*, [1939] 4 All E.R. 34; [1940] 1 K.B. 180; 109 L.J.K.B. 8; 161 L.T. 323; 32 B.W.C.C. 238; 2nd Digest Supp.
- (2) *Young v. Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (3) *Leathley v. Fowler (John) & Co., Ltd.*, [1946] 2 All E.R. 326; [1946] K.B. 579; 115 L.J.K.B. 424; 175 L.T. 212; 39 B.W.C.C. 86; 2nd Digest Supp.
- (4) *Medcalf v. Samuel Jones & Co., Ltd.*, [1951] 1 T.L.R. 832; 2nd Digest Supp.
- (5) *Reeve v. Van Den Bergh* (July 10, 1950), unreported.
- (6) *Hillyard v. Porn & Dunwoody, Ltd.* (July 12, 1950), unreported.
- (7) *Crossley v. Crouther*, (1851), 9 Hare, 384; 21 L.J.Ch. 565; 18 L.T.O.S. 181; 68 E.R. 556; 42 Digest 50, 405.
- (8) *Re Paine*, (1912), 28 T.L.R. 201; 42 Digest 50, 408.
- (9) *Re Newen*, [1903] 1 Ch. 812; 72 L.J.Ch. 356; 88 L.T. 264; 42 Digest 66, 582.

APPEAL by the plaintiff from an order of CROOM-JOHNSON, J., at Stafford Assizes, dated Mar. 6, 1953.

On Feb. 3, 1947, the plaintiff, who was employed as a cupola charger by Messrs. John Thompson (Wolverhampton), Ltd., suffered an accident while at work caused by the breaking of the wire rope of a lift which resulted in injury to his foot and leg. Thereafter and until July, 1947, the employers made payments of compensation to the plaintiff amounting to £2 15s. per week, under the Workmen's Compensation Acts, 1925 to 1943. In or about March or April, 1947, the plaintiff consulted the defendant, a solicitor, professionally to advise him in respect of the accident, full details of which he gave to the defendant, and told him that he was in receipt of compensation from the employers. Thereupon the defendant told the plaintiff that he was receiving the maximum amount of compensation and advised him to wait until the employers' insurance company attempted to reduce the amount. The insurance company then gave notice to terminate the compensation and the defendant claimed compensation for partial incapacity, which was duly paid over the next following three years. The defendant ultimately negotiated for a lump sum of £250, with which the plaintiff was dissatisfied. The plaintiff brought the present proceedings against the defendant, alleging that the defendant had been negligent in that it was the duty of the defendant to consider whether the plaintiff had a claim for damages at common law against his employers or whether his claim was limited to one under the provisions of the Workmen's Compensation Acts, 1925 to 1943. He alleged, further, that the defendant had negligently failed to consider or advise him as to his common law rights and that as a result thereof, he had lost his right of action against the employers. The defendant in his defence denied that he had been negligent and contended that he had been

asked for advice, not in respect of the accident generally, but solely as to the amount of compensation under the Acts. The judge, accepting the defendant's evidence; found that there was no negligence and gave judgment for the defendant.

Ryder Richardson, Q.C., and Garrard for the plaintiff.
Eveleigh and Popplewell for the defendant.

Cur. adv. vult.

Nov. 10. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from a decision of CROOM-JOHNSON, J., in which the plaintiff claimed damages for negligence against a solicitor. The learned judge found for the defendant, but assessed damages in case the Court of Appeal should reverse his decision on liability. The plaintiff appeals and submits that the learned judge was wrong on both liability and quantum.

The plaintiff worked as a cupola charger for Messrs. John Thompson (Wolverhampton), Ltd. On Feb. 3, 1947, he had an accident while at work. In his statement of claim he alleges that the accident was occasioned by the negligence or breach of statutory duty of his employers, and that is admitted for the purposes of these proceedings. I will read para. 5 which sets out his complaint against the defendant.

"In or about the months of March or April, 1947, the plaintiff consulted the defendant professionally to advise him, the plaintiff, in respect of his accident hereinbefore described and it was accordingly the duty of the defendant to consider as to whether the plaintiff had a claim for damages at common law against his said employers or whether his claim was limited to one under the provisions of the Workmen's Compensation Acts, 1925 to 1943. The defendant negligently failed to consider or if he did consider negligently failed to advise the plaintiff as to his common law rights and was content that the plaintiff should receive compensation pursuant to the said Workmen's Compensation Acts."

Then it goes on to allege that he had lost his right of action. The defence was that the defendant had not been asked to advise in respect of the accident but simply as to the amount of compensation under the Workmen's Compensation Acts. This will become clearer when I refer to the defendant's evidence. The plaintiff was in hospital and his foot or leg were in plaster-of-Paris for some time and the effects of the accident continue. The employer made weekly payments, at what was calculated to be the maximum rate under the Act, from the time of the accident until July. The plaintiff's evidence was that he had asked the defendant some six weeks after the accident to take his case on. The defendant's account differs both as to the date of the first visit and the instructions he received. It is plain from the learned judge's judgment that he accepted the defendant's sworn evidence in full, which was, indeed, both as to the date and as to the instructions corroborated by the defendant's own record. The question is whether on his own evidence and record he was guilty of negligence.

The plaintiff went to see the defendant first on July 11, 1947, some five months after the accident. He was at that time, as I have stated, receiving the maximum under the Act, but had reason to believe that these payments were about to be reduced in amount. I will read the defendant's own account of the matter.

"Q.—Will you tell his Lordship what it was that Mr. Griffiths asked you to do for him? A.—Mr. Griffiths consulted me about his workmen's compensation—his weekly payment—as he was under an impression that there was going to be some reduction, or some alteration in the amount. I took details of his accident, etc., as I always did in a workmen's compensation matter, and as he has said here I told him, as he was receiving the maximum compensation, to carry on receiving that amount, and should there be any difficulty or any question arise to report to me immediately.

Q.—Did he at any time ask you to advise him generally as to his rights against his employers? A.—Never in any shape or form. The whole gist of this matter was purely the amount of his weekly payments of compensation and, a little later on, to negotiate to try to settle for a lump sum—the usual run of most workmen's compensation cases. CROOM-

A JOHNSON, J.: Did that come to anything? A.—It was unsuccessful. The limit to which I arrived with the insurance company, by way of a safe maximum, was £250, and the man, quite rightly, wanted much more. His idea was £1,000. Q.—So those broke off? A.—Yes. The matter was still proceeding when the man came one morning into my office and said could he have his papers as his union were then going to take up the matter for him, and then Messrs. Thompson's came on the scene. Counsel for the defendant: And was that in July, 1950, some three years after he first saw you? A.—Yes, I think so. The date on the letter will prove that."

Before citing some of the answers from the cross-examination I will refer to the instruction sheet. After the name of the employers these words occur:

C "Wire rope of lift broke—I came down on lift with barrow—compound fracture os calcis—Mr. Freeman at hospital—he says never be able to do this work again."

D There then followed the name of the midland employers which refers to the insurers and a reference number. Then are the words "paying comp. £2 15s." and, in capital letters, "Wait". The defendant, Mr. Evans, in advising the plaintiff to wait, of course had in mind s. 12 of the Workmen's Compensation Act, 1925. In fact, on July 30 a notice under s. 12 (3) was received by the plaintiff, who consulted the defendant and negotiations were carried on as to the quantum of the payment from time to time.

E It is submitted, on the part of the plaintiff, that the reference to the breaking of the rope should have put the defendant on inquiry. He should have followed up the question whether the plaintiff had not a claim under the Factories Act, 1937 or at common law and whether he had considered the matter and realised the alternative possibility. The plaintiff had not considered the matter, nor had he had any previous advice. Reliance is placed by the plaintiff on an answer given by the defendant when he said that the breaking of the rope might well indicate negligence. As to his state of mind when he was taking down the facts which appear on the instruction sheet I will read three questions and answers F in his cross-examination.

G "Counsel for the plaintiff: If this employer had been very careless, did it occur to you that the workman would have a right to common law damages? A.—At that time that proposition did not enter my mind. Q.—Why not? A.—As the man only discussed with me the question of his weekly payment of compensation and the possibility of some interference with it. Q.—But why did it not occur to you that he probably had a common law right? A.—I am telling you the fact as it was in my mind at that time. It did not come into my mind because the man was discussing with me the question of his weekly payments of compensation, and there was some possibility of some interference with those weekly payments."

H It was later suggested to him that he had considered the possibility of a claim at common law but had not pursued it believing that the acceptance of the weekly payments over some months would have precluded the plaintiff from claiming. He did not agree with that. His mind had not reached that stage.

The learned judge found that the defendant was not guilty of negligence. It is submitted that that decision was coloured by the learned judge's assumption that the plaintiff had already lost his rights at common law by accepting the payments. That, of course, was assumed to be the law over a long period, but

it had ceased to be so in 1947 as a result of decisions to which I will refer in a moment. There is a passage, perhaps more than one, which indicates that the learned judge was proceeding on this basis, and this might well have coloured his finding as to negligence. In any case, however, where, as here, the defendant's evidence is accepted in full and an appellant plaintiff is prepared to argue his case on the basis that the defendant made a favourable impression on the judge, the difficulties which sometimes arise when this court is asked to reverse a finding of negligence or no negligence are absent. It is, I think, unnecessary to read the Workmen's Compensation Act, 1925, s. 29, which confers the option to proceed at common law or for compensation. In *Selwood v. Townley Coal & Fireclay Co., Ltd.* (1) this court held that as the workman had been paid compensation known to be such under the Workmen's Compensation Act, 1925, even although he had made no claim for compensation, he was precluded under s. 29 (1) of that Act from recovering damages from his employers at common law. In *Young v. Bristol Aeroplane Co., Ltd.* (2) s. 29 was considered. The workman in that case had accepted payments, without knowing of his rights at common law, over a period and this would have barred his claim at common law if *Selwood's* case (1) had been rightly decided. At a later period, he had come to know of the choice given to him by s. 29 (1) and with that knowledge had continued to receive the compensation until he returned to work. The House of Lords was unanimous in holding that what had happened in this latter period constituted an election. All the noble and learned Lords did, however, consider whether the receipt of payments before knowledge was sufficient or, in other words, whether *Selwood's* case (1) was rightly decided. VISCOUNT SIMON, LORD RUSSELL OF KILLOWEN and LORD PORTER held that *Selwood's* case (1) was wrongly decided. LORD SIMONDS and LORD MACMILLAN held that it was rightly decided. In *Leathley v. John Fowler & Co., Ltd.* (3) it was argued before this court that *Selwood's* case (1) and other cases which had laid down or applied a similar principle were still good law on the ground that all the observations in the House of Lords on this topic were obiter. This court decided that as each of their Lordships had dealt with this matter this court ought to apply the opinion of the majority. *Selwood's* case (1) was, therefore, overruled as from that date. *Leathley's* case (3) was not cited to the learned judge, but I think, in considering the question of negligence, it is relevant to bear in mind the somewhat unfortunate history of judicial decisions on the application of s. 29 to the facts as they existed when the plaintiff consulted the defendant.

I have found the question of negligence a difficult one. I think the defendant, being wise after the event, may well reproach himself for not having gone outside the question put to him and made inquiries as to the accident generally. The variety of matters with which a solicitor has to have some familiarity increases annually. The case may well be on the border-line, but I am not satisfied that the plaintiff has made out a case of negligence. If such a case had been made out, counsel for the defendant submitted that no damage had resulted and that the plaintiff's employers would have had no answer under s. 29 to a claim if put forward, and which we understand may still be put forward, today. It is unnecessary for me to consider that issue. We were referred to *Medcalf v. Samuel Jones & Co., Ltd.* (4), a decision by LORD GODDARD, C.J., who held that an injured workman who had consulted solicitors as to his rights generally must be taken to have exercised his option under s. 29 if the solicitors claimed compensation under the Act, although they had not informed him of his possible alternative remedy at common law. In that decision the Lord Chief Justice distinguished a decision of ORMEROD, J., *Reeve v. Van Den Bergh* (5), in which the solicitors had been consulted as to the quantum of compensation only. We have a transcript of the judgment of ORMEROD, J., and also a decision of BARRY, J., in 1950 in *Hillyard v. Porn & Dunwoody, Ltd.* (6), which contains some observations which, I think, are in conflict with *Medcalf's* case (4). If a claim against the employers

is proceeded with these cases may well become relevant to the issue and I do not, therefore, think it would be right to make any comment on them. For the reasons, I have stated I would dismiss the appeal.

DENNING, L.J.: The duty of a solicitor depends, of course, very much on what he is employed to do. In this case the solicitor says that he was employed solely for the purpose of a claim under the Workmen's Compensation Acts, and, therefore, he was under no duty to consider the possibility of a common law claim, whereas the workman says that he employed the solicitor to conduct his case for compensation without specifying whether it was under the Acts or not, leaving it to the solicitor to do the best he could for him and, therefore, the solicitor ought to have considered the possibility of a claim at common law. On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last hundred years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it: see *Crossley v. Crouther* (7), per SIR GEORGE J. TURNER, V.-C.; *Re Paine* (8), per WARRINGTON, J. The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences.

In the present case, the judge found there was no conflict on the retainer. The judge said in terms that the workman was giving the best account of these matters that he could and that he did not find anything inconsistent in the workman's evidence with the account given by the solicitor. Nor do I. I think that the two accounts come to this. The workman went to the solicitor and said: "Will you take on my case?" The solicitor said: "What have you done?" The workman said: "I have had an accident at work. The wire rope of the lift broke." He gave full details of the accident and then went on to say: "My employers' insurance company have been paying me £2 15s. compensation and I think they are going to try to reduce it". Thereupon the solicitor told him that he was receiving the maximum compensation and should wait until the insurance company made a move to reduce it. The solicitor said that it did not enter his head to consider a right to common law damages. He thereafter treated the case as solely a workman's compensation case. When the insurance company did give notice to terminate the compensation, the solicitor wrote to them saying:

"William Griffiths & John Thompson (Wolverhampton), Ltd. Mr. William Griffiths has now placed this matter in my hands and I enclose his doctor's certificate."

The solicitor thereafter claimed compensation for partial incapacity and agreed the amount of it from time to time, and it was duly paid for over three years. Eventually, the solicitor negotiated for a lump sum settlement of the workman's compensation payments at a figure of £250. These negotiations had not concluded when the workman, disappointed with the figure, went to other solicitors.

On those quite simple facts, the question is whether the solicitor did his duty by the client. In particular, ought he to have considered whether the man had a claim at common law? I am clearly of opinion that he should have done so. When a workman goes to a solicitor and tells him he has had an accident and wants the solicitor to take on the case, the very first question the solicitor ought to put to himself is this. What is the man's legal position? Every solicitor ought to know that there is all the difference in the world between a case where the employer is to blame and a case where he is not. If the employer is not to blame, the man only gets workman's compensation. If the employer is to blame, either for negligence or for breach of statutory duty, the man gets the much higher award given by the common law. I cannot think it is right for the solicitor to

escape by saying: "You only consulted me about workman's compensation, not about common law damages". That attributes to the workman a legal knowledge of the difference between them. Many workmen do not in fact know the difference, and it would be most unfair to attribute such knowledge to them. This workman certainly did not. All he knew was that he was receiving weekly payments from his employers or their insurance company and that he was receiving them as compensation for his accident. It was not for him to know the difference between compensation under the Acts and compensation at common law, but it was the business of the solicitor to know it, and to know also, in those days, that the workman had an option to claim one or other which, once exercised, could not be retracted. If the workman had, indeed, known of the difference, and with that knowledge had consulted the solicitor about workmen's compensation only, pursuing that claim alone, then his conduct might itself have been an exercise by him of his option. He would have chosen for himself to receive workmen's compensation and not common law damages. But it was not suggested before us that he had any such knowledge. It was accepted by both parties that when he went to his solicitor he was ignorant of his rights and had not lost his option. The judge was in error in thinking the man had already lost his option by the mere fact of accepting payments. If this solicitor had considered, even for a moment, what were the rights of this man, he would have been bound to come to the conclusion that the man had a good claim at common law. The accident was caused by the breaking of the lift rope, which was a plain breach of the Factory Acts. But the solicitor did not consider it at all. He agreed the workman's compensation with the employers' insurance company and thought nothing about the common law.

A most critical question is: What is the effect of the solicitor's conduct? Does it mean that the man, through his solicitor, has exercised his option? Does it mean, if he should now sue his employers for damages, he would fail on the ground that he had already chosen to take workmen's compensation? There is a decision of LORD GODDARD, C.J., *Medcalf v. Samuel Jones & Co., Ltd.* (4), which goes far to show that the solicitor's action binds the man and he cannot now claim against his employers, although there are earlier decisions of two other judges which rather point to the contrary: ORMEROD, J., in *Reeve v. Van Den Bergh* (5), and BARRY, J., in *Hillyard v. Porn & Dunwoody, Ltd.* (6). This question, like so many others, depends very much on how you look at it. From the man's point of view it would seem hard that, when he did not know of his option, he should be bound by what his solicitor has done, but from the employers' point of view, it would seem that they should be entitled to assume that the solicitor had advised the man as to his rights and that he had elected to take compensation. The Lord Chief Justice in *Medcalf v. Jones* (4) expressed his opinion in these words ([1951] 1 T.L.R. 836):

"... when an employer has been asked formally . . . to admit a claim for compensation and has done so, surely it is not for him to ask the solicitor what advice he has given to his client and whether he has made him aware of his alternative claims . . . In my opinion, where a workman who has sought legal advice puts forward a claim through his solicitor for compensation and accepts it he cannot afterwards say that he did not know of the option which the Act of 1925 gives him and claim damages."

BARRY, J., in *Hillyard v. Porn & Dunwoody* (6), put the same view most cogently, although he did not give effect to it in that case, having regard to the very special facts which he had to consider. He said:

"During the course of the argument it seemed to me a most unfortunate position that a workman who consults solicitors and authorises them to conduct negotiations with his employers on his behalf should be able, after a long period of time, to say that, although he had sought legal advice, yet those whose advice he had sought had not told him of all the

relevant considerations which should be present in his mind. It seems to me that if a workman can say, after he has been instructing solicitors for a long period of time, that the solicitors failed to tell him of his alternative rights, the employers are placed in a position of very grave difficulty. It is, I think, virtually impossible for them to produce evidence which might tend to contradict the workman's statement and any investigation as to the confidential discussion between a solicitor and his client seems to me to be an unfortunate matter for the court to have to undertake, irrespective of any question of privilege."

In this situation, I must say that I agree with the Lord Chief Justice. It must be remembered that, in an action by the man against his employers, the conversations between the man and his solicitor are privileged. If the man asserts that he did not know of his option, the employers cannot call the solicitor to contradict him. They cannot even ask the solicitor what advice he gave to his client. The conversations are privileged. If the law imposes on the employers such a handicap in meeting the claim, surely it will give them a corresponding relief. It will hold the man bound by everything done by his solicitor within his ostensible authority. It will assume that the solicitor has done what it is his duty to do and what any careful solicitor would do, i.e., tell the workman of his option. If the solicitor thereafter on the man's behalf makes an agreement for workman's compensation, the law will assume that he does it with the man's authority and with knowledge of his option. If it should turn out that the solicitor has not done his duty, that should not affect the employers who acted on the faith of his authority. It should be a matter to be thrashed out between the man and his solicitor, for it is only in proceedings between them that it can be thrashed out free of privilege. It has often been said that a solicitor is the agent of his client in all matters that may reasonably be expected to arise for decision in the cause: *Re Newen* (9). There can be no doubt that the exercise of an option is a matter that may reasonably be expected to arise for decision. The man is, therefore, bound by what the solicitor does in regard to it.

If the reasoning of the Lord Chief Justice is correct, then it follows that this man has, by his solicitor's action, been deprived of his claim against his employer. He has been deprived of well over £1,000. I reckon it at £1,290. Surely, in those circumstances, he should have a remedy against his solicitor? I realise that the solicitor's reputation is at stake. We must be very careful of that, but we should remember also that the solicitor's profession will suffer more if the members of it make mistakes which they ought not to make, and cause loss for which no remedy is given. Even if the reasoning of the Lord Chief Justice is not correct, it must at least make it very difficult for the man to succeed against his employers, at any rate in a court of first instance. I doubt whether anyone can say with certainty, short of the House of Lords, whether the Lord Chief Justice was right or wrong, and even the House of Lords may be divided on it, as they were on an analogous point in *Young v. Bristol Aeroplane Co., Ltd.* (2). Yet all this difficulty is due to what the solicitor has done. The man is left now with a claim against his employers which is disputable, and is, indeed, disputed, instead of being undisputed, as it would otherwise have been. I do not think the man can recover the full amount from the solicitor because allowances must be made for the chance that he may still recover from the employers. We were told that his present solicitors have already issued a writ against the employers so as to save the Limitation Act, 1939, from running. I think the damages recoverable from the solicitor must be assessed by taking into account the inconvenience and expense to which he will be put in suing the employers and the risk of failure. I would assess the damages at £600 and give judgment for the man accordingly. I would allow this appeal.

ROMER, L.J.: The relevant evidence which the defendant gave at the trial with regard to the instructions which he received from the plaintiff in July, 1947,

has been fully stated in the judgment which SOMERVELL, L.J., has delivered. This evidence was accepted by the learned judge and the gist of it was that the plaintiff consulted Mr. Evans, the defendant, solely with regard to the anticipated reduction in the plaintiff's weekly payments of compensation, and, later, as to a redemption of such payments, and that the plaintiff never in any shape or form asked the defendant to advise him generally as to his rights against the employers. The plaintiff's case is that the defendant was nevertheless at fault in not applying his mind to the position generally, and, in particular, in not advising the plaintiff that he had, or might have, a right of action against his employers at common law. This contention was rejected by the learned judge and the plaintiff has not persuaded me that the judge's conclusion was wrong.

The employers started to make the weekly payments to the plaintiff shortly after the accident which befell him in February, 1947. When he went to see the defendant in the following July, he was still receiving them, and, as the defendant ascertained, they were at the maximum amount to which the plaintiff was entitled by virtue of the Workmen's Compensation Acts. The plaintiff never entertained, nor in any way communicated either directly or indirectly to the defendant, any dissatisfaction with the nature or amount of these weekly payments. The only thing that troubled him was the belief that in the near future the employers were intending to diminish them. That was the problem which was weighing on his mind and which he took to the defendant for solution. The statutory provision which was relevant to this question is the Workmen's Compensation Act, 1925, s. 12, and is the provision to which the defendant's mind would naturally be directed. It prescribes the circumstances in which it is permissible for weekly payments to be discontinued or reduced by employers. The section is directed to one particular aspect of the compensation legislation, but the aspect is a large one which has given rise to many reported cases and s. 12 is attended by no fewer than sixteen pages of notes in WILLIS ON THE WORKMEN'S COMPENSATION ACTS, 37th ed.

The problem which the plaintiff presented to the defendant came within this special and potentially difficult field of inquiry, and I cannot think that it was negligent of the defendant not to apply his mind to another, and totally different, field as well. The plaintiff had received the weekly payments for months and an agreement (albeit implied and unrecorded) was constituted between himself and his employers in such circumstances that, as the law was believed to be before the decision in *Young's* case (2), the option conferred by the Workmen's Compensation Act, 1925, s. 29, would no longer have remained open to the plaintiff. In the light of the majority of speeches in that case, the option did in fact remain open, but questions as to its existence and exercise were, as it seems to me, altogether distinct from, and unconnected with, the issue on which, and on which alone, the plaintiff sought the professional advice of the defendant. The plaintiff said in his evidence that he asked the defendant to advise him on his position generally; and, indeed, if, in fact, he had wanted general advice nothing could have been easier than for him to have asked for it. But his recollection in this respect was wrong and he did not ask for it and the defendant did not give it, and the plaintiff has not satisfied me that the defendant's omission in this respect amounted to an actionable neglect of his professional duty to the plaintiff.

Having regard to the conclusion which I have expressed on the question of negligence it is unnecessary for me to indicate an opinion as to what (if any) damages should be awarded to the plaintiff if he had established a breach of duty on the part of the defendant, and, in view of possible future events, I prefer to refrain from doing so. In my opinion, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the plaintiff); *William Charles Crocker* (for the defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

SMITH AND OTHERS v. CARDIFF CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
October 30, November 2, 3, 4, 1953.]

Practice—Parties—Representative action—Suit on behalf of “numerous persons having same interest”—Tenants of council houses—Proposal to increase rents of some tenants—R.S.C., Ord. 16, r. 9.

A In accordance with their obligations under the Housing Act, 1936,
Part V, the defendants, as local authority, provided houses to over thirteen
thousand tenants under weekly tenancy agreements. On or about June 8,
1953, the defendants resolved to introduce a differential rent scheme which
involved an increase of rent according to the ability to pay of each tenant
having regard to his financial circumstances. Under the scheme some
B tenants would have to pay an increase of 12s. 6d. per week, whilst the
rents of other tenants would remain unchanged. The plaintiffs, being
four tenants, and “suing on behalf of themselves and all other tenants of
houses provided by the defendants under Part V of the Housing Act, 1936,”
issued a writ against the defendants, claiming a declaration that the rent
scheme was ultra vires and void, and an injunction to restrain the defend-
C ants from carrying out the scheme. On a motion by the defendants to
set aside the writ,

Held: to bring the case within the provisions of R.S.C., Ord. 16,
r. 9, and to enable the action to be constituted as a representative action
the plaintiffs must show that all the members of the class on whose behalf
they sued had a common interest in a common subject-matter, that all had
a common grievance, and that the relief was in its nature beneficial to them
all; the scheme by its nature involved the affluent “subsidising” the
less affluent tenants, and so, apart from those in an intermediate position,
there were two distinct classes of tenants whose interests were in conflict,
viz., those who would benefit by having to pay no increase and those who
would have to pay the maximum increase of rent; without deciding whether
or not the thirteen thousand tenants had a common interest, the relief
sought was not in its nature beneficial to them all; and, therefore, R.S.C.,
Ord. 16, r. 9, could not apply, but the writ would be amended by striking
out the reference that the plaintiffs were suing in a representative capacity,
so that they would proceed as individuals and the action be treated as a test
action.

F Dictum of LORD MACNAGHTEN in *Bedford (Duke) v. Ellis* ([1901] A.C. 7),
applied.

AS TO PERSONS SUING IN A REPRESENTATIVE CAPACITY, see HALSBURY,
Hailsham Edn., Vol. 26, p. 17, para. 14; and FOR CASES, see DIGEST, Practice,
pp. 415-420, Nos. 1131-1164.

G FOR THE HOUSING ACT, 1936, Part V, see HALSBURY'S STATUTES,
Second Edn., Vol. 11, pp. 513-541.

Cases referred to:

- (1) *Belcher v. Reading Corpn.*, [1949] 2 All E.R. 969; [1950] Ch. 380; 114 J.P. 21; 2nd Digest Supp.
- (2) *Morrison S.S. Co., Ltd. v. Greystoke Castle (Cargo Owners)*, [1946] 2 All E.R. 696; [1947] A.C. 265; [1947] L.J.R. 297; 176 L.T. 66; 2nd Digest Supp.
- H (3) *Bedford (Duke) v. Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 33 Digest 529, 68.
- (4) *Price v. Rhondda Urban Council*, [1923] 2 Ch. 372; 93 L.J.Ch. 1; 88 J.P. 69; 19 Digest 604, 302.
- (5) *Jones v. Cory Bros. & Co., Ltd., Thomas v. Great Mountain Collieries Co.*, (1921), 56 L.Jo. 302; 152 L.T.Jo. 70; Digest, Practice, 416, 1137.
- (6) *Colman v. Eastern Counties Ry. Co.*, (1846), 10 Beav. 1; 16 L.J.Ch. 73; 8 L.T.O.S. 530; 50 E.R. 481; 38 Digest 249, 1.

APPEAL by the plaintiffs against an order of GLYN-JONES, J., sitting as vacation judge, dated Aug. 12, 1953.

The defendants, as local authority, had provided housing accommodation under the Housing Act, 1936, Part V, for over thirteen thousand tenants, all of whom held under agreements in substantially the same terms except as to rent. On or about June 8, 1953, the defendants decided to adopt a "differential rent scheme", which involved the payment by different classes of tenants of differing amounts of rent, the maximum increase to be 12s. 6d. per week in the case of a tenant in receipt of a gross income of £600 or more per annum. In furtherance of this scheme a circular dated June 26, 1953, was sent to each tenant containing a questionnaire whereby each tenant was required to give full information as to his financial circumstances—his own income and that of any members of his family residing with him, the number of lodgers or sub-tenants, and so forth—and requiring him to sign the following:

"I hereby declare that the above statement is true and correct and I understand that the giving of incorrect information herein or failure to notify any change which will affect the rent charge may be regarded as good reason for terminating the tenancy."

Each tenant was informed that, if he failed to complete the form, he would be assumed to be liable for the maximum increase of rent. After receiving this circular the tenants held meetings, formed a tenants' protection committee, and some nine thousand tenants signed a document approving the present proceedings against the defendants.

On July 22, 1953, a writ was issued by

"Herbert William Smith, Trevor Spickett Roberts, John Waters, and William John Williams, (suing on behalf of themselves and all other tenants of houses provided by the defendants under Part V of the Housing Act, 1936) . . ."

against the corporation of Cardiff, claiming (i) a declaration that the decision made on or about June 8, 1953, purporting to authorise the introduction and operation of a scheme for certain specified increases of the rents payable by the tenants of council houses was ultra vires and void; (ii) an injunction to restrain the defendants, their servants or agents from carrying out the scheme; and (iii) an interim injunction. The defendants entered a conditional appearance and moved to set aside the writ on the grounds, inter alia,

"(iii) That the plaintiffs have not a common interest with all other . . . tenants. (iv) That the relief sought in this action is not in its nature beneficial to all such tenants."

On Aug. 12, 1953, GLYN-JONES, J., sitting as vacation judge, ordered the writ to be set aside, and the plaintiffs appealed.

Diplock, Q.C., and *Millner* for the plaintiffs.

H. Edmund Davies, Q.C., and *Pennant* for the defendants.

SIR RAYMOND EVERSHED, M.R.: The defendants have applied to have the writ struck out and all proceedings stayed on the ground that the action was not properly constituted as a representative action—that is to say, that the action was not one which fell within the ambit of R.S.C., Ord. 16, r. 9, which reads:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue . . . on behalf of or for the benefit of all persons so interested."

The question for our determination is whether or not this is a case in which "there are numerous persons having the same interest in one cause or matter."

[His LORDSHIP stated the facts and continued:] Our attention was called to *Belcher v. Reading Corpn.* (1), in which tenants sought to challenge the validity

A of what the Reading Corporation had been disposed to do. The form of action there selected was a representative action and junior counsel for the plaintiffs in the present case appeared as junior counsel for the plaintiffs there. It appears from what occurred before HARMAN, J., during interlocutory proceedings that a question arose of the propriety of a representative action in such circumstances. Counsel for Reading Corporation submitted that, strictly speaking, the case did not fall within the ambit of R.S.C., Ord. 16, r. 9, but stated that the corporation were not disposed to object to the form of proceeding. It was obviously desirable that the matter that had been raised should be speedily determined. As the judge said, a representative form of action, as distinct from, or as an alternative to, a "test" action, was a convenient form of proceeding. If junior counsel for the plaintiff expected the defendants in the present case to be as accommodating as were Reading Corporation he is proved to have been mistaken.

B There is no doubt that in other branches of the work of these courts actions on behalf of a group of persons who all have similar rights are found convenient. MORRIS, L.J., in the course of the argument, asked whether it was not a fact that actions are brought in this way by the owners of cargo in a particular ship; and he has since found an example—*Morrison S.S. Co., Ltd. v. Greystoke Castle* (Cargo Owners) (2). The procedure in that class of litigation is, no doubt, of a special character; but I refer to it because I wish to make it plain that nothing that I say should be taken as casting any doubt on the propriety of actions of that character in cases of the kind to which MORRIS, L.J., alluded. I am bound to say that I am entirely unconvinced that there is any substance in the objection taken D in this case by the defendants. It seems to me not to matter to the defendants whether or not the form of action is as at present constituted. The plaintiffs were anxious to obtain an interim injunction. They did not succeed—and I am not surprised. In any claim for an interim injunction the problem of any undertaking as to damages, should the plaintiffs ultimately prove wrong, is likely to arise, and since we are informed that the increased rents, if brought into E operation, would be equivalent to some £45,000 per annum, it is not surprising that the plaintiffs might have been in difficulty in finding adequate security for an undertaking to indemnify the defendants if they were wrong. But I am not satisfied that the insistence of the plaintiffs on a representative form of action was material to the question of an interim injunction. It is true that if the action were simply brought by one, two or three individuals and a claim made for an F injunction, then, strictly speaking, any injunction would be limited to benefiting those individuals. On the other hand, and as a practical matter, if an injunction were granted, it would obviously be difficult for the defendants, while restrained as regards the four plaintiffs, to proceed with the scheme in respect of all the other tenants from whom they would be likely immediately to receive writs. But, from the plaintiffs' view, it is fair to say that I can G understand some reluctance on the part of an individual weekly tenant to embark alone on litigation with the defendants; for he might think that they would forthwith serve him with a notice to quit and then contend that he had no subject-matter which enabled him competently to maintain his action.

H These matters are, perhaps, by the way, though they will have a relevance when I come to deal with costs. The question, however, which we have to determine is whether this case falls within the scope of R.S.C., Ord. 16, r. 9. One might be disposed to say that if you have thirteen thousand weekly tenants with tenancies, so far as relevant, in identical form, then the case is one which the rule would be designed to meet, on grounds at least of convenience. But, on second thoughts, taking the rule according to its own language and without for the moment considering any expositions of it in the decided cases, one cannot see how these thirteen thousand individual tenants can be said to have "the same interest in one cause or matter". The truth is that they have similar or identical

interests in similar or identical matters. It is, I think, important to bear in mind the strict legal position. The document issued by the defendants speaks of increasing rents, and, as a matter of practice and of ordinary decency, the defendants would not seek to evict all their existing tenants and offer to the world at large new tenancies on the new terms. They would naturally prefer that the existing tenants should remain, offering them the continuation of their occupancy on terms of their paying increased rents. But the rents are not capable of being increased unless, first, the tenancies are determined, and then new contracts will or may come into operation. If the offer of the new contract is at a rent which afterwards it is found the defendants have no power to charge, it may be that in the result there will be no contract at all. But at the moment of the issue of the writ these thirteen thousand tenants were all weekly tenants with a right only to remain as such tenants until the council gave notice to determine those tenancies: see the Housing Act, 1936, s. 83 (1) and s. 156 (1). In actual fact, all of them have since been determined as a necessary preliminary to putting into effect the scheme, and when a tenancy has been determined, it may be said that the former tenant has no more right to continue in occupation of his house on the terms offered than any other person who may ask to be granted a tenancy according to the terms of the new scheme.

That consideration is, I think, of significance when one looks at the decided cases. In *Duke of Bedford v. Ellis* (3) a class of persons (there were, in fact, two or three classes, but for simplicity it will be sufficiently accurate if I treat them as one class) called "growers" (as distinct from merchants and middlemen) of vegetables and like products, was concerned, under the Covent Garden Market Act, 1828, with the rights and obligations of the Duke of Bedford as owner of the market. It was alleged that the Duke of Bedford had disregarded his obligations under the Act by which the growers as a class were given preferential rights to have certain stands and places of business in the market. It was also alleged that the tolls which the Duke of Bedford might exact from growers in respect of these places of business were limited by the statute and had in fact been exceeded by him. The writ, therefore, asked for declarations that this class had a preferential right by statute, and that the tolls exigible from this class were limited in certain respects; and the individual plaintiffs also claimed the return of the excess tolls they had individually paid. It will be observed at once that there is a distinction between that case and the present. There, a class of persons had by statute a certain preferential right, namely, a right to be offered stands in the market in priority to non-growers and other persons. The right of any individual rested on his being, but belonged to him as, a member of that class. There was only a small number of stands, so that the chance of any individual in fact getting a stand was small, but, still, the statutory right alleged was a right belonging to a class and all its members, just as under an intestacy one of the next of kin has a right to a share in the estate as being a member of a class of the next of kin.

It was, I think, in the light of those circumstances that LORD MACNAGHTEN said ([1901] A.C. 7):

"If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity . . . Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiffs proposed to represent."

That latter sentence was spoken in fact of the old Chancery practice before R.S.C., Ord. 16, r. 9, came into operation. But I am content to take it (as counsel for the defendants was content to argue it) that the necessary qualifications in that sentence are applicable here and must here be shown to be satisfied. It

must be shown, first, that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.

It is unnecessary to refer in detail to all the cases on the question: Is there here a class so that each member may be said to have the same interest in a common subject-matter? It seems, however, to me that the present case may be distinct on its facts from *Price v. Rhondda Urban Council* (4), where the plaintiff sued on behalf of a class, namely, married women teachers, to test the validity of a resolution of the Rhondda Urban Council that married women teachers as such would not be employed, save on terms which were disadvantageous to them as a class. Similarly, in *Jones v. Cory Bros. & Co., Ltd.* (5) where a plaintiff sued as a member of a class, namely, underground mine workers, alleging against the mine owner that he was not fulfilling his statutory obligations to the class of underground mine workers. There are other cases (for example, *Colman v. Eastern Counties Ry. Co.* (6)) which may, perhaps, go further towards making this form of procedure applicable where a number of persons may be said to have, not the same interest in one cause or matter, but, identical interests in identical causes or matters.

I have already said I am anxious that a convenient form of procedure, which in many classes of case can usefully be adopted, should not be held by this court to be inappropriate and wrong. I, therefore, without saying more, except to express my doubts on it, will assume that it could be said that all these thirteen thousand tenants have the same, in the sense of a common, interest. Still, in my judgment, GLYN-JONES, J., rightly concluded that the third qualification of LORD MACNAGHTEN'S dictum is not here fulfilled. The nature of this scheme makes it plain that the differentiation will operate so that the more affluent of the tenants will "subsidise" the less affluent. Indeed, it is pointed out that some five of the thirteen thousand will suffer no increase of rent at all. It is true that they may do so at some future date, but, of course, only if their then existing contracts are first determined; it is also true that if they fail to fill up this form, they will cease to be the over-privileged and become the under-privileged. Yet, when one does apprehend that the main characteristic of this scheme is that the more will subsidise the less affluent, it is at once apparent that there are two classes whose interests are not only not identical, but are in conflict, namely, the subsidisers and the subsidised. I agree with GLYN-JONES, J., that it would be shutting one's eyes to realities to suppose that if the plaintiffs succeeded in this action they would all continue to remain at what are called in the scheme the basic rents, and that the defendants will be so defeated that they will fail to think of some other scheme for implementing their obligations to "make ends meet". Indeed, any possible alternative scheme such as the town clerk, in his affidavit, adumbrates shows that there will be a considerable class whom the plaintiffs now purport to represent who are almost certain to be worse off, if this scheme be held invalid, than they will be under the scheme itself. But I need not, I think, pursue the matter beyond pointing out that there are, apart from those in an intermediate position, two distinct classes whose interests are in conflict—those, on the one hand, who will benefit by having no present increases and those, on the other, who will have what may be called inflated increases. I, therefore, prefer to base my conclusion that this case does not fall within the strict terms of R.S.C., Ord. 16, r. 9, on that point rather than deciding whether it fails in limine, because there is here no class of persons "having the same interest in one cause or matter."

I am bound to say that I am not sorry to reach this conclusion. It seems to me startling, if this claim to bring the case within R.S.C., Ord. 16, r. 9, is correct, to note the consequences. An example was taken of the season ticket holders of British Railways between London and, say, Folkestone. If one individual sought to challenge the validity of some increase in the season ticket rate he could, apparently (if the plaintiffs are right), bring an action on behalf of all the season

ticket holders, whether they liked it or not. The remedy, counsel for the plaintiffs says, is adequate and simple (though I doubt if it would seem so to a great many people). The person who says: "I do not want to be represented by you" can ask to be joined as a defendant. It seems to me that such a result involves a serious inroad on the ordinary individual's liberty to make his own terms as he will with some other party with whom he is under no obligation to make any contract.

The result, however, is that, in my judgment, this case is not within R.S.C., Ord. 16, r. 9. But it does not follow that it is right to strike out the whole of the proceedings. I repeat that I cannot see that it matters to the defendants what is the form of action—certainly now that any question of an interim injunction is out of the way. Counsel for the defendants was willing (after I had pressed him) to say that the defendants would be content, if the bracketed words were omitted from the writ, to treat this as a test action, and stated that they would not in fact seek to "victimise" the four individuals who have stood out as the champions of, at least, the nine thousand tenants who have signified their support of the action taken by the four plaintiffs. But he was willing to do that only on terms that the plaintiffs paid the whole of the defendants' costs up to date. We, therefore, have had to consider the matter and express our view on it. In the circumstances, I think that the right course is not that the writ should be struck out and all proceedings stayed. It is conceded that this court has the power and jurisdiction to order, in lieu of striking out the proceedings, that the bracketed words should be struck out, so that the action can proceed, not as a representative action, but as an action brought by four individuals against the defendants; and that, in my judgment, is what we ought to do, varying GLYN-JONES, J.'s order accordingly. Since that result is achieved not by agreement, but by direction of the court, it is not competent to impose terms on the defendants, but I have no doubt whatever that they, having a difficult task to perform under the Housing Act, 1936, and being (as counsel said) anxious to get this question determined, will not do otherwise than treat this as a test action and will not seek to defeat these four individuals by what is called victimisation. Indeed, if they did, they would not advance much, for other champions would be found (I doubt not) to spring up from the soil.

There remains the question of costs. I regret that it has been necessary in this important matter that the costs of an appeal to this court should have been incurred. Both parties took up attitudes which, no doubt, made it inevitable; and, as counsel for the defendants says, he was brought here by the plaintiffs appealing against the order of GLYN-JONES, J., striking out their writ. In the circumstances, I think there is no ground for disturbing the effect of the order as to costs which GLYN-JONES, J., made, but I do not think it right that the plaintiffs should be made now to pay the defendants' costs of this appeal. I think (and in saying this I am not to be taken as suggesting that the defendants have not acted to the best of their ability as guardians of the ratepayers' interests money) that, doing justice as best I can between these plaintiffs and the defendants, the defendants' costs of this appeal should be their costs in the action. The result will be that if the defendants win the action they will get the costs of this appeal; if, however, they lose and the plaintiffs win, then the plaintiffs will not have to pay the costs of this appeal. I, therefore, think that the order should be that in lieu of striking out the proceedings, the writ should be amended by striking out the bracketed words (making it a representative action) and that the defendants' costs of this appeal should be their costs in the action.

JENKINS, L.J.: I agree. The argument of counsel for the plaintiffs was to the effect that the thirteen thousand tenants of the houses provided by the defendants in performance of their statutory duty under the Housing Act, 1936, constituted a class of persons having a common interest, because they each of them stood in the relationship of tenant to a common landlord, namely,

the defendants, and their tenancies alike fell to be regulated by any provisions of the Housing Act, 1936, applicable to the case. He said, in effect, that the common interest of these tenants consisted in the right to remain in occupation of their respective houses at no higher rent than the defendants could lawfully charge having regard to the provisions of the Act. He said, further, that these tenants have a common grievance, in that the scheme, the validity of which is challenged in the action, purported to propose for all of them without exception some increase, either actual and immediate or contingent and future, in the amount of the rent payable by them; and, finally, inasmuch as the object of the action was to prevent the scheme being brought into effect, the action was for the benefit of all, for, if successful, it would prevent the increases, actual or potential, foreshadowed in the scheme.

A Counsel for the defendants went so far as to argue that these thirteen thousand
B tenants could not, for the purposes of any dispute, constitute a class on whose behalf a representative action could properly be brought. He founded himself on the contention that here there is not a class of persons entitled to a common right conferred on members of that class by, for example, an Act of Parliament (as in *Duke of Bedford v. Ellis* (3)), and there is not any common right properly so called. He said, in effect, that there was no more than an aggregate of
C individuals each bound to the defendants by a separate contract of tenancy peculiar to himself and conferring and imposing rights and obligations on him separately as an individual and not as a member of a class. I am not prepared to accede to that argument in its widest form, and I find it unnecessary (as does
D SIR RAYMOND EVERSHED, M.R.) for the purpose of deciding this case to determine whether or not, in any, and if so what, circumstances or for the purposes of any, and if so what, dispute a body of persons such as the tenants of the council
E houses in the present case are capable of forming a class on whose behalf a representative action can properly be brought. The only questions which it is necessary to answer for the purpose of deciding this case are whether or not these thirteen thousand tenants are a class of persons having a common interest for the purposes of this present dispute, and, if so, whether or not, for the
E purposes of this present dispute, they can be said to have a common grievance, and, if so, whether or not the relief claimed in relation to this present dispute is in its nature beneficial to all.

As counsel for the plaintiffs put the matter it has, if I may say so without offence, a specious appearance of being a case in which (on the assumption that the charge of *ultra vires* can be made good) all these tenants are labouring under
F a common grievance, namely, the threat of an increase, actual or potential, in the amount of the rent payable by them over and above the amount lawfully exigible. But while at this stage it is not for us to investigate the merits of the action, I apprehend that to determine whether or not the action is properly constituted as a representative action it is necessary to look into the nature of the dispute far enough to be able to see the true character of the alleged
G grievance. On doing that it immediately appears that though the grievance, for the purposes of justifying the form of the proceedings, is put as a threatened increase, actual or potential, in the amounts of all the rents, the true grievance is not that. It is not, and could not, I apprehend, be contended that the defendants have no power to increase the rents in any circumstances. The true grievance is not that rents are being increased, but that they are being increased, not on a
H uniform, but on a differential, basis, the scheme being that a tenant in receipt of a gross income at the rate of £500 per annum or over and less than £600 shall suffer an increase of 8s. 6d. a week and a tenant in receipt of a gross income at the rate of £600 per annum or over shall suffer an increase of 12s. 6d. a week, with other provisions to meet the cases of adult wage or salary earning children, any wages earned by a wife, and the presence of lodgers or sub-tenants, or of what are termed "additional families", by the increases considered appropriate in each of those contingencies, and an overriding maximum increase of 12s. 6d. per

week. The objection is that instead of charging a uniform increase in rent (measured, I suppose, by reference to the estimated letting value of the house, and the necessity of charging an economic rent and of providing for increased outgoings, or other objective considerations of that nature) this scheme charges rent by reference to the purse, and as such it is said to be *ultra vires*. It was put by counsel for the plaintiffs that it was beyond the powers of the defendants to charge differential rents according to the means and circumstances of the tenants because the result would be that those tenants in more affluent circumstances would, in effect, by the increases in rent imposed on them be subsidising the tenants in less affluent circumstances in whose cases no increase was to be made at all.

That being the true nature of the grievance, it seems to me impossible to maintain that in this particular dispute these thirteen thousand tenants constitute a class having a common interest in any relevant sense. It seems to me impossible to maintain that they had in this dispute a common grievance or that the relief sought is beneficial to all. On the contrary, it seems to me necessarily to follow that a tenant who under this scheme qualifies for the subsidy—that is to say, a tenant whose rent is not increased—has an interest which may be diametrically opposed to that of a tenant who suffers the increase. *Prima facie*, it is in the interests of the subsidised tenants, who suffer no increases in rent, that this scheme should be upheld and put into operation, in order that they may enjoy the benefit of it by being allowed to remain as tenants at the old rent, and having the deficit, which the defendants are obliged so far as possible to make good, provided by other tenants whose means are such as to bring them within the range of one or other of the increases.

Therefore, while deciding nothing as to the possibility of such an aggregate of individuals as these thirteen thousand tenants constituting a class on whose behalf a representative action could properly be brought in relation to some matters, I hold that with regard to this particular matter it is impossible to say that they are such a class. I have only to add that I agree with the order *SIR RAYMOND EVERSHED, M.R.*, proposes as regards the costs of this appeal, and that the writ should not be struck out, but that leave should be given to make the appropriate amendments in order that the action may go forward as an action brought by the four named plaintiffs as individuals and not in any representative capacity.

MORRIS, L.J.: I agree. The writ claimed a declaration that the decision of the defendants to introduce a scheme for differential rents was beyond their powers. With the merits of the dispute we are not concerned. Nothing in the decision today affects the merits of the matter that will have to be decided. We have been concerned with a question that has arisen in a preliminary skirmish in the litigation. It concerns merely a bald point of procedure, in regard to which it has seemed to me that success does not profit and defeat does not hurt. The writ does, however, direct attention to a particular scheme, and, therefore, while the merits of the dispute which will have to be decided are not before us, we have to look at the scheme in order to see whether a representative action can properly be brought. It seems to me that a mere perusal of the scheme shows that there are many tenants who are not today and may not ever be adversely affected, so far as their rents are concerned, by this scheme. There is nothing I can add to the reasons that have already been assigned by my Lords in support of the view that the relief sought is not in its nature beneficial to all tenants. It seems to me that a mere examination of the scheme demonstrates that. Furthermore, in regard to the scheme itself, I think there is force in the submission of counsel for the defendants that it is shown that all the tenants have not a common

grievance. For those reasons I think GLYN-JONES, J., came to a correct conclusion.

Appeal allowed.

Solicitors: *Wrentmore & Son*, agents for *Thos. John & Co.*, Cardiff (for the plaintiffs); *Theodore Goddard & Co.*, agents for *Sydney Tapper Jones*, town clerk, Cardiff (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

R. v. ALGAR.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Glyn-Jones, JJ.), November 9, 16, 1953.]

Criminal Law—Evidence—Wife—Criminal offence committed during marriage—Admissibility of wife's evidence after decree of nullity for impotence.

A husband was prosecuted for forging his wife's name to a number of cheques, thereby defrauding her bank. Before the prosecution took place, the wife had obtained a decree of nullity on the ground of the husband's impotence. She was called as a witness for the prosecution, and the husband was convicted of forgery.

HELD: a voidable marriage was regarded as valid and subsisting until it had been avoided at the suit of the aggrieved party; accordingly, a spouse who had been lawfully married, but who had subsequently obtained a decree of nullity on the ground of the other spouse's impotence, was not a competent witness against that other spouse on his or her trial for a criminal offence committed during the coverture; and, therefore, the wife's evidence was inadmissible, and the husband's conviction must be quashed.

AS TO THE COMPETENCY OF SPOUSES AS WITNESSES IN CRIMINAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 217-221, paras. 304-307; and FOR CASES, see DIGEST, Vol. 14, pp. 450-453, Nos. 4757-4785, 4800-4805.

Cases referred to:

- (1) *Monroe v. Twisleton*, (1802), Peake, Add. Cas. 219; 170 E.R. 250; 22 Digest, Replacement, 413, 4451.
- (2) *Doker v. Hasler*, (1824), Ry. & M. 198; 171 E.R. 992; 22 Digest, Replacement, 414, 4452.
- (3) *O'Connor v. Marjoribanks*, (1842), 4 Man. & G. 435; 5 Scott, N.R. 394; 11 L.J.C.P. 267; 134 E.R. 179; 22 Digest, Replacement, 414, 4453.
- (4) *Jones v. Jones*, [1916] 2 A.C. 481; 85 L.J.K.B. 1519; 115 L.T. 432.
- (5) *Shenton v. Tyler*, [1939] 1 All E.R. 827; [1939] Ch. 620; 108 L.J.Ch. 256; 160 L.T. 314; 22 Digest, Replacement, 414, 4454.
- (6) *Wells v. Fisher*, (1831), 1 Mood. & R. 99 (174 E.R. 34); *sub nom. Wells v. Fletcher*, 5 C. & P. 12 (172 E.R. 855); 22 Digest, Replacement, 414, 4455.
- (7) *Re Eaves*, [1939] 4 All E.R. 260; [1940] Ch. 109; 109 L.J.Ch. 97; 162 L.T. 8; 2nd Digest Supp.
- (8) *Adams v. Adams*, [1941] 1 All E.R. 334; [1941] 1 K.B. 536; 110 L.J.K.B. 241; 165 L.T. 15; 2nd Digest Supp.
- (9) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.

APPEAL against conviction.

The facts appear in the judgment.

Buzzard for the appellant.

M. J. H. Turner for the Crown.

Cur. adv. vult.

Nov. 16. **LORD GODDARD, C.J.**, read the following judgment of the court. The question for decision in this appeal is whether a spouse who has been lawfully married, but has subsequently obtained a decree of nullity on the ground of the impotence of the other, can give evidence against that other on his or her trial for alleged criminal offences committed during the coverture. There has been hitherto, as far as we are aware, no decision on the subject; the point was not taken at the trial of the appellant nor was it raised in his notice of appeal. He sought leave to appeal on grounds which had no substance, but the court, on perusing the papers, saw that the question arose and gave leave to appeal so as to have it argued and determined. Counsel for the appellant, who was not counsel below, undertook the case at the request of the court and we are indebted to him for a careful and learned argument in which all the relevant authorities have been brought to our notice.

The facts can be stated very shortly and are that the appellant married the lady, who afterwards obtained the decree, in 1934. The marriage was duly and regularly celebrated and it is not contended that there was any impediment to the parties marrying. They lived together as man and wife till some time about 1949, when the wife presented a petition on the ground of the appellant's impotence. She was a woman of some means and had a substantial bank account. During 1947-48 the appellant forged his wife's name to thirty-two cheques, thereby obtaining in fraud of the bank some £7,000. On discovering that her account had been depleted by forgeries she sued the bank in February of this year, and, after the action had proceeded for a day before LLOYD-JACOB, J., the bank submitted to judgment. The learned judge sent the papers to the Director of Public Prosecutions who prosecuted the appellant for forgery. He was convicted before HAVERS, J., at the Norfolk Summer Assizes and sentenced to five years. Meanwhile, after the forgeries were committed, and before the action against the bank was tried, the wife had petitioned for, and subsequently obtained, a decree of nullity on Mar. 21, 1950. As is well known, at least to lawyers, the judgment, or, to use the old expression of the ecclesiastical courts, the sentence, in such cases declares that the petitioner is, and always has been, free of the bonds of matrimony. The prosecution, taking the view that this was equivalent to a judgment that the petitioner never had been the wife of the appellant, accordingly called her as a witness for the prosecution. Counsel for the Crown admitted, in our opinion rightly, that, had there been a decree of divorce, she would have been incompetent as a witness, but he contended that the position was different where the decree was one of nullity which in terms related back so that she was never married. In view of this admission, in strictness it is only necessary to consider whether there is any difference between the legal effect of a decree of divorce and a decree of nullity as affecting the competence of the wife as a witness, but the case, having never before arisen, is of importance, and, as decrees of divorce and nullity are far more frequent than in former days, we think it advisable briefly to review the law on the subject. Moreover, as this is, I think, the third case which has quite recently come before this court where a wife has been called against her husband, we think it may be as well to state the law of competency both in what we may call the ordinary case as well as where divorce or nullity come into question.

At common law one spouse could not give evidence against the other except in the case of offences against the person or liberty of the other party to the marriage. In such cases a spouse is both competent and compellable. There have been a considerable number of modern statutory exceptions to this rule which allow a wife to be a competent but not a compellable witness. The Criminal Evidence Act, 1898, s. 4 (1), deals with some of these cases, but not exhaustively. We need not set them out in detail. Suffice it to say that they are mostly offences against children and young persons, and sexual offences. In cases permitted by s. 12 and s. 16 of the Married Women's Property Act, 1882, which give spouses the

right to bring criminal proceedings for the protection of their property, it has been placed beyond doubt by the Married Women's Property Act, 1884, s. 1, that the spouses are both competent and compellable. Cases in which spouses can be admitted but not compelled to give evidence against the other are set out in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 9, pp. 218 and 219. Quite modern instances since the Criminal Evidence Act, 1898, are prosecutions for bigamy (Criminal Justice Administration Act, 1914, s. 28 (3)) and the Infant Life (Preservation) Act, 1929. The present case comes within none of the categories. There may be cases of forgery in which a spouse could give evidence against the other if the case could be brought within the sections of the Married Women's Property Act, 1882, referred to above, but we need not consider them as it was the bank that was defrauded in this case.

Now, here it should be remembered that the three statutes passed in the middle of last century to reform the law of evidence only affected civil proceedings. The Evidence Act, 1843, s. 1, removed the disqualification of a witness on account of interest or infamy, the Evidence Act, 1851, s. 2, removed the incompetence of the parties themselves, and the reform was completed by s. 1 of the Evidence Amendment Act, 1853, which allowed the spouses of the parties to give evidence. None of these statutes applied to criminal cases. So we now have to inquire whether the incompetency in a criminal case extended beyond the actual period of coverture. *Monroe v. Twisleton* (1), a case approved again and again, lays down in terms that a divorced wife cannot be called to testify against her husband in respect of any matters arising, or conversations that have passed, during the marriage. The same rule was applied in the case of a widow: *Doker v. Hasler* (2). Both of these cases were decided at nisi prius, the first by ALVANLEY, C.J., the second by BEST, C.J., afterwards LORD WYNFORD. They were approved by the Court of Common Pleas in *O'Connor v. Marjoribanks* (3), where the incompetence was extended to the widow's personal representatives. The reason for the rule was stated in this case both by TINDAL, C.J., and by MAULE, J., to be the necessity of preserving the confidence of the conjugal relation, and this reason for the rule has been stated in much the same terms by other judges of eminence. In *O'Connor's* case (3), MAULE, J., said (4 Man. & G. 445):

"A rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule."

As LORD SUMNER once observed in *Jones v. Jones* (4) ([1916] 2 A.C. 500): "Principles are like that". All these cases were cited without criticism or dissent by the Court of Appeal as recently as *Shenton v. Tyler* (5). These decisions were all before the three statutes to which we have just referred and we need not stay to inquire what effect they had on the doctrines laid down so far as civil proceedings are concerned. This was much discussed in *Shenton v. Tyler* (5), but those Acts have no application to criminal law. In a criminal case, therefore, subject to the common law and modern statutory exceptions mentioned above, a spouse remains incompetent to give evidence against the other, and the incompetence continues after divorce in respect of matters which arose during the coverture.

We have now to consider whether the same incompetency attaches after a decree of nullity. In our opinion, this depends solely on whether the marriage annulled was void or merely voidable. A marriage is void where there is bigamy, consanguinity, non-age, or where it has been celebrated contrary to the requirements of the law now collected and enacted in s. 25 to s. 49 of the Marriage Act, 1949. In those cases, the court will regard the marriage as never having taken place and no status of matrimony as ever having been conferred. Consequently, the parties never having been husband and wife, either is competent to be called against the other: *Wells v. Fisher* (6). The expressions to be found in some of the text-books and cases "de facto marriage" or "de facto wife" mean, in

our opinion, no more than that, while the parties may have appeared to be, and even have believed that they were, husband and wife, they were not, either because there was an impediment which prevented their marriage or that the marriage was not celebrated according to law. We say nothing about the absence of true consent as it is possible that, at least for certain purposes, other questions not material to this case might arise. But impotence only makes a marriage voidable. Until it has been avoided at the suit of the aggrieved party it will be regarded by every court as valid and subsisting. The parties are husband and wife till a decree has been pronounced, and if one party dies before or without one being obtained the other is the widow or widower of the deceased. The reason why the decree is in the form which declares that the petitioner is, and always has been, free of the bonds of matrimony was, if I may be permitted to quote a judgment of my own, shown in *Re Eaves* (7). The old sentence of the ecclesiastical courts following the canon law has been preserved, but, in truth, neither the petitioner nor the respondent has always been free. The petitioner has always been in the position to obtain freedom, but, until the decree, the tie remains binding. Since the decision of the Court of Appeal in that case, in *Adams v. Adams* (8), and in *De Reneville v. De Reneville* (9), it is, we think, settled that the courts now regard the parties to a voidable marriage before decree to be for all purposes truly husband and wife. Unless there is a decree they will live and die as married persons with all the incidents that attach to that estate. We think it clear that the reason for the incompetency applies to these persons with force at least equal to the case of divorced persons. It would be artificial in the highest degree to apply a different rule in the two cases. It is with no disrespect that one can say that what is artificial is the old form of sentence in these cases which, in truth, perpetuates a canonical fiction. The result is that the evidence of the appellant's former wife was inadmissible, and, as it dealt with a vital point in the case, we cannot apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. Accordingly, the conviction must be quashed.

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Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

BROWN v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS. FORD v. SAME.

[QUEEN'S BENCH DIVISION (Barry, J.), November 6, 1953.]

Compulsory Purchase—Application to quash order—Need to serve notice on statutory tenant—"Occupier"—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, para. 3 (1) (b).

A

A statutory tenant is an "occupier" within the meaning of the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, para. 3 (1) (b). Consequently, a notice in the prescribed form must (except in so far as the confirming authority directs in a particular case that para. 3 (1) (b) shall not apply) be given of a compulsory purchase order to every statutory tenant of land comprised in the order before the order is submitted to the confirming authority under para. 1 of sched. I to the Act.

B

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1065; and for sched. I, paras. 1-4, see *ibid.*, pp. 1075, 1076.

C Cases referred to:

(1) *Keeves v. Dean, Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 31 Digest, Replacement, 694, 7865.

(2) *Abbey v. Barnstyn*, [1930] 1 K.B. 660; 99 L.J.K.B. 369; 142 L.T. 619; 94 J.P. 196; Digest Supp.

D

(3) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401; 31 Digest, Replacement, 647, 7516.

(4) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 31 Digest, Replacement, 639, 7472.

(5) *Inland Revenue Comrs. v. John Dow Stuart, Ltd.*, [1950] 1 All E.R. 1; [1950] A.C. 149; 31 Tax Cas. 274; 2nd Digest Supp.

E

(6) *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C. 647; 66 L.J.Ch. 726; 77 L.T. 284; 61 J.P. 820; 35 Digest 219, 457.

APPLICATIONS under the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, para. 15, for orders quashing a compulsory purchase order.

The applicants were the statutory tenants of two flats in the same building, viz., 83, West Hill, Putney, in the metropolitan borough of Wandsworth. On or about Nov. 20, 1951, the borough council, by virtue of their powers under the Housing Acts, made a compulsory purchase order entitled the Metropolitan Borough of Wandsworth (Sutherland Grove) Compulsory Purchase Order, 1951, which included 81, 83, 85 and 87, West Hill, Putney. No notices were served on the applicants before the compulsory purchase order was submitted to the confirming authority. By order of the confirming authority, a public inquiry was held on Oct. 20, 1952. The applicants were unaware of the fact that the inquiry was being held and so raised no objection to the confirmation of the order. Later, as a result of the publicity given to the inquiry, the existence of the order became known to the applicants. In spite of communications addressed to the confirming authority by the applicants, the order was confirmed on May 1, 1953.

H

It was contended on behalf of the applicants that they were entitled to receive the individual notices prescribed by the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, para. 3 (1) (b); that such notices had not been served; that they had been substantially prejudiced by the council's failure to serve such notices; and that they were entitled to have the order quashed as the requirements of the Act had not been complied with. On behalf of the respondents it was conceded that no notices had been served on the applicants and that

they had been substantially prejudiced by the failure to serve such notices, but it was contended that the applicants as statutory tenants were not within the scope of para. 3 (1) (b), and that, consequently, they were not entitled to be served.

Scarman for the applicants.

J. P. Ashworth for the respondents.

BARRY, J., stated the facts and continued: The jurisdiction of the court to deal with matters of this kind arises from the Acquisition of Land (Authorisation Procedure) Act, 1946, sched. I, Part IV. Paragraph 15 (1) of sched. I reads:

"If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that . . . any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate, he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this schedule in that behalf, make an application to the High Court, and on any such application the court . . . (b) if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this schedule or of any regulation made thereunder not having been complied with, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant."

The Acquisition of Land (Authorisation Procedure) Act, 1946, standardises the procedure which is to be adopted by local authorities, amongst others, in relation to the compulsory purchase of land which the authority is authorised to purchase by some other statute. Section 1 (1) of the Act provides:

"The authorisation of any compulsory purchase of land—(a) by a local authority where, apart from this Act, power to authorise the authority to purchase land compulsorily is conferred by or under any enactment contained in a public general Act and in force immediately before the commencement of this Act, other than any enactment specified in sub-s. (4) of this section . . . shall, subject to the provisions of this and the next following section, be conferred by an order (in this Act referred to as a 'compulsory purchase order') in accordance with the provisions of sched. I to this Act (being provisions which, subject to certain adaptations, modifications and exceptions, correspond with provisions as to the authorisation of the compulsory purchase of land of the Local Government Act, 1933)."

Schedule I to the Act provides:

"1. A compulsory purchase order authorising a compulsory purchase by a local authority (hereafter in this schedule referred to as the 'acquiring authority') in a case falling within sub-s. (1) of s. 1 of this Act shall be made by the local authority and submitted to and confirmed by the authority having power under the enactment in question to authorise the purchase (hereafter in this schedule referred to as the 'confirming authority') in accordance with the following provisions of this schedule. 2. The compulsory purchase order shall be in the prescribed form and shall describe by reference to a map the land to which it applies. 3. (1) Before submitting the order to the confirming authority the acquiring authority shall . . . (b) except in so far as the confirming authority directs that this provision shall not have effect in any particular case, serve on every owner, lessee and occupier (except tenants for a month or any period less than a month) of any land comprised in the order a notice in the pre-

A scribed form stating the effect of the order and that it is about to be submitted for confirmation, and specifying the time (not being less than twenty-one days from the service of the notice) within which and the manner in which objections thereto can be made. 4. (1) If no objection is duly made by any such owner, lessee or occupier as aforesaid or if all objections so made are withdrawn, the confirming authority, upon being

B satisfied that the proper notices have been published and served, may, if the authority thinks fit, confirm the order with or without modifications. (2) If any objection duly made as aforesaid is not withdrawn, the confirming authority shall, before confirming the order, either cause a public local inquiry to be held or afford to any person by whom any objection has been duly made as aforesaid and not withdrawn an opportunity of appearing before and being heard by a person appointed by the confirming authority for the purpose, and, after considering the objection and the report of the person who held the inquiry or the person appointed as aforesaid, may confirm the order either with or without modifications. (3) If

C any person by whom an objection has been made avails himself of the opportunity of being heard, the confirming authority shall afford to the acquiring authority, and to any other persons to whom it appears to the confirming authority expedient to afford it, an opportunity of being heard on the same occasion."

The compulsory purchase order which the court is now asked to quash was made by the borough council on Nov. 20, 1951. At a later date, it was submitted to the appropriate Minister, who, I understand, was the Minister of Housing and

D Local Government, for confirmation. It is not suggested that the respondents failed in any way to comply with the requirements of para. 3 (1) (a) of sched. I to the Act. Advertisements were, as I understand it, duly published in two local papers, but those advertisements were not seen by the applicants in these two matters. It is common ground that the council did not serve on either of the two applicants the notices referred to in para. 3 (1) (b) of the schedule. In

E fact, the confirming authority, the Minister of Housing and Local Government, caused a public inquiry to be held, and that inquiry took place on Oct. 20, 1952. The applicants were unaware of the fact that this inquiry was to be held, and did not attend it or seek to raise any objection to the confirmation of this order.

As a result of the publicity given to the inquiry, the existence of the order subsequently came to the knowledge of the applicants, and communications

F were addressed to the confirming authority, but none the less the order was in fact confirmed on May 1, 1953. Both the applicants' cases now are that they were substantially prejudiced by the failure of the respondents, the mayor, aldermen and burgesses of the metropolitan borough of Wandsworth, to serve on them the notice prescribed by para. 3 (1) (b) of sched. I to the Act, and so failed to comply with one of the requirements of the schedule.

G It is conceded for the purposes of this case, and, I think, very rightly conceded, by counsel for the respondents, that assuming the applicants were entitled to receive individual notices of the making of this order and its submission for confirmation to the confirming authority, they were in truth substantially prejudiced by the failure of the borough council to serve any such notice on them. That admission made only for the purposes of this case, was, I am quite satisfied,

H rightly and properly made, because there can be no doubt on the evidence that, owing to the lack of any notice of the impending public inquiry, and owing to the lack of any knowledge that the respondent council were proposing to obtain confirmation of this order, the two applicants were deprived of the opportunity of lodging objections to the confirmation and of being heard by the inspector or other officer appointed by the Minister to conduct the inquiry which was in fact held. As a result, their case and the arguments which they wished to submit to the confirming authority in an endeavour to persuade him not to confirm this

order, have never been put, and, in consequence, I have no doubt that they were, indeed, substantially prejudiced, to use the words of the schedule.

Thus, the sole question for the court is: Were the applicants, who were both statutory tenants of premises falling within the Rent Restrictions Acts, either "owners, lessees or occupiers (except tenants for a month or any period less than a month)" of any land comprised in the order. The question is not an easy one to answer. It is common ground between the applicants and the respondents that the applicants, whatever else they were, were not the owners of these properties. It is now, I think, common ground that the applicants could not properly be described as the lessees of the properties, nor can it be said that they were tenants of the properties for a month or any period less than a month. The whole difference between the parties is now focussed on the proper construction of one word, namely, the word "occupier" in sub-para. (b) of para. 3 (1) of the schedule.

Counsel for the applicants, in opening his case, drew my attention to a large number of authorities which related to the true legal position of a statutory tenant under the Rent Restrictions Acts. He referred to those cases primarily in support of his submission that the applicants in this case were not tenants in the true sense, and, therefore, they could not in any proper construction of the words be regarded as tenants for a month or any period less than a month so as to fall within the exception contained in sub-para. (b) of para. 3 (1). However, the cases are of some importance as indicating what the real status of a statutory tenant, so called, should be taken to be. The conditions of statutory tenancy are described in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). That sub-section reads:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice."

Since 1920 the courts on numerous occasions have been occupied by arguments as to the true status of a person who was at one time a contractual tenant and continues in possession of premises by virtue of the protection afforded to him against ejectment by the various Rent Restrictions Acts. I do not think that it would be of assistance to the parties if I reviewed those cases in detail. It is clear that a statutory tenant is not a tenant in any true sense of that term. That has been pointed out on several occasions by the Court of Appeal. I think it is only necessary for me to refer to a few words in the judgment of BANKES, L.J., in *Keeves v. Dean, Nunn v. Pellegrini* (1). BANKES, L.J., used these words ([1924] 1 K.B. 690):

"These two appeals from the Divisional Court raise a very important question under the Increase of Rent, etc. Act, 1920—namely, whether a person who has been a tenant of a dwelling-house, whose tenancy has been determined by notice to quit, but who has remained in possession against the will of his landlord, can assign his statutory position to another person. The person who so seeks to assign has come to be known as a 'statutory tenant', and I think it is a pity that that expression was ever introduced. It is really a misnomer, for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one, and as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

Similar views as to the nature of the so-called statutory tenancy have on many subsequent occasions been expressed by the Court of Appeal. It is, perhaps, worth referring to a few words used by GREER, L.J., in *Abbey v. Barnstyn* (2). He said ([1930] 1 K.B. 669):

A "But the term 'statutory tenant' was in the main used to describe a person enjoying the rights of an occupier in class 2. Certain modifications of the first statute were made by the Courts Emergency Powers Act [and other Acts] . . . Neither of these statutes affect the questions we have to determine in this appeal. The Act of 1920 consolidated and amended the earlier Acts and made certain amendments which are not material. It is with this Act and the Act of 1923, which provides that in certain cases the Act shall no longer apply to certain houses, that we are concerned in this appeal. In the margin to s. 15 of the consolidating Act of 1920 the words 'statutory tenancy' appear as applying to the relationship between the ex-landlord and the ex-tenant, where the latter is protected from ejection. The section itself does not use the term. It provides that so long as the tenant retaining possession by virtue of the provisions of that Act retains possession he must observe and shall be entitled to the benefit of all the terms and conditions of the original tenancy. The term 'statutory tenant' has been frequently criticised, but it does not seem to me to be inapt to describe the occupier, who by statute is entitled to remain in occupation after his contractual tenancy has been determined, but must remain in occupation subject to the obligations and benefits of the original contract of tenancy. The use of the word 'tenant' for such an occupier does however create some difficulty when we have to interpret the word 'tenant' when used in other parts of the Act, and in the decontrolling section of the Act of 1923."

The House of Lords has on at least one occasion approved of the general sense of the construction of the Act of 1920 which was indicated in these judgments of the Court of Appeal and other judgments to which I have not referred, and in two recent cases their Lordships have made references to this subject. In *Baker v. Turner* (3) LORD REID in his speech says ([1950] 1 All E.R. 853):

F "It has long been settled that the Rent Acts do not prevent an owner from terminating the tenancy of his tenant in the ordinary way: what they do is to give to a person who has been tenant a right to remain in possession after the tenancy has gone. A person with such a right is commonly called a statutory tenant, but that name, though convenient, is inaccurate. The true position of such a person was stated as long ago as 1923 by BANKES, L.J., in *Keeves v. Dean* (1) . . ."

Then the learned Lord cites the passage in the judgment of BANKES, L.J., to which I have already referred.

G One of the most recent pronouncements on this subject was made by the Court of Appeal in *Dudley & District Benefit Building Society v. Emerson* (4). In that case, SIR RAYMOND EVERSHED, M.R., said ([1949] 2 All E.R. 257):

H "Furthermore, in certain circumstances (when, for example, an effective notice to quit has been given) the contractual tenancy between A and B may come to an end, and there then is created what is known as a statutory tenancy, B remaining in possession as a 'statutory tenant' of A. It has been said in these courts that a statutory tenancy, as the phrase is commonly used, is a somewhat inapposite expression, for it confers on the so-called statutory tenant no estate or interest in the land. He cannot part with it or dispose of it, and in certain circumstances the right to possession, which is its principal feature, may pass to persons who would be quite different from the persons who would get the benefit of a contractual tenancy when a tenant dies."

On that state of the authorities as to the true position of a statutory tenant,

counsel for the applicants argued that clearly a person living in premises as the statutory tenant of those premises was the occupier of the premises, and as such, under the clear wording of para. 3 (1) (b) of the schedule, entitled to service of the notice in the form prescribed by that sub-section.

Counsel for the respondents submitted that, in the circumstances of these two cases, the applicants could not properly describe themselves as occupiers of these flats. He submitted that in order to establish occupation within the meaning of para. 3 (b) of sched. I, an applicant must show first of all that he or she is in actual physical occupation of the premises. He conceded that, in both the present cases, the applicants were in physical occupation of the premises, but he said they must also show that their occupation was of a type which brought them within the true meaning of para. 3 (b). He submitted that in the context in which that word is to be found in para. 3 (b) of the schedule, "occupier" must mean some person who has some estate or interest in the property. He supported that view by references first to the immediate context in which the word "occupier" is to be found. It is to be found intimately associated with the words "owner" and "lessee", and also immediately followed by the words

"except tenants for a month or any period less than a month."

He said that there the statute is referring to the various classes of persons who may be interested in land or houses, and is referring to them in descending order of importance, first the owner, then the lessee, and lastly the occupier. That occupier, said counsel for the respondents, must be someone who has some legal interest in the land which he occupies. He also supported his argument in favour of this somewhat narrow construction of the word "occupier" by reference to the provisions of Part IV of the schedule to which I have already referred. He attached particular importance, and I think rightly, to the closing words of para. 15 (1) (b) of Part IV of the schedule where the court is given power to

"... quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant."

In view of the authorities to which I have referred, counsel for the respondents argues that neither of the applicants in this case has any property properly so called in any of the land or buildings comprised in this compulsory purchase order. They have nothing more, he says, than a mere personal right to remain in possession of parts of those properties until ordered to leave by an order of the court, which can only be made under certain conditions and in certain circumstances provided by the Rent Restrictions Acts. He says that the word "occupier" must have some restriction placed on its interpretation, otherwise it might cover any person who was on the premises for a short period, no matter in what capacity he was there. As it is a word which can be used in different senses (and he pointed out that it was used in different senses in a number of enactments, enactments relating to rent restrictions, enactments relating to rating, and in other Acts, in particular one relating to leasehold property, the Leasehold Property (Temporary Provisions) Act, 1951, and that "occupation" is used in a special sense under the Defence (General) Regulations, 1939, reg. 68CB (1)) and is susceptible of these various shades of meaning, counsel for the respondents has invited me to deal with that word as though it was an ambiguous word in the sense described by LORD REID in *Inland Revenue Comrs. v. John Dow Stuart, Ltd.* (5) ([1950] 1 All E.R. 19). He also relied on the principle enunciated by LORD HERSCHELL in *West Derby Union v. Metropolitan Life Assurance Society* (6) ([1897] A.C. 655). By virtue of the principles there enunciated, he submitted that the court was entitled to look at the proviso to the words used, and to construe the words if they were capable of more than one meaning in the light of the proviso. Here, he says, the proviso excludes

tenants for a month or any period less than a month, and that being so, he submits that the word "occupier", which immediately precedes that proviso or exception, should be read as including only persons holding such an interest in land as is in fact held by a tenant.

Again relying on the general scope of the Act as a whole, counsel for the respondents submitted that it was clear that the legislature could not have intended that a local authority minded to make and have confirmed a compulsory purchase order should be required to serve notice on a vast floating population of controlled tenants, any one of whom might, on receipt of this notice, demand a public inquiry, and, if occupiers within the meaning of the schedule, any one of them would be entitled to insist that such a public inquiry was in fact held.

Forceful though those arguments may be, I do not think that I should accept them. To my mind, it is placing a most artificial limitation on the ordinary meaning of the word "occupier" to exclude from its scope persons in the position of statutory tenants under the Rent Restrictions Acts. I need only refer to the words of GREER, L.J., in *Abbey v. Barnstyn* (2). Again and again in his judgment in that case GREER, L.J., used the word "occupier" to describe the position of a statutory tenant. He says ([1930] 1 K.B. 670):

"The use of the word 'tenant' for such an occupier does however create some difficulty when we have to interpret the word 'tenant' when used in other parts of the Act . . ."

Whatever criticism he and the other lords justices in that case and many other cases may have made of the word "tenant", no one has suggested, so far as I am aware (and counsel has been unable to draw my attention to any case which might even suggest) that persons living in premises—occupying them by virtue of the provisions of the Rent Restrictions Acts—are not occupiers of those premises in the ordinary and reasonable sense of that term. It seems to me that, if the legislature had desired to exclude statutory tenants from the province of para. 3 (1) (b) of the schedule, they would have done so in clear terms.

As counsel for the applicants has pointed out, the word "occupier" is used in conjunction with and immediately following the words "owner" and "lessee". "Occupier", no doubt, in this context includes persons occupying the premises, perhaps under agreements for leases or under short tenancies created verbally or in writing, but not under a lease. I do not think, however, that it would be right for me to construe the word "occupier" as solely referring to tenants other than lessees in the strict sense of that term, because it does appear to me that the Act makes a marked differentiation between the meaning of the word "occupier" and the meaning of the word "tenant" by the exception of tenants for a month or any period less than a month from the right to obtain a notice. It seems to me that it would have been quite simple if "occupiers" were to be used synonymously with the word "tenant" for the Act to have read "serve on any owner, lessee or tenant (except tenants for a month or any period less than a month)". However, the Act uses the two distinct separate words "occupier" and "tenant" and I am satisfied in those circumstances that "occupier" means something more or something wider than a tenant, though it includes tenants within its scope.

I asked counsel for the respondents what class of person other than tenants could be covered by the word "occupier", if that word, as he suggested, meant in this context someone who had some estate or interest in the property. With all his ingenuity, counsel for the respondents was unable to provide an answer to that question. He quite rightly said that the fact that an answer cannot be found does not necessarily mean that the word must be given the wider interpretation contended for by counsel for the applicants. I think it somewhat curious, however, that the word "occupier" should be used in this sense if it

cannot include within its meaning any one but one who holds an actual estate or interest in the property.

I think that on any reasonable construction of the word "occupier", the meaning of that term must include persons occupying premises by virtue of the rights conferred on them by the Rent Restrictions Acts. I was for some time impressed by the argument of counsel for the respondents based on the use of the words "property of the applicant" in sub-para. (b) of para. 15 (1) of Part IV of sched. I. I think on the whole, and again not without some hesitation, that counsel for the applicants has provided the true solution for that difficulty. First of all he says that one must not allow a sentence of that kind, situated in a quite different part of the schedule, to influence one in the construction of what he says, and what, I think, he rightly says, is a word of the plainest possible meaning, that is to say, the word "occupier". He says that "any property" in para. 15 (1) is not used in the sense of any interest in land. The words, he says, are apt to describe the form of property which a statutory tenant does, undoubtedly, possess. It is not a form of property known to the common law, it is a creature of statute, it does not create any estate in the land or premises occupied by the statutory tenant, but none the less I think that would be a very unreal view to take if I were to hold that in no sense of that term can a statutory tenant be regarded as having a right of property conferred on him by the Rent Restrictions Acts.

I think on the whole that I should not affect what I think otherwise is the clear construction of the word "occupier" by taking any narrow view as to the meaning of the term "any property" in the latter part of the schedule. It is true that "occupier", as counsel for the applicants concedes, may have to be qualified in some sense so as to exclude a servant, a trespasser, or a squatter, or some person who has no interest, to use that word in its widest sense, in the land. I think, using the word "occupier" in its widest sense, that the Rent Restrictions Acts do confer on a protected or statutory tenant some interest in the premises which he occupies. As I say, it is an interest which is purely the creature of statute, but it is there, and it is, I am satisfied, an interest of very considerable value. It is a personal interest, it is, in some sense, a negative interest, being a right not to be removed from the premises, but none the less I think it is an interest which can properly be referred to as "any property of the applicant" in the sense in which that phrase is used in the schedule. I do not for a moment venture to inquire whether, when this Act was being drafted, Parliament had this particular problem in mind—they may have had or they may not. It is my duty to construe statutes in the ordinary and natural sense of the words which are used. Adopting that canon of construction, and not regarding this as a penal or confiscatory statute, I am satisfied that the applicants in both these cases were occupiers of these two flats at 83, West Hill, Putney, and that as such occupiers they should have had notices served on them in accordance with the provisions of para. 3 (1) (b) of sched. I to the Act of 1946. The requirements of that paragraph have not been complied with. There being admittedly substantial prejudice to the applicants, I think that I have no option but to accede to their request to quash the two orders in so far as they affect the rights of the applicants as statutory tenants of the premises in question.

Order accordingly.

Solicitors: *Murray, Hutchins & Co.* (for the applicants); *Solicitor, Ministry of Health* (for the respondents).

[Reported by MICHAEL MALONEY, ESQ., Barrister-at-Law.]

BOWSKILL v. DAWSON AND ANOTHER.

[QUEEN'S BENCH DIVISION (DEVLIN, J.), November 2, 3, 17, 1953.]

Document—Admissibility in evidence—Copy—Need to show undue delay or expense caused by production of original—Copy of statement made to police after road accident—Original statement lost—"Person interested"—Author of statement party to action for negligence—Evidence Act, 1938 (c. 28), s. 1 (2), (3).

After an accident in which a car collided with a motor cycle and then struck and damaged the rear of a stationary motor lorry the driver of the car made a statement to a police inspector and signed it. The next day a copy of that statement was made by a police sergeant, and subsequently the original was lost. The driver of the car began an action for damages for negligence against the personal representatives of the motor cyclist (who had been killed in the accident). Before trial of the action, the plaintiff died in circumstances unconnected with the accident.

HELD: (i) under the Evidence Act, 1938, s. 1 (2), a copy of an original document was admissible as evidence only if the court was satisfied "that undue delay or expense would otherwise be caused"; that sub-section was not a provision designed as a substitute for the common law rule as to secondary evidence of lost documents, and it implicitly required that the original document should be in existence; the only question which arose was whether it would cause unnecessary delay or expense to have the original produced; and so, in the circumstances of the present case the copy of the driver's statement was not admissible.

(ii) the document was also inadmissible under s. 1 (3) of the Act as being a statement made by a "person interested" when legal proceedings could be anticipated.

FOR THE EVIDENCE ACT, 1938, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 626.

ACTION for negligence.

The plaintiff, a doctor, when driving his car along the Colnbrook by-pass was involved in a collision with a motor cyclist and then ran into the back of a stationary lorry. The motor cyclist was killed. The plaintiff brought an action for damages for negligence against the administrators of the estate of the deceased motor cyclist. Shortly after the accident the plaintiff made a statement which was taken down in writing by a police inspector and signed by the plaintiff in his presence. The following day a typed copy of the statement was made by a police sergeant on a form headed: "Form No. 27 of the Buckinghamshire Constabulary". The original statement was lost and before the trial of the action the plaintiff died in circumstances unconnected with the accident. The action was continued by his executors, and at the hearing it was sought to produce in evidence the copy of the plaintiff's statement.

Marven Everett, Q.C., and Tudor Evans for the plaintiff.

Fearnley-Whittingstall, Q.C., and P. M. O'Connor for the defendants.

DEVLIN, J., stated the facts and continued: It is clear that the only way in which the copy of the statement can become evidence is by virtue of the Evidence Act, 1938, s. 1 (1) of which provides:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact . . ."

if certain conditions are satisfied. That sub-section says: "production of the original document". In my judgment, these words, if they stood alone, would

be sufficient to exclude the ordinary common law rule which admits secondary evidence of a lost document. It has been proved in this case that the original statement which was taken down by the police inspector and signed by the plaintiff has been lost, and that is why the copy has been tendered. It cannot be admitted merely by the common law rule as to secondary evidence of lost documents. In this sub-section the words "on production of the original document" mean that the original document itself must be produced. The statute makes admissible a document which would not, in common law, be admissible, and, therefore, its provisions must be strictly followed.

The only qualification, therefore, to the words "original document" that can be introduced must be found, not in the common law, but from the statute itself. Section 1 (2) provides:

"In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s. (1) of this section shall be admissible as evidence . . . (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be."

Counsel for the defendants argues that sub-s. (2) is not applicable in this case. The condition which is required to be satisfied before a copy can be produced is that the court should, having regard to all the circumstances of the case, be satisfied that undue delay or expense would otherwise be caused. It is not, therefore, a provision designed as a substitute for the common law rule as to secondary evidence of lost documents. It requires the court to be satisfied that undue delay or expense would otherwise be caused, and, therefore, implicitly requires that the original document is in existence, and the only question that arises is whether it would cause unnecessary delay or expense to have it produced. That is borne out by what follows in the rest of the section. The copy to be admitted must be certified to be a true copy. It looks as if the legislature had in mind the rule that where there are original documents which are kept in the custody of, for instance, a bank or a public authority, and it is inconvenient to have them brought to court, a certified copy is accepted instead.

I am bound to say that I think that it is not an altogether satisfactory ground for excluding documents. I have no reason to doubt that the copy in this case is an accurate copy and of just as much value as the original would have been. However, I think an Act of this sort must be carefully applied, and, in my judgment, the Act does not allow the admission of a copy which is produced in the way that this one has been produced in substitution for a lost document.

That really concludes the matter, but I think it is desirable that I should also deal with the second point and express my view about that. That turns on the well-known provisions of s. 1 (3), which provides that:

"Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

Section 1 (5) permits the court to draw any reasonable inference from the form or contents of the document in which the statement is contained. Accordingly, with the consent of counsel for the defendants, I have looked at the document which counsel for the plaintiff desires to put in.

I am satisfied that, quite apart from the fact that the plaintiff admittedly knew that the motor cyclist was killed and, therefore, that there would be an inquest, it

is a case in which a person in the plaintiff's position would have been likely to anticipate that civil proceedings would result. It is plain, I think, that he was personally interested. He was the driver and the owner of the car. Of course, nobody knows for certain that proceedings will result from a road collision—there might, for example, be a “knock for knock” agreement. Subject to that, it seems to me to be obvious, to take no other feature of the case, that a stationary lorry having been struck from behind by a motor car and having on the evidence been damaged, the owner of the lorry would require to be indemnified by the owner of the car. It is plain from the nature of the statement at which I have looked that the plaintiff was naturally concerned to explain how it came about that, without his fault, he drove into the back of the stationary lorry. I think the case also falls within sub-s. (3).

Accordingly, for these reasons, I exclude the statement.

Statement held inadmissible.

Solicitors: *E. P. Rugg & Co.* (for the plaintiff); *W. Easton & Sons* (for the defendants).
[Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

Re GREAVES' WILL TRUSTS. PUBLIC TRUSTEE v. ASH AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 14, November 12, 1953.]

Power of Appointment—Revocation—Fraudulent exercise—Special power to appoint among children and issue—Appointor having life interest in income of trust fund—Revocable appointment to children and grandchildren—Revocation with intent to further scheme for distribution of part of capital of trust fund between appointor and adult children.

By his will, dated Nov. 19, 1931, the testator, who died on Dec. 6, 1934, gave his residuary estate (referred to hereafter as “the trust fund”) to his trustee on trust to pay the income thereof to his daughter (referred to hereafter as “the appointor”) during her life, and, subject thereto, the trustee was to stand possessed of the trust fund and the income thereof on trust for all or any of the children or remoter issue of the appointor at such time and in such shares as she should by deed revocable or irrevocable or by will appoint, and in default of and subject to any such appointment on trust for all the appointor's children who should attain the age of twenty-one, in equal shares. By a deed of appointment, dated May 30, 1938, in which she reserved to herself the power of revocation, the appointor directed that the trust fund was to be divided into as many equal shares as there should be (a) children of hers living at her death who should attain the age of twenty-one, or, being daughters, marry under that age, and (b) children of hers who should have predeceased her leaving children living at her death. She then directed the trustee to hold the share of each such child who survived her on protective trusts for that child during his or her life, and, subject thereto, to hold the capital and income of the share of each child on trust for that child's children at the age of twenty-one. The appointor had five children, the youngest of whom was still an infant. In 1951 the appointor and the four adult children suggested to the trustee a scheme for the distribution of part of the capital of the trust fund, the details of the scheme being as follows: (a) that the appointor should revoke the appointment of May 30, 1938, and release her power of appointment; (b) that the trustee should divide the trust fund into five

equal shares and appropriate one of such shares to each of the five children; (c) that the share appropriated to each adult child should be divided between the appointor and the child actuarially, according to the respective values of their interests therein, the appointor releasing her life interest in the part to be taken by the child, and the child, by way of exchange, assigning to the appointor her reversionary interest in the part to be taken by the appointor; and (d) that, in the carrying out of the scheme, the appointor and the adult children should be separately represented both by solicitors and actuaries, and that due regard should be had to any estate duty payable in respect of the trust fund on the death of the appointor for which the trustee would be liable. With the object of carrying the scheme into effect, on Feb. 15, 1952, the appointor executed a deed whereby she revoked the appointment of May 30, 1938, and on Feb. 16, 1952, she executed a deed releasing the trust fund from the power of appointment conferred on her by the testator's will, to the intent that the trust fund should devolve according to the provisions contained in the will in default of appointment. The trustee sought the opinion of the court on the validity of the deed of revocation.

HELD: as the result of the scheme would be to benefit the appointor by putting her in possession of a large capital fund in exchange for her life interest, the scheme, notwithstanding the fact that it was beneficial to all parties, did not comply with the requirement that the donee of a power must not acquire any benefit for himself directly or indirectly: dicta of LORD WESTBURY, L.C., and LORD ST. LEONARDS in *Portland (Duke) v. Topham (Lady)* (1864) 11 H.L. Cas. 54, 55 and of LORD PARKER OF WADDINGTON in *Vatcher v. Paull* ([1915] A.C. 378), applied; a deed of revocation was subject to the doctrine of fraud on a power: *Re Jones' Settlement* ([1915] 1 Ch. 373), followed; and, therefore, as the deed of revocation was executed to enable the scheme to take effect, the appointment of May 30, 1938, was not effectively revoked by the deed of revocation.

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 504-513, Nos. 972-1052.

Cases referred to:

- (1) *Shirley v. Fisher*, (1882), 47 L.T. 109; 37 Digest 507, 1001.
- (2) *Re Jones' Settlement*, [1915] 1 Ch. 373; 84 L.J.Ch. 406; 112 L.T. 1067; 37 Digest 508, 1006.
- (3) *Portland (Duke) v. Topham (Lady)*, (1864), 11 H.L. Cas. 32; 11 E.R. 1242; *sub nom. Portland (Duke) v. Topham (Lady), Bentinck (Lady) v. Topham (Lady), Bentinck (Lord) v. Topham (Lady)*, 34 L.J.Ch. 113; 10 L.T. 355; 37 Digest 503, 963.
- (4) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.
- (5) *Re Crawshaw*, [1948] 1 All E.R. 107; [1948] Ch. 123; [1948] L.J.R. 586; 2nd Digest Supp.
- (6) *Re Huish's Charity*, (1870), L.R. 10 Eq. 5; 39 L.J.Ch. 499; 22 L.T. 565; 37 Digest 507, 999.
- (7) *Re Merton's Settlement*, [1953] 2 All E.R. 707.

ADJOURNED SUMMONS to determine, inter alia, whether, in the circumstances in which a deed of revocation, dated Feb. 15, 1952, was executed by the defendant, Mrs. Ash, an appointment, dated May 30, 1938, whereby she exercised the power given to her by the will of the testator, Henry Greaves, was effectively revoked by the said deed of revocation with the result that, under the trusts of the will and a deed of release, which was executed by Mrs. Ash on Feb. 16, 1952, the testator's residuary estate was now held on trust for Mrs. Ash during her life

and after her death for such of her children as had attained or should hereafter attain the age of twenty-one years, or marry under that age, in equal shares.

A Mrs. Ash had five children, the youngest of whom was still an infant. Under the will the income of the trust fund was to be paid to Mrs. Ash during her life. By the appointment of May 30, 1938, which was revocable, she exercised the power given to her by the will in favour of her children and grandchildren. The deed of revocation and the deed of release were executed with the intention of carrying into effect a scheme whereby, inter alia, part of the capital of the trust fund might be distributed between Mrs. Ash and the adult children.

Wigglesworth for the plaintiff, the Public Trustee.

Jopling for the first defendant, the appointor, and the second, third, fourth and fifth defendants, her adult children.

B *Templeman* for the sixth defendant, the appointor's infant child.

W. F. Waite for the seventh defendant, the appointor's infant grandchild.

Cur. adv. vult.

C Nov. 12. VAISEY, J., read the following judgment. This case raises the question whether the doctrine of frauds on powers applies to an exercise of a power of revocation contained in a revocable appointment. If that question is answered in the affirmative, there is the further question whether the revocation of an appointment in the present case, made in the circumstances hereinafter mentioned, was or was not fraudulent.

D The matter arises in the following way. Henry Greaves, the testator, made his will on Nov. 19, 1931. He appointed the Public Trustee to be the trustee and executor thereof and constituted a capital fund of residue which he defined as "the trust fund". He directed that one half of the income of the trust fund should be paid to his wife during her life—she died in 1944—and subject thereto he directed that the whole of the income of the trust fund should be held on trust for his daughter, the defendant, Mrs. Ash, during her life. Subject to those interests, he directed that his trustee should stand possessed of the trust fund and the income thereof in trust for all or such one or more exclusively of the others or other of the children or remoter issue of Mrs. Ash at such time and if more than one in such shares and with such provisions for maintenance, advancement and otherwise at the discretion of any persons and generally in such manner for the benefit of such children or issue or some or one of them as Mrs. Ash should by deed revocable or irrevocable or by will or codicil appoint, with an ultimate trust in default of and subject to any such appointment for all or any of the children or child of Mrs. Ash who, being male, attained the age of twenty-one years or, being female, attained that age or married under that age, and if more than one in equal shares, subject to the usual hotchpot provision. The testator died on Dec. 6, 1934, and his will was duly proved. His estate was a large one, being sworn at a sum of upwards of £420,000.

G On May 30, 1938, Mrs. Ash executed a deed of appointment whereby she (inter alia) directed the trustee of the will to divide the trust fund into as many equal shares as there should be children of hers living at her death who, being sons, should have attained the age of twenty-one years or, being daughters, should have attained that age or have married or should marry under that age, and as there should be children of hers who should have predeceased her leaving children living at her death, and that each share should be held on the trusts following, that is to say: (a) on trust to hold the income of each share in the trust fund attributable to children who should not have predeceased her on protective trusts for the benefit of the child during his or her life; (b) subject thereto, on trust to hold the capital and income of the share of each child of Mrs. Ash living on the date of the death of the testator for all or any of the children and child of such child who, being male, should attain the age of twenty-one years or, being female, should attain that age or marry, in equal shares

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if more than one; and (c) subject as aforesaid, on trust to hold the capital and income of each share of every other child of Mrs. Ash for all and any of the children and child of such child born in Mrs. Ash's lifetime and who, being male, should attain the age of twenty-one years or, being female, should attain that age or marry, and for all and any of the children and child of such child as should be born after Mrs. Ash's death and who, whether males or females, should be living at, or, being females, should marry before, the expiration of twenty years from Mrs. Ash's death, if more than one in equal shares. Further, by the said deed of appointment Mrs. Ash also purported to make certain modifications in the protective trusts contained in the statute in that behalf [: see Trustee Act, 1925, s. 33]. She also reserved to herself power at any time or times thereafter by any deed or by will or codicil wholly or partially to revoke the appointment thereinbefore contained. Mrs. Ash is said never to have exercised her power of appointment among issue save by the said appointment of May 30, 1938. She was born on Jan. 30, 1897. She has been married once only, namely, to her present husband, and of that marriage there have been issue five children and no more, namely: (i) a daughter, the defendant, Elizabeth Woods, who was born on Jan. 13, 1926, and has been married once only, namely, to her present husband, and of that marriage there has been issue one child, who was born on June 10, 1951, namely, the defendant, Jane Elizabeth Woods; (ii) a daughter, the defendant, Barbara Frances Ash, born in 1927; (iii) a daughter, the defendant, Rachel Eleanor Ash, born in 1929; (iv) a daughter, the defendant, Mary Margaret Ash, born in 1930; and (v) a daughter, the defendant, Janet Ruth Ash, born on Dec. 29, 1935.

About two years ago, a scheme was suggested to the Public Trustee by Mrs. Ash and her adult daughters for a partial distribution of the capital of the trust fund, and particulars of the scheme were as follows: (a) that Mrs. Ash was to revoke the said appointment of May 30, 1938, and release her power of appointment among issue; (b) that the Public Trustee should divide the trust fund into five equal shares and appropriate one of such shares to each of Mrs. Ash's five children; (c) that in the case of each of the adult children the share of the trust fund appropriated to such child should be divided between Mrs. Ash and the child actuarially according to the respective values of their interests therein, Mrs. Ash releasing her life interest in the part to be taken by the child and the child, by way of exchange, assigning her reversionary interest to Mrs. Ash in the part to be taken by Mrs. Ash; and (d) that in the carrying out of such scheme Mrs. Ash, on the one hand, and her adult children, on the other hand, should be separately represented both by solicitors and actuaries, and that due regard should be had to any estate duty payable in respect of the trust fund on the death of Mrs. Ash for which the Public Trustee would be liable. The present proceedings were brought by the Public Trustee as plaintiff against Mrs. Ash, her five daughters and the infant daughter of Mrs. Woods as defendants, owing to doubt in regard to the proper answers to the questions stated in the opening words of this judgment.

Having decided to carry the scheme into effect, if possible, Mrs. Ash and her adult children have respectively entered into the following documents: (a) Mrs. Ash on Feb. 15, 1952, executed a deed whereby she revoked the appointment of May 30, 1938, and on Feb. 16, 1952, she executed a further deed releasing the trust fund from the power of appointment conferred on her by the testator's will, to the intent that the trust fund should devolve according to the provisions contained in the will of the testator in default of appointment by her; and (b) on Feb. 18, 1952, she entered into four conditional agreements for exchange (one with each of her four adult daughters), such agreements being agreements to exchange interests as proposed by the scheme as before-mentioned, but all were conditional on the outcome of the present proceedings and have, in fact, been superseded by further conditional agreements, dated May 15, 1953, to which I will presently refer. Subsequently to February,

1952, it was agreed that the scheme should not include those parts of the trust fund which consisted of rentcharges or freehold lands, and certain investments representing capital moneys arising from the sale of certain lands. The balance of the trust fund has been divided into five equal shares and the division is accepted by the Public Trustee for the purposes of the appropriations under the scheme. In the substituted conditional agreements for exchange, the respective one-fifth shares of the balance of the trust fund appropriated to the adult daughters respectively are dealt with as follows. In sched. II thereto, in each case, is set out the particulars of the share of the property appropriated to the daughter in question, and in each case Mrs. Ash and the child in question agree for the exchange of Mrs. Ash's interest in the investments in Part 2 of that schedule for the interest of the child in the investments in Part 1 of that schedule, such agreement being, in each case, conditional on the validity of the said deed of revocation being established in these proceedings. In the event of the deed of revocation being held to be invalid, questions will arise as to the extent to which the trusts declared by the said appointment intended to take effect after the death of Mrs. Ash are, if unrevoked, effective. I will refer to this later on.

It cannot be disputed that the result of the scheme, which derives from and depends on the deed of revocation, is to place Mrs. Ash in possession of large capital funds. Nor, I think, can it be doubted that the scheme is, at least, as much for the benefit of Mrs. Ash as for the benefit of her daughters. The first question, therefore, is whether the deed of revocation is of such a nature as to be liable to be invalidated under the doctrine of fraud, as that word is used in this connection. It is surprising that the authorities are so few and not altogether satisfactory. In *Shirley v. Fisher* (1) it would seem that BACON, V.-C., said that such a deed was not so liable. On the other hand, ASTBURY, J., in *Re Jones' Settlement* (2), came quite definitely to the opposite conclusion and explained *Shirley v. Fisher* (1) as being a case in which there was no evidence of fraud so that the pronouncements of BACON, V.-C., on the general proposition were no more than obiter. The headnote in *Re Jones' Settlement* (2) includes the following statement:

"Although the doctrine of fraud on a power does not apply to the release of a limited power . . . it applies to the revocation of an appointment thereunder. The donee cannot therefore revoke a previous appointment with the avowed object of obtaining a benefit by that revocation."

The judgment of ASTBURY, J., concludes with the following statement ([1915] 1 Ch. 381):

"In the present case, although there is no evidence of fraud in the ordinary sense, I still have to determine whether it is not what is called a fraud on the power for the wife to execute her fiduciary power of revocation with the avowed object of getting £890 for herself, she being neither an object of the power, nor entitled in default of appointment. There can only be one answer to that question."

In view of the plain words of ASTBURY, J., to which I have just referred, I think that I ought not to attempt to re-open the general question whether a power of revocation can be fraudulently exercised, and I propose to follow him and to say that it can. It is, undoubtedly, somewhat anomalous that the release of a power is not subject to the provisions as to fraud while the revocation of an appointment is so subject, but the whole doctrine is somewhat technical in its application. In FARWELL ON POWERS, 3rd ed., at p. 497, this sentence occurs:

"It must be borne in mind that, although the doctrine of frauds on powers does not apply to a release of a power, it does apply to a power of revocation."

Then *Re Jones' Settlement* (2) is cited. Remembering that Mrs. Ash is endeavouring by the scheme to put herself in possession of a large capital fund in exchange for

her life interest, I turn to the classic pronouncements of the highest authorities, as, for example, *Duke of Portland v. Lady Topham* (3), in which LORD WESTBURY, L.C., said (11 H.L. Cas. 54):

" . . . the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power."

In the same leading case, LORD ST. LEONARDS observed (*ibid.*, 55):

" A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself, directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property, as property, to the person to whom he affects, or attempts, to give it in that character."

See also *Vatcher v. Paull* (4), in which appear ([1915] A.C. 378) the well-known words of LORD PARKER OF WADDINGTON, who defines a fraudulent appointment as one which

" has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

He also observed (*ibid.*) that it was enough to vitiate an appointment if the appointor's purpose and intention was to secure a benefit for himself or for some other person not an object of the power, and that, in such a case, the appointment was invalid, unless the court could clearly distinguish between the quantum of the benefit intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor. See also *Re Crawshay* (5) ([1948] 1 All E.R. 114).

I do not think that this case can be brought within the principle of *Re Huish's Charity* (6) or within *Re Merton's Settlement* (7), in which a transaction not altogether dissimilar from the present was carried out. There, however, the appointment and the scheme were not part of the same transaction, but were, as WYNN-PARRY, J., found, separate and distinct. The truth is that the scheme in the present case may well be regarded as a meritorious one, but the very fact that it is beneficial to all parties, non-objects as well as objects and including Mrs. Ash herself, makes it impossible for me to say that it complies with the requirements laid down by LORD WESTBURY, L.C., and LORD ST. LEONARDS in *Duke of Portland v. Lady Topham* (3) and the many other cases which illustrate the same principle. The scheme may be very good, and there may be many ways in which to carry it out, but, in my judgment, it cannot be validly effected in any manner which gives to the appointor, Mrs. Ash, many thousands of pounds of capital through and by means of her execution of a fiduciary power.

[After saying that further consideration of the question which then arose, viz., the validity of the appointment of May 30, 1938, should stand over for the present, HIS LORDSHIP said that he would make a declaration that, in the circumstances in which the deed of revocation of Feb. 15, 1952, was executed, the appointment of May 30, 1938, was not effectively revoked by the deed of revocation.]

Order accordingly.

Solicitors: Woodcock, Ryland & Co., agents for Tweedale, Sons & Lees, Oldham (for the plaintiff); *Vertue & Churcher* (for the defendants other than the seventh defendant); *Kingsford, Dorman & Co.* (for the seventh defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MOORE v. NAPIER (formerly MOORE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), October 30, 1953.]

Justices—Husband and wife—Maintenance order—Variation—Order for maintenance of wife and child—Variation of order on re-marriage of wife—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

A On Mar. 8, 1950, the wife obtained a separation order whereby she was awarded £2 a week as maintenance, being £1 10s. in respect of herself and 10s. in respect of the child of the marriage, of whom she was given custody. On Oct. 17, 1951, the wife obtained a decree absolute of dissolution of the marriage on the ground of the husband's cruelty. On Mar. 22, 1952, the wife re-married. The husband thereafter paid only 10s. a week as maintenance for the child. On July 24, 1953, the husband applied for the variation of the order "by revocation in so far as the payment to the wife . . . is concerned, on the ground that . . . the . . . wife . . . is no longer in need of maintenance". On Aug. 5, 1953, the justices varied the order by reducing the amount from £2 to £1.

C HELD: since the separation order, although it contained a provision for the maintenance of the child, was, nevertheless, an order only in favour of the wife, it was inapt to ask for variation of the order by revocation of the payment to the wife, and in the circumstances the justices were entitled to reduce the sum awarded under the original order from £2 to £1.

D FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 852; FOR THE MARRIED WOMEN (MAINTENANCE) ACT, 1949, s. 1, see *ibid.*, Vol. 28, p. 736; and FOR THE MAGISTRATES' COURTS ACT, 1952, s. 76, see *ibid.*, Vol. 32, p. 480.

APPEAL by the husband against an order of the justices for the Workington petty sessional division of Cumberland, dated Aug. 5, 1953.

E On Mar. 8, 1950, the husband was convicted summarily of an aggravated assault on the wife and on the same date the justices made a separation order on that ground in favour of the wife and awarded her the sum of £2 for maintenance, being £1 10s. in respect of herself and 10s. in respect of the child, of whom she was given the custody. The wife petitioned for dissolution of the marriage on the ground of the husband's cruelty and obtained a decree which was made absolute on Oct. 17, 1951. On Mar. 22, 1952, the wife married one Napier. The husband thereafter ceased to pay the wife £1 10s. per week, but F continued to pay her the 10s. per week in respect of the child. Under the mistaken belief that her rights had come to an end, the wife made no attempt to enforce the order. On July 24, 1953, the husband applied to the justices:

G "That the order should be varied by revocation in so far as the payment to the wife for her own maintenance is concerned, on the ground that the parties have been divorced and that the said wife has since become the wife of one Napier and is no longer in need of maintenance."

On Aug. 5, 1953, the justices reduced the amount of the order from £2 to £1 per week. The husband appealed.

H. J. I. Summerfield for the husband.

D. R. Ellison for the wife.

H LORD MERRIMAN, P., stated the facts and continued: I think it is important to emphasise that the order of Mar. 8, 1950, was an order only in favour of the wife. Though the amount of £2 in all was divided between maintenance for herself personally and maintenance in respect of the child, of whom she was awarded custody, it was the wife's order. It is, therefore, in my opinion, as a matter of words, though, perhaps, not of substance, inapt to talk about varying the order by revocation of the payment to the wife. So long as the order

subsists, there is no question of revocation; it is a question of variation by increasing or decreasing the sum awarded. It is true that at the time when the original order was made the Married Women (Maintenance) Act, 1949, had been passed, which had, by s. 1 (1), increased the maximum sums which respectively could be awarded for the benefit of the wife and for the benefit of a child, and, moreover, by s. 1 (2) enabled the amounts payable under then existing orders to be increased to the new maxima. The wife, however, never applied for an increase of the money in respect of the child; the only matter before the justices on the occasion with which we are dealing was the husband's application to revoke the order in respect of the payment of £1 10s. per week to the wife. Under the original order the 10s. would automatically cease to be payable on the child (who is now over thirteen) attaining the age of sixteen years. It has been argued that if the welfare and maintenance of the child had any bearing on this matter, the wife ought to have been made to take out a cross-summons and to invoke the extended powers provided by s. 1 (1) of the Act of 1949 to increase the award of maintenance payable in respect of the child, and to prolong its existence under s. 2 (2) of that Act, while at the same time reducing the maintenance payable in respect of the wife to at least a nominal sum, if not getting rid of it altogether. I am unable to see that so cumbrous a method of procedure was necessary, when all that the justices had to do was to give sensible consideration to the existing circumstances when this application came before them, viz., that there was a child of the marriage, now growing up, for whom the husband had never disclaimed responsibility, and in respect of whom he had faithfully sent 10s. a week. But if the order in respect of the wife herself were reduced to a nominal sum, the result would be, in existing circumstances, that the wife's new husband would have to bear whatever expense over 10s. a week was involved in the proper care and maintenance of this child. That, in my opinion, is the outstanding circumstance in this case. The justices reduced the sum of £1 10s. by £1, leaving unaltered the 10s. in respect of the maintenance of the child. The net result is that under her order as varied the wife, who, so far as we know, is still looking after the child, is to receive £1 a week. It is admitted that she is entitled to, at least, a nominal order on her own behalf, not less because the maintenance in respect of the child will cease in two or three years' time, and it seems to me that there is nothing excessive, in the circumstances, in leaving her in possession, for the time being, of £1 a week.

In view of some of the arguments with which we have been pressed, I think it is necessary to re-state that there is no finality about the assessment of these amounts. We were pressed with the argument that it will be hard on the husband to have it declared by this court that his former wife is entitled to at least 10s. a week as a nominal order. We are not declaring anything of the sort. We are saying that to allow her a total sum of £1 a week, in the present circumstances, is not an order with which we are prepared to interfere. We are saying nothing about how things will stand when this child reaches the age of sixteen years and that sum of 10s. ceases to be payable. It is not our business to peer into the future. In my opinion, this appeal must be dismissed.

COLLINGWOOD, J.: I agree. The criticism which has been offered of the justices' decision is twofold. The first relates to the amount by which this order has been varied, and it is urged that the justices' considerations, as set out in their reasons, are not to be supported by evidence. They say:

"The justices considered that though the [wife] had secured a fresh legal right to be supported, and her means had thereby increased, this increase in the circumstances of the parties generally was only sufficient to allow us to consider that a reduction of £1 a week from the amount in the original order was fair and reasonable."

It is argued that the only evidence before the justices was that of the wife, that the man to whom she is now married was able to support her, and that no figures

were put before the justices as to the change in her circumstances. But it must be remembered that this was the husband's application, and, though the wife alone gave evidence, she gave evidence as his witness, and any deficiency in the evidence which she gave lies at his door. In my opinion, the "increase in the circumstances of the parties generally" includes the consideration that the original order of Mar. 8, 1950, was an order for £2 payable to the wife, and, as LORD MERRIMAN, P., has pointed out, that is an order in the wife's favour, although the amount is arrived at by an allocation of £1 10s. towards her needs and 10s. towards those of the child. The justices have decided, on the material before them, that the total of £2 should now be reduced to £1. The wife, it must be remembered, is still responsible for the care and upkeep of the child. In my opinion, it is impossible to quarrel with the justices' conclusion on that matter.

Appeal dismissed.

B Solicitors: *Broughton & Co.*, agents for *Milburn & Co.*, Workington (for the husband); *Speechly, Mumford & Craig*, agents for *Paisley, Falcon & Highet*, Workington (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

C

LEWIS v. CARMARTHENSHIRE COUNTY COUNCIL.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), November 9, 10, 13, 1953.]

Schoolmaster—Negligence—Child at nursery school—Permitted to run on to highway—Injury to vehicle driver in avoiding child—Liability of education authority.

D

A child aged four years, while at a nursery school, was made ready to go out for a walk and was left by one of the mistresses with another child in a classroom. During the mistress's absence the child left the classroom and ran on the highway, causing the driver of a lorry to swerve violently to avoid him with the result that the lorry struck a telegraph post and the driver was killed. In an action for damages for negligence by the widow of the driver against the defendants, the education authority,

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HELD: the teacher owed a duty of care, not only to the child who was permitted to stray on the highway, but also to those persons who might seek to avoid causing injury to the child and thereby themselves suffer injury; the accident to the lorry driver might well have been anticipated; the teacher was in breach of the duty she owed to him; and, therefore, the defendants were liable to the plaintiff in damages.

F

Decision of *DEVLIN, J.* ([1953] 1 All E.R. 1025), affirmed.

AS TO THE DUTY TO TAKE CARE, see *HALSBURY*, Hailsham Edn., Vol. 23, pp. 568-587, paras. 823-840; and FOR CASES, see *DIGEST*, Vol. 36, pp. 12-21, Nos. 33-101, and *Digest Supps.*

G

Cases referred to:

- (1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- (2) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp.
- (3) *King v. Phillips*, [1953] 1 All E.R. 617; [1953] 1 Q.B. 429.
- (4) *Lynch v. Nurdin*, (1841), 1 Q.B. 29; 10 L.J.Q.B. 73; 5 J.P. 319; 113 E.R. 1041; 36 Digest 24, 118.
- (5) *Haynes v. Harwood*, [1934] 2 K.B. 240; 103 L.J.K.B. 410; 151 L.T. 135; *affd.* C.A., [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; Digest Supp.

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APPEAL by the defendants from an order of *DEVLIN, J.*, at Carmarthenshire Winter Assizes, dated Mar. 31, 1953, and reported [1953] 1 All E.R. 1025.

A child aged four years, named David Morgan, was a pupil at a nursery school at Ammanford under the control and management of the defendants. The school was in a building situated behind the junior school which adjoined a busy highway known as College Street. After the morning period of lessons had come to an end on Apr. 19, 1951, between 12.15 and 12.30 p.m. the mistress who was in charge of the nursery school, a Miss Morgan, made ready David and another child to go for a walk in the town. She left them in a classroom while she went to the toilet, but outside she found a child who had fallen down and hurt itself, and she was absent from the classroom for some ten minutes while she attended to that child. During her absence David and the other child left the classroom, and David reached College Street through a gate in the school yard which opened on to a lane leading to the street. He ran into the road along which the plaintiff's husband was driving a lorry, and thereby put himself in imminent peril of death. The plaintiff's husband swerved violently to avoid the child, struck a telegraph post, and was killed. The plaintiff, in an action for damages against the defendants as education authority, alleged that the death of her husband was caused by the negligence of the defendants or their servants in allowing the child to stray into the road. *DEVLIN, J.*, held that the defendants had been negligent through their servant, Miss Morgan, and gave judgment for the plaintiff.

Lloyd-Jones, Q.C., and *N. G. L. Richards* for the defendants.

H. Edmund Davies, Q.C., and *D. G. Jennings* for the plaintiff.

Cur. adv. vult.

Nov. 13. **SOMERVELL, L.J.**, stated the facts and continued: Two related questions arise. First, was the teacher careless? Secondly, if there was carelessness or negligence at law within a certain scope, was the deceased within the scope of the reasonable contemplation of the teacher on the principle which I will not repeat but which can be found laid down, e.g., in some of the speeches of the noble and learned Lords in *Hay (or Bourhill) v. Young* (1). In considering the question whether the teacher, Miss Morgan, was careless or negligent, the learned judge first of all considered two matters which she, herself, had put forward as relevant to the issue. One was that, at the material time, in the yard into which this child and the other child went (it was common ground that they could open the door from the classroom into the yard) there would be children of from five to seven years old playing under the supervision of one or two mistresses. The other matter was that the door from the yard into the lane was usually kept locked. The learned judge said, and, with respect, I agree, that, had there been two teachers in the yard who could have supervised the boy had he opened the door and got out as far as that, that fact would have been relevant, and, in his view, would have been an answer to any suggestion of negligence. But that evidence was not correct. The head mistress was called and she said that the infants were at dinner until 12.30 p.m. On that point the learned judge said ([1953] 1 All E.R. 1027):

"... I find it difficult to believe that she [Miss Morgan] was ignorant of their dinner-hour or that she could really have thought that the side gate was usually kept locked."

One feels great sympathy with Miss Morgan. Even if she was (as the learned judge found) negligent, the consequences were very terrible, but I think it is clear from the judge's words that Miss Morgan did not create a wholly favourable impression on the learned judge and, so far as that was relevant to his decision, that is a matter which he could weigh and we cannot.

There is another point which I will mention. The learned judge made some complaint that Miss Rees [who was in charge of the infants on the morning in question] was not called and that he was not given more information about the injury to the child who fell down. It is a matter for counsel to decide what witnesses he shall call, but if the case had been that Miss Morgan was

deflected from taking steps which she normally would have taken by a sudden emergency, that would have been relevant in applying the standard of what a reasonable person would do in the circumstances. The learned judge said:

- A "If the case had been that the child was hurt sufficiently badly to give rise to a degree of alarm that drove from Miss Morgan's mind the other calls on her, or to put her into the position of having to choose between two duties, both of which she could not adequately perform, I should have felt gravely handicapped by lack of material. But I think it emerged quite clearly from Miss Morgan's evidence that the defence was that there was nothing to prevent Miss Morgan from calling to David and the other child to come out into the play-pen, or from asking Miss Rees to keep an eye on them, or from keeping an occasional eye on them herself from the cloakroom, or at least from telling the junior children not to leave them alone."
- B

- The learned judge, who clearly found the case a difficult one, put forward three matters as affecting his mind. One was a statement by Miss Morgan herself that, although she had in her care these two children whom she was going to take out, she could not safely ask Miss Rees to attend to the hurt child because that
- C would have meant leaving the others alone in the play-pen. That, no doubt, pointed, as the learned judge said, to a very high standard of care. If the children could not have been properly left alone in the play-pen ought the two children properly to have been left in the classroom? He then refers to the fact that these two children were dressed up and expecting to go out. It is common ground that Miss Morgan—nobody criticises her for this—took the occasion of her free half-hour to take small children out into the town on an expedition which they, no doubt, very much enjoyed. It was suggested, picking out one isolated sentence in the judgment, that the learned judge had applied the wrong test, that he had asked himself whether there was anything Miss Morgan could possibly have done rather than whether she failed to do something a reasonable person in those circumstances would have done. I do not think that is right. The learned
- D judge poses the question in this form ([1953] 1 All E.R. 1027):
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"... the cardinal question is, therefore, whether she ought to have anticipated that two four-year olds, left in the position of David and the other child, might leave the classroom and get out into the street."

- F For the moment, I would prefer to say "leave the classroom or get into trouble or do some hurt to themselves". Having considered all the points the learned judge says (*ibid.*, 1028):

"On the whole, I have come to the conclusion that Miss Morgan ought not to have been unmindful of these children, and that she ought to have foreseen the possibility that they might go out on their own."

- G I agree with that, but part of the second point has given me more difficulty, and I can put it in this way. Primarily, a duty of this kind is owed to the child and if in this case the children, being left alone as they were for ten minutes or possibly more, in a room of which they could open the door and from which they could walk into the yard, had gone into the yard and there damaged themselves in some foreseeable way, in my view, it would be difficult to say that that was not due to the carelessness which, on the basis on which I am at present considering it,
- H the learned judge has found. But was the street, as it were, so far off as to be outside the reasonable contemplation of the teacher? On the whole, I have come to the conclusion that it was not. We have seen photographs and a plan and it was not disputed that the door of the room where these children were left could be opened by them, small as they were, and also the gate into the lane. I have come to the conclusion, therefore, although that part of the case is on the border line, that it ought to have been contemplated that these children

might get into the street. Once one comes to that conclusion then I agree with the learned judge that the deceased was clearly within the scope of the duty. A duty is owed to a child who is allowed to stray into the street, and it must, I think, also be owed to those who seek to avoid injuring a child and, in so doing, injure themselves. For these reasons, I would dismiss the appeal.

DENNING, L.J.: I ask myself, what if the child had been run over? Would the school authorities have been held free from blame? Surely not. They ran a nursery school for children of three to five years of age. The mother had left her small son, who was not quite four years of age, in their charge. Somehow he reached the busy main street in the town, where he was in imminent peril. Those facts call for an explanation by the school authorities. What is the explanation put forward by them? Only this: The mistress was going to take this little boy and a little girl out with her into the town. She had prepared them for their walk when she had to leave them for ten minutes to attend to another child who was hurt. Whilst she was away for those ten minutes, the two children made their way through a door and a gate (which were both unlocked) and out into the main street. The judge thought that she need not have left these two mites by themselves for so long a time. She could have told them to go into a play-pen where there was a mistress looking after the other children, or she could have kept an occasional eye on them herself as she was only next door and could have left the door open. The judge found that she ought not to have been unmindful of these children, and I entirely agree with him. If the child himself had been run over by the lorry, I have no doubt that any jury would have found the school authorities to blame, and so would most judges of the Queen's Bench Division. At any rate, **DEVLIN, J.**, would have so held and we ought not to interfere with his decision on this point unless we are clearly of the opinion that he was wrong: see *Bolton v. Stone* (2), per **LORD PORTER** ([1951] 1 All E.R. 1082), and per **LORD NORMAND** (*ibid.*, 1083).

The child, however, was not run over, or injured at all. It was the lorry driver who, in order to avoid hitting the child, swerved, struck a telegraph pole and was killed. The question is whether that makes any difference. Does it mean that the school authorities are no longer to blame? I think not. Their fault is just the same, whether it was the boy or the man who was killed. The damage only is different. Does this difference in damage mean, then, that the school authorities need not pay compensation? If that were so, it would be a grievous state of the law. In the emergency created by this boy's presence in the road, the child might have been killed and the man saved, in which case the school authorities would have to pay damages. As it happened, the child was saved and the man killed. He died saving the school authorities from the consequences of their own fault. Can it be the law that they need pay his widow nothing? The truth is that the man's death is just as direct a consequence of their fault as the child's death would have been. They are as responsible for it as they would have been for the child's death, and the law should hold them liable. Counsel for the defendants, however, sought to say that the distinction lay in this. The school authorities, he said, owed a duty of care to the child and his mother, but no duty to the lorry driver, because injury to the child could reasonably be foreseen but not injury to the lorry driver. This argument contains, I believe, a fallacy. The duty of the school authorities is not merely a negative duty to avoid injury to the child: it is a positive duty to look after the child with reasonable care, to see that it does not go on to the road, and this is a duty which they owe not only to the child and its parents, but also to everyone in the vicinity. The reason is that a child of three is an unpredictable creature who may run into the road if given a chance, and that is a contingency that the school authorities can and should foresee. If they negligently leave the child to his own devices with the result that he is placed in imminent peril on the road, then their breach of duty is the same, no matter whether the child or someone else is injured,

and they must be responsible for all injuries caused by their negligence unless they are too remote in law to be recovered: see *King v. Phillips* (3). As counsel for the plaintiff pointed out, it is not unlike the cases where a van-driver leaves his horse and van unattended and a mischievous child frightens it so that it runs away. The questions in such cases are, first, was the van-driver negligent? Secondly, if so, was the damage too remote?: see *Lynch v. Nurdin* (4) and *Haynes v. Harwood* (5). The question of remoteness in cases of this kind, as in the nervous shock cases, depends on foreseeability, but as GREER, L.J., said ([1935] 1 K.B. 156):

“It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated . . .”

That is, I think, the case here. The accident was of a class which might well be anticipated. The damage was not too remote and I think the widow is entitled to recover. Accordingly, I agree that the appeal should be dismissed.

ROMER, L.J.: I confess that I have entertained very considerable doubts, which have not been altogether resolved, as to the defendants' liability for negligence in this case. I cannot help feeling that in all the circumstances which existed at the time almost superhuman vision would have been required to enable Miss Morgan to appreciate the likelihood of the little boy David's leaving the classroom with his companion, crossing the school grounds (which were forbidden territory to them) passing through the main gate and occasioning an accident in College Street, more especially as the evidence disclosed no parallel or even similar incident having ever occurred at the school before. However, in an action such as this, an action founded on negligence in which the learned judge had the advantage of seeing the witnesses, something more than doubt is necessary to justify the appellate court, or any member thereof in interfering with the judge's finding. Only a feeling of reasonable certainty that the decision was wrong should justify such interference, and, having regard to the views which my brethren have formed and expressed on the matter, it is obvious that no such certainty can exist in my own mind. I, therefore, concur in the proposed order dismissing the appeal, but I should like to make it plain that, so far as I can see, no moral blame of any kind attaches to Miss Morgan for the tragic accident which befell the plaintiff's husband.

Appeal dismissed.

Solicitors: *A. V. Vandamm & Co.*, agents for *Le Brasseur, Davis & Son*, Newport (for the defendants); *Davies, Arnold & Cooper*, agents for *T. Llewellyn Jones*, Neath (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

PRACTICE DIRECTION.

[CHANCERY DIVISION (Vaisey, J.), November 3, 1953.]

Trust and Trustee—Trustee—Costs—Indemnity as to costs—Form of order—Trustee Act, 1925 (c. 19), s. 60.

At the sitting of the court on Nov. 3, VAISEY, J., made a reference to the Practice Direction with regard to trustees' costs: see ante, p. 1159.

In the course of his observations HIS LORDSHIP said: For years, ever since I can remember, it has been the practice on a summons by trustees for such a purpose as the construction of a will to direct that the costs of all parties should be taxed as between solicitor and client. That has continued, as I say, ever since I can remember, and has been the normal practice. It has recently been realised that, under a solicitor and client taxation, the trustees may not get the whole of what they are entitled to. A solicitor and client taxation is on a lower basis, not a higher basis, than the basis which is appropriate when trustees' costs are being dealt with. The matter arose in a very plain form in *Re Robertson**, where the Public Trustee, who had his costs taxed as between solicitor and client, was disallowed the sum of £2 ls. in respect of a payment made for taking a shorthand note and for a copy of the transcript. That case came before me, and in point of fact I felt able to vary the taxing master's certificate and to allow that sum of £2 ls.

One thing is perfectly plain, and it is important that the profession should understand it. If a trustee submits to having his costs taxed as between solicitor and client, he is entitled to his costs as so taxed and nothing more. He is not entitled to take the taxing master through his bill, and then, when the taxing master disallows certain items, to go away and say: "That does not matter. I know I have wasted the taxing master's time, but I do not care about that. I do not care what he taxes off. I will help myself to whatever he has disallowed". That is wrong, and, hoping that I could help to resolve that difficulty in which trustees have found themselves, I, with the assistance of the Chief Registrar and the Chief Taxing Master and with the approval of all the judges of the Chancery Division, came to the conclusion that a form of words should be used which would give trustees more than solicitor and client costs, that is to say, give them all the costs to which they are entitled. The form of words which was adopted for that purpose is taken from s. 60 of the Trustee Act, 1925, which relates to orders appointing new trustees and is in these words:

"The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of . . ."

the trust estate.

It is, I think, plain that those words "the costs and expenses of and incident to any application" are intended to cover the whole of the costs that the trustees were entitled to, and mean almost the same as costs on an indemnity basis, or costs as between solicitor and own client. It seemed appropriate to use the words of the statute. Any suggestion that trustees are being deprived of costs, and that this would be a more hostile taxation than there has been under the old solicitor and client taxation is absolutely wrong. The whole point of making this change was to give the trustees more, to give them a wider range, and to make sure that all costs and expenses which had been properly incurred would be allowed on the taxation. It is an attempt to get the taxation on a better, juster and higher basis than the old taxation, which, in the judgment of myself and my brother judges, did not always give the trustees that to which they were entitled.

* *Re Robertson*, [1949] 1 All E. R. 1042; 2nd Digest Supp.

HOUGHTON v. TRAFALGAR INSURANCE COMPANY, LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), November 11, 1953.]

Insurance (Motor)—Exclusion clause—Liability of insurers excluded if “car conveying load in excess of that for which it was constructed”—Car carrying one person in excess of normal seating accommodation.

A The assured claimed against insurers in respect of damage to his motor car in an accident. At the time of the accident the car, which normally provided seating accommodation for five persons, two in front and three behind, contained six persons including the driver, one passenger being seated on the knees of another passenger in the back of the car. The policy under which the plaintiff claimed contained an exclusion clause in the following terms: “(d) Loss, damage, and/or liability caused or arising whilst any such car is engaged in racing, pace-making, in any reliability trials, speed testing, or is conveying any load in excess of that for which it was constructed.” The insurers contended that at the time of the accident the car was carrying a load in excess of that for which it was constructed, and, therefore, the assured was not covered by the policy.

B HELD: on its true construction cl. (d) extended only to cases where there was a weight specified in respect of the load of the vehicle, as, for instance, in the case of a lorry, and it could not be extended to cover the case of a private car in which an extra passenger was being conveyed, and, therefore, the insurers were liable on the policy.

C AS TO APPLICATION OF “ORDINARY MEANING” IN CONSTRUCTION OF INSURANCE POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, p. 430, para. 616.

APPEAL by the defendants from an order of GORMAN, J., dated Apr. 27, 1953.

D The plaintiff, the assured, claimed against the defendants, the Trafalgar Insurance Co., Ltd., under an insurance policy, in respect of an accident which occurred on Mar. 18, 1951, as a result of which his car became a total loss. At the time of the accident the car contained six persons—the driver and one passenger in the front seats, and four passengers in the back of the car, three being seated on the back seat and one on the knees of another. The back seat could normally provide seating accommodation for three persons if the arm rest were pushed up into the back of the seat. The policy contained a group of clauses headed “Exclusions”, cl. (d) of which provided as follows:

E “Loss, damage, and/or liability caused or arising whilst any such car is engaged in racing, pace-making, in any reliability trials, speed testing, or is conveying any load in excess of that for which it was constructed.”

F The defendants denied liability under the policy, and contended that at the time of the accident the car was carrying a load in excess of that for which it was constructed. GORMAN, J., held that, on the true construction of the policy, the defendants were liable.

C. N. Shawcross, Q.C., and Humfrey Edmunds for the defendants.

P. M. O'Connor for the plaintiff.

G **SOMERVELL, L.J.**, stated the facts and continued: If there is any ambiguity in cl. (d) of the exclusion clauses it will be resolved in favour of the assured. In my opinion, the words relied on, “any load in excess of that for which it was constructed”, clearly cover cases only where there is a weight specified in respect of the load of the vehicle, be it lorry or van. I agree that the earlier words in the clause are obviously applicable to an ordinary private car in respect of which there is no such specified load weight, but there was no evidence whether this was a form which was used for lorries as well as private cars. However, I do not think that is material. We have to construe the words

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in their ordinary meaning, and I think that they clearly cover only the cases which I have mentioned. If that be right, they cannot avail the insurers in the present case.

I would only add that the present suggestion that the words apply here is, to me, remarkable. I think the plainest possible words would be necessary if it were desired to exclude the insurance cover because in the back of the car there was one passenger more than seating accommodation was provided for. All sorts of obscurities and difficulties might arise. I would like to add that, if this or any other insurance company wishes to put forward a policy which will be inapplicable when an extra passenger is carried, I hope they will print that provision in red ink so that the assured will have it drawn to his particular attention. In my opinion, this appeal should be dismissed.

DENNING, L.J.: It would surprise most car owners to be told that, if they squeezed in one more passenger than is provided for by the ordinary seating capacity of the car, they thereby lost the benefit of their insurance policy. But that is what the insurance company contend here. They say that by reason of this exclusion clause they are under no liability. If the clause had such a meaning, I should regard it almost as a trap. I am glad to find that the clause is not capable of that extended interpretation. It is applicable only to cases where there is a specified load weight which must not be exceeded, as in the case of lorries. I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree. I think it would be most regrettable if a provision of this kind were held to have the force for which the insurance company contends. It would be a serious matter for a motorist involved in a collision if he were told that the circumstances which existed here excluded him from the benefit of the policy. Any clause or provision that purports to have that effect ought to be clear and unambiguous so that the motorist knows exactly where he stands. This provision is neither clear nor unambiguous. If applied to a private motor car I have not the least idea what it means. Accordingly, for that reason and the reasons which my brethren have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.* (for the defendants); *Hewitt, Woollacott & Chown* (for the plaintiff).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

In the Estate of PARK. PARK v. PARK.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), October 27, 28, 29, 30, November 2, 1953.]

Marriage—Consent—Degree of soundness of mind required—Test to be applied—Capacity to understand nature of contract.

A In considering whether or not a marriage is invalid on the ground that one of the parties was of unsound mind at the time it was celebrated the test to be applied is whether he or she was capable of understanding the nature of the contract into which he or she was entering, free from the influence of morbid delusions on the subject. To ascertain the nature of the contract of marriage a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage.

B Per BIRKETT, L.J.: The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.

C Per HODSON, L.J. (on the question whether consent to a marriage required a lesser degree of unsoundness of mind than that required to make a valid will): In my opinion, there is no sliding scale of soundness of mind by reference to which different matters of which the law is required to take cognisance may be measured.

D Dicta of SIR JAMES NICHOLL in *Browning v. Reane* (1812) (2 Phillim. 70), and of SIR JAMES HANNEN, P., in *Durham v. Durham. Hunter v. Edney (otherwise Hunter)* (1885) (10 P.D. 81, 95), applied.

E Decision of KARMINSKI, J. (ante, p. 408), affirmed.

AS TO CAPACITY TO MARRY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 564-569, paras. 843-854, and *ibid.*, Vol. 21, pp. 286-288, paras. 492-497; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 40, 41, Nos. 168-190.

Cases referred to:

- F (1) *Culross v. Park*, (Dec. 1, 1949), not reported.
 (2) *Boughton v. Knight*, (1873), L.R. 3 P. & D. 64; 42 L.J.P. & M. 25; 28 L.T. 562; 37 J.P. 598; 33 Digest 146, 234.
 (3) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; *sub nom. McNaughton's Case*, 4 State Tr. N.S. 847; 1 Car. & Kir. 130, n. (174 E.R. 744); 14 Digest 56, 229.
- G (4) *Burdett v. Thompson*, (1873), L.R. 3 P. & D. at p. 72.
 (5) *Browning v. Reane*, (1812), 2 Phillim. 69; 161 E.R. 1080; 33 Digest 137, 147.
 (6) *Durham v. Durham. Hunter v. Edney (otherwise Hunter). Cannon v. Smalley (otherwise Cannon)*, (1885), 10 P.D. 80; 33 Digest 138, 150.
 (7) *Jackson (otherwise Macfarlane) v. Jackson*, [1908] P. 308; 77 L.J.P. 147; 27 Digest, Replacement, 577, 5352.
- H (8) *Forster (otherwise Street) v. Forster*, (1923), 39 T.L.R. 658; 33 Digest 138, 152.
 (9) *Baldwin v. Baldwin (otherwise Mann)*, (1919), The Times, July 30, 31.
 (10) *Jemima Cole v. William Cole*, (1857), 5 Sneed's Ten. Rep. 56.
 (11) *Turner v. Meyers*, (1808), 1 Hag. Con. 414; 161 E.R. 600; 27 Digest, Replacement, 35, 127.
 (12) *Park v. Park*, (1914), 1 S.L.T. 88.

APPEAL by defendant against an order of KARMINSKI, J., reported ante, p. 408, in an action in which he gave judgment for the plaintiff, holding that the defendant was not estopped (by statements in pleadings in earlier proceedings) from disputing the validity of the marriage of the plaintiff to the deceased, but that the ceremony of such marriage on May 30, 1949, constituted a valid and binding marriage, and pronouncing against the will of the deceased dated Mar. 1, 1948, as having been revoked by such marriage.

The deceased was a business man who had withdrawn from the day to day work of the company in which he was interested. Following the death of his wife in January, 1948, when he was seventy-seven years of age, and a stroke in May, 1948, he was in a weak physical condition, showed little interest in the details of the business, was unable to look after his financial affairs, was forgetful and untidy, and was sometimes confused and sometimes lucid. In March, 1949, he became ill, suffering some physical relapse and some degree of mental deterioration. On May 30, 1949, he married the plaintiff, and the same day he executed a will. On June 17, 1949, he died. In an action by the executors propounding the will of May 30, 1949, which was heard by PEARCE, J., and a jury, the jury on Dec. 1, 1950, found that at the date of the alleged will the deceased was not of sound mind, memory and understanding, and PEARCE, J., pronounced against that will. The plaintiff in the present action claimed as the lawful widow of the deceased to have an earlier will dated Mar. 1, 1948, pronounced against and claimed a grant of letters of administration of the deceased's estate. The defendant, a beneficiary and a residuary legatee under this will, alleged that, at the time of the ceremony of marriage on May 30, 1949, the deceased was of unsound mind and mentally incapable of appreciating the nature of the marriage contract and that there was not any consent by him to the marriage. He counterclaimed for a declaration that the alleged marriage between the plaintiff and the deceased was null and void, and that the court should pronounce in solemn form in favour of the will dated Mar. 1, 1948. KARMINSKI, J., held that consent to a marriage required a lesser degree of capacity than that required to make a will, that on May 30, 1949, the deceased was capable of understanding the nature of the contract into which he was entering, and that the marriage was valid and binding. He held, therefore, that the will dated Mar. 1, 1948, was revoked by the marriage and that the deceased died intestate. The defendant appealed.

Salmon, Q.C., and *John Laty* for the defendant.

Beyfus, Q.C., and *Marshall-Reynolds* for the plaintiff.

R. L. Barnard for the parties cited.

SINGLETON, L.J.; The deceased died on June 17, 1949. He had been a successful business man. He was head of, and owned most of the shares in, a private company which carried on the business of shipping brokers and packers. He was seventy-eight years old when he died. His first wife, to whom he had been happily married for over fifty years, died in January, 1948. There were no children. On May 25, 1948, he had a stroke which affected him seriously, and he was not able to attend to important matters of business thereafter. He recovered to some extent, but he suffered a further attack in March, 1949. On Mar. 1, 1948, he had made a will under which he had appointed two of the partners in a firm of solicitors, Mr. Culross and Mr. Trelawny, in whom he placed confidence, as executors and trustees. No one has raised any question as to his condition at that time, and it has not been suggested that he did not understand and approve of the contents of that will, complicated though its provisions were. By that will he left bequests to relatives, friends and employees and several sums to charities, and an annuity of £300 a year to a sister who has since died, and he provided, as far as possible, that his executors should be governing directors of the company for life at a salary of £350 a year plus ten per cent. of the net profits of the company to each of them. That provision, no doubt, when it was

known, would not be very well received by those who are responsible for the ordinary running of the company, as, indeed, the evidence shows.

The deceased was a member of the Devonshire Club, and he used to go there for lunch and for dinner frequently. The cashier at the club was Miss Blodwen Wyn Hughes, the plaintiff. At Easter or Whitsuntide, 1949, when there were very few people in the club he commiserated with her that they should be the only two people left in London. Undoubtedly, he was lonely, and he was not well. On or about May 7, he took her for a drive to Hawkhurst, and the next day he told his chauffeur-valet: "That lady we had in the car, I am going to marry her. If she don't marry me I will commit suicide." The chauffeur said: "Well, I don't think you even know the lady yet, sir." A few days later, on May 10, there was another drive, this time to Woodcock Park, and in the hearing of the chauffeur he proposed marriage to her. There was no division between the chauffeur and those at the back of the car. The proposal was made immediately he got into the car. According to her evidence she was somewhat diffident about accepting his proposal, but on May 13 he gave her an engagement ring and £500, and the ring, it is said, was put on her finger in the presence of Mr. Culross, the solicitor. The deceased went away to Bexhill for a few days. On his return on May 26 the plaintiff took up residence in his flat. There had been discussions with the solicitor as to a settlement, and it had been decided that two thousand preferred ordinary shares in his company (worth approximately £6,000) should be settled on her, which she thought was satisfactory. She said, in the course of her evidence:

"Most of it had been discussed before. I was outside the room for about a quarter of an hour and most of the business had been discussed, and then I joined them, and as far as I could see everything was satisfactory and [the deceased] had said: 'Yes, everything is correct and done', you see. But as far as the actual figures had been concerned it had gone through before I went into the room, you see."

There is no doubt that he thought he was married to her at that time. Indeed, he thought he was married to her from May 13. That was spoken of as a delusion. The plaintiff was asked in the court below:

"There is one matter on which I want particularly to ask you. Part of your evidence has been read and it is clear from that that you said at the last trial that on occasions at any rate [the deceased] thought he had been married to you earlier than the date at which he was actually married?

A.—Yes, I did say that. Q.—Was that as a result of things that [the deceased] said—'Yes' or 'No'? A.—Yes. Q.—Will you tell my Lord what he said and on what occasions that led you to say that he thought that he was married to you earlier? A.—[The deceased] had always had in his lifetime everything he wanted, and when he gave me the ring on the 13th you see I had said: 'No, no', and then I fully made up my mind, and when I told him I had made up my mind I promised him I would never leave him whatever happened. He pointed out to me I was much younger than he was, and I said: 'When I make a promise I keep it.' On the 13th he gave me this ring and our engagement was to him and myself as sacred as a wedding, and then during that time— Q.—During which time? A.—From May 13 to my marriage. Q.—Yes, but he was away? A.—Then he went away to Bexhill and he came back one day earlier than he had said, so I took up residence in the flat and then at night time he came to my bedroom, and previous to me getting married to him I had been worried about the sex point of it."

The judge asked her the date, and she said:

"When he came back from Bexhill he came into my bedroom. Q.—At what time? What sort of time? A.—Oh, during all the night time he

would come into my bedroom, and I would take him back to bed. Q.—What sort of time ? Do you mean after midnight, or after ten ? A.—We used to retire early—ten o'clock—from say ten o'clock. Q.—After you had both gone to bed ? A.—After we had both gone to bed. Q.—He came into your bedroom ? A.—He came in. He was dressed in a white bath robe which used to sort of frighten the life out of me, and then this went on during the night perhaps five or six times during the night. Q.—What did you say or what did he say ? A.—He came into the bedroom expecting me to fondle him, and I was a bit worried in my mind but I did not say anything to him that night, and that night passed. The same thing happened on the Friday night, and the same thing happened on the Saturday night, and then, of course, I locked my door and he used to rattle the door all through the night. Q.—What I have been asking you is what did he say ? A.—He did not say very much. All he wanted to do was to pet and fondle me, you see, and since we were married it was perfectly all right for you to go ahead. Q.—Is that what he said ? A.—Yes. To his way of thinking once I had said 'Yes' to his engagement it was just the same as being married."

She added it never occurred to her that he was not fit mentally to get married.

Mr. Turnbull, a director of the company, thought that the deceased understood the arrangements made for the settlement, though he did nothing except gaze vacantly, or smile vacantly, at the plaintiff, and practically took no part in the conversation at the time when the settlement was made. The settlement was executed at the solicitors' office on Saturday, May 28. On that day the deceased's condition was very bad. Mr. Turnbull thought that his affairs ought to be looked after by trustees, as he might sign something without knowing its contents.

The story of how the settlement came to be signed is given by Mr. Turnbull. He was asked:

"It is not on the question of understanding a long document, Mr. Turnbull. I am suggesting to you that on the last occasion you said that, as [the deceased] really did not know what he was doing, it was time his affairs were taken over ? A.—It is quite right, I did. Q.—Did you say that he was mentally enfeebled when he signed the settlement ? A.—Yes, he was. Q.—That was on May 28, two days before the wedding. Was he so mentally enfeebled on that day that he did not know what he was doing ? A.—On that Saturday morning, I agree. Q.—Is this a pretty fair description of what happened on that Saturday morning. Did you try to explain what you were getting him to sign ? A.—Mr. Culross did. Q.—That is to say that you were settling two thousand shares ? A.—Yes. Mr. Culross tried to get him to repeat it in words. Q.—He said 'Repeat after me, "I am settling on [the plaintiff] two thousand shares in R. & J. Park, Ltd."' ? A.—That is quite right. Q.—He tried several times to get him to repeat that ? A.—Yes. Q.—And all the poor old man said to him was 'I am giving her £4,000'. Then Mr. Culross would explain again 'No, you are not. Repeat after me "You are settling two thousand shares"' ? A.—Yes, that is quite right. Q.—And then Mr. Culross would say to him 'What are we doing' and he would say 'We are giving her the works.' Did Mr. Culross finally finish up by shrugging his shoulders and saying 'It's hopeless, let us get him to sign to get it finished ?' A.—Yes, he did. Q.—And did you agree with that ? A.—Yes. Q.—Did you think he was fit to get married on that day ? A.—No, I do not think so; not on Saturday morning, no. Q.—He was obviously hopeless on the Saturday morning ? A.—He was very bad. Q.—He was not much better on the day of the wedding mentally ? A.—Oh, yes; he was a lot better on the day of the wedding. Q.—Would it be true to say that on the day of the wedding he was not quite so bad as on the Saturday ? A.—Yes. Q.—Not quite so bad ? A.—No, not quite so bad. Q.—But still very bad ? A.—Yes, he was bad, yes. He was always bad but

he was better at times than others. He used to get better as the day went on. He was always bad first thing in the morning."

Mr. Turnbull made arrangements for the wedding reception on the Monday. Meanwhile, the plaintiff had made arrangements with the registrar for the wedding to take place at the Kensington register office on Monday, May 30, at 11 a.m. On the Sunday morning the deceased was up in good time and wishing to put on his morning coat, as he thought he was going to be married that day.

A On the Monday morning he was up about 4 a.m. helping to prepare the room for the reception, according to the plaintiff's evidence. The wedding ceremony took place as arranged. The certificate shows that Mr. Culross, the solicitor, and Mr. Ernest R. Park (who was a brother or a half-brother) were the two who signed as witnesses. Several people were present, judging by the photograph, which shows the bride and bridegroom, the bride's sister, Mr. and Mrs. Culross,

B Mr. Turnbull, a director of the company, and Mr. Elsey, another director, Mr. McGrath, the chauffeur, the father and mother of Mr. Peter Park, the defendant in this suit, and the bride's mother, on the steps of the register office in Kensington.

Afterwards there was a party, and some champagne was drunk. Somewhere before a quarter to three the deceased signed a new will, which was on much the same lines as the 1948 will, with the addition of the £1,000 legacy for the plaintiff, with whom he had just gone through a form of marriage. The will was witnessed by the superintendent registrar, who was a guest at the party, and by a clerk in the firm of solicitors, Messrs. Culross & Trelawny. On June 7 the deceased complained to his doctor of his disappointment. He died on June 17.

C

Objection was raised by the plaintiff to the will of May 30, 1949—i.e., the will made on the day of the wedding—and there came about the action of *Culross v. Park* (1), in which the solicitors, who were executors, sought to have the validity of the 1949 will established, and the present plaintiff opposed it. Paragraph 1 of the amended defence in that suit alleges that the will was not duly executed in accordance with the statute. Paragraphs 2 and 3 are in these terms:

D

"2. The deceased, at the time the said will purports to have been executed, did not know and approve of the contents thereof. 3. At the time when the said will purports to have been executed the deceased was not of sound mind, memory and understanding."

E

Paragraph 4 alleges undue influence on the part of the solicitors and Mrs. Culross. That was found not proved, and I need say nothing with regard to it. On the substance of the case it is alleged:

F

"Under para. 2 and para. 3 the defendant says that at the time the said will purports to have been executed the deceased, who was then seventy-eight years of age, and who was subject to a stroke in the month of May, 1948, from which he only partially recovered, was physically enfeebled, he was unable without difficulty to read, the powers of his mind were impaired, his memory defective, clouded and confused, he was unable to manage his affairs and was able only with difficulty to concentrate on matters of business, and did not have and could not form a rational opinion as to the extent of his property."

G

There is also an allegation that his powers were further diminished as a result of alcohol and emotional excitement at the time when he made the will.

H Further particulars of those allegations were delivered on Oct. 26, 1950, before the case came on for trial:

"From shortly after the death of his first wife in the month of January, 1948, the deceased showed signs of general forgetfulness, lack of concentration, and of depression and in particular inability to attend to his personal financial and business affairs. He frequently contemplated suicide and on an occasion towards the end of the year 1948 did in fact attempt to commit

suicide. He was forgetful of the date or day of the week. He would on occasions walk about his flat with his trousers down to his ankles, start to go out with his hat and umbrella but dressed only in his underclothes; forget to do up his buttons after going to the lavatory. He was often unable to undress himself. He would bathe or shave at 4 a.m. or 5 a.m. thinking it was 8 a.m., sit down to breakfast with lather on his face erroneously thinking he had shaved, and would leave the table in the middle of a meal to go and clean his teeth. He once picked up a cushion thinking it was his overcoat and tried to put it on. On Sunday, May 29, 1949, the day before his wedding to the [plaintiff], the deceased demanded to have his tail coat as he insisted he was being married that day; and on the following day, being his wedding day, believing that he had been married on the previous Thursday, he thought he had an engagement to take a Mr. Ludlow to lunch but on realising that it was in fact his wedding day he said: 'Blow Mr. Ludlow, he can wait'. He would have difficulty in reading. He was unable to understand the contents of documents put before him, although explained in detail, and his habitual response when asked for a decision thereon, or on other business matters, was: 'Well I'll leave it to you entirely.' On Mar. 1, 1948, the deceased executed a will but subsequently said that he did not really know what bequests he had made therein except that he thought he had created a trust . . . He would forget to pay for drinks he ordered in public places and when paying would proffer an excessive amount (not due to lack of change) or would let people help themselves from his wallet or write a cheque for him. He would hide money and forget where he had put it; he would think he had money in his wallet when in fact it was empty."

Those were some of the allegations made in that case by the plaintiff in the suit now before the court, as to the condition of the man she married, and they cover the date of the marriage. On May 4, 1950, Mr. Peter Park, a nephew of the half-blood of the defendant in this case, was added as a co-plaintiff with the solicitors. The case set up by the amended defence and in the particulars which I have read was supported by the evidence of the plaintiff and other witnesses. The hearing was before PEARCE, J., and a jury in November and December, 1950. The judge put questions to the jury, of which two answers were:

"Q.—Do you find that the [deceased] did know and approve of the contents of that will? A.—No. Q.—Do you find that the [deceased] was of sound mind, memory and understanding at the time of the execution of the will? A.—No."

The onus was on those putting forward the will. The answer to the first of those questions would have been enough, but the further question was put on the plea put forward in the defence, and the answer to it means that the jury found that the deceased at about a quarter to three was not of sound mind, memory and understanding, or, at least, the jury, on the evidence, were not satisfied that he was. So it was said by the present defendant that, if the old gentleman was not of sound mind, memory and understanding on May 30, he was not fit to be married and that the marriage was not valid. There followed this action, which was commenced on May 17, 1951, and in which the plaintiff claimed

"as the lawful widow and relict and one of the persons entitled in the event of an intestacy to share in the estate of [the deceased] late of Garden House, Cornwall Gardens, Kensington, in the county of London who died on June 17, 1949, to have a pretended will of the said deceased dated Mar. 1, 1948, pronounced against and to have a grant of letters of administration of the estate of the said deceased."

If she succeeds the marriage revoked the 1948 will and there is an intestacy. The solicitors have fallen out of the picture. No one interested under the will remains in the proceedings except the defendant, and he defended as, and is appealing as, an assisted person.

One can well appreciate the difficulties of Messrs. Culross and Trelawny and others who were interested under both wills. They sought to propound the 1949 will. The jury decided against that. It would be difficult for Mr. Culross now to say that the deceased was not fit to get married on the same day. No one suggested at the time that he was not fit to get married. The defendant in these proceedings gave evidence in the first case in support of the will. He did not give evidence in this action. The hearing of this action took place before
A KARMINSKI, J., in May of this year, and on June 12 he gave his considered judgment by which he held that the deceased could, and did, understand the nature of the contract into which he was entering, and that the ceremony of marriage was valid. The defendant appeals to this court against that judgment.

It was submitted by counsel for the defendant that the judge approached the case on the wrong basis. He put before the court these propositions. In order
B to make a valid marriage (i) the parties must understand the nature of the marriage contract; (ii) the parties must understand the rights and responsibilities which marriage entails; (iii) each party must be able to take care of his or her person and property; (iv) it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; if he lacks that which is involved under heads (i),
C (ii) and (iii) the marriage is invalid. His junior counsel, who followed, put the case in this way. No doubt the deceased intended to marry the lady. A person of unsound mind may form such an intention. The question for consideration is whether he sanely comprehended the nature of the marriage contract.

It was further submitted that the case ought not to be left in the way in which it stands. There is the verdict of a jury that the deceased was of unsound mind
D on May 30, and the judgment of a judge that he was fit to make a will on the same day, and there was no evidence of any change in the condition of the deceased between the time of the marriage ceremony and the making of the will; and it was claimed that, if the defendant was not entitled to succeed, at least there ought to be a new trial.

Counsel for the plaintiff agreed that, on the evidence given in the court below, there was nothing to show any difference in the state of the deceased's mental
E condition between 11 a.m. and 2.45 p.m. He submitted that the judgment of KARMINSKI, J., was right on the evidence and that this court ought not to interfere. He said that, as a matter of law, KARMINSKI, J., ought not to have paid any attention to the fact of the jury's finding of incapacity, and that this court ought not to have regard to the jury's verdict. At a later stage he withdrew
F from that proposition to some extent.

It seems to me impossible for the judge in this case to close his eyes to the findings of the jury in the earlier case. He is not bound by them. He must make up his mind on the evidence given before him. At the same time, much of the evidence given before the jury was read on this trial, and, in particular, a considerable part of the evidence of the present plaintiff herself.

Besides the evidence referred to by the judge (ante, pp. 409, 410, 415), there
G are some passages in the transcript of the evidence to which I ought to refer. The first witness called for the defendant, on whom the onus lay in this suit, was Dr. Jenner Hoskin, a heart specialist, who gave evidence that he had been called in to see the deceased in consultation on two occasions after the deceased's first stroke. He described the deceased's condition on June 8, a few days after
H the stroke, in this way:

"I was called in by Dr. Urwick of Knightsbridge, I think one morning, and he was then suffering from weakness of the left side of the body and face. His speech was not then affected. On examination I found he had a large heart, high blood pressure, hardened arteries, and I think there was also, as a matter of fact, a large liver. I do not know what the cause of that was . . . but he was very difficult to get to rouse and did not seem to take any

interest in things. I occasionally got him to answer questions but his mind soon seemed to drift off and really one made the examination without very much co-operation from him . . . When I saw him then he was mentally confused. I have got in my notes that his mental condition was inclined to wander. I took an electrocardiograph at the time and that also showed signs of degenerative changes of the heart, and with that the heart rhythm was completely irregular, a condition known as auricular fibrillation. (Counsel for the defendant): Was his circulatory system sound or not ? A.—No, he had hardened arteries which I think must have been the cause of his stroke—hardened, narrowed arteries . . . Q.—Would the effect of this disease on the reasoning or understanding depend on the progress which the disease had made? A.—The progress is—— Yes, it would, but the disease is not, as a rule—— it is a slow, continuous progress, the disease itself, taking a great number of years, but, of course, having a stroke would have an extra sudden bad effect on the circulation.”

The physician saw the deceased again on July 25, 1948, and his note was:

“ ‘Mentality impaired; he was placid, vacant, no memory, no interest, gets intelligent about past events.’ . . . one was very doubtful that his mental condition would improve to any extent.”

He was asked:

“To what did you attribute his mental condition on July 25 ? A.—I attributed it to the condition which caused his stroke, the arterio-sclerosis affecting the brain vessels. Q.—In your opinion was he able to form any balanced judgment about anything ? A.—I did not think so.”

Later, he described his condition, and he used the word “gaga”. Clearly, he said, he was not fit to get married at that time. He did not see him afterwards. The witness had been asked to read a transcript of the evidence given by the plaintiff in these proceedings, given on the hearing before PEARCE, J., and a jury. He had done that, and he was asked this question:

“Assuming that what the [plaintiff] said was accurate and that he did and said and was in the state she describes in May, 1949, would you say that his condition was any better or the same or worse than it was when you saw him on July 25 ? A.—Reading the transcript of what I heard this morning, I should certainly not expect to find any improvement in that mental condition.”

He said in cross-examination:

“There is no doubt about it that, when this type of heart with arterial disease begins to fail, then one of the things which shows itself the earliest is impairment of mental faculties. On the other hand, when that heart is failing and you get it to improve the circulation then mental faculties very often become normal.”

Then he said it was the worst type of case. In reply to another question he said as regards July 25:

“Yes, but I was not very impressed by him the second time, as I mentioned I think I have just read that mentally poor, placid, vacant, no memory, no interest. That is the second time I saw him in July.”

It is quite clear from the answers which the witness gave that the deceased was suffering from a disease which is normally progressive. His mental condition was such that he was not fit for anything at that time, and the doctor did not expect there would be much improvement mentally. None the less, there was some improvement, as the evidence showed.

The witness, Lady Greer, and her late husband had been friends of the deceased and his late wife for about fifty years. Lady Greer was a widow, and after the

deceased's wife died she spent a good deal of time with him comforting him. After the deceased's stroke, when he was able to move about, she used to go for drives with him, and she would go to see him quite often. She was asked:

"After his stroke, how often were you used to see him between the date of his stroke and the date of his re-marriage? A.—Practically every day until about ten days before his marriage. I used to go away with him week-ends.

A Q.—Did you visit him at his flat? A.—Yes, every evening, and sometimes he would telephone me during the day. (KARMINSKI, J.): I do not know where he lived. (Counsel for the defendant): Where was that? A.—Cornwall Gardens. Q.—In Kensington? A.—Yes, near Gloucester Road Station. Q.—I want you to tell my Lord, if you will, what you noticed about his mental condition during the period from the date of his stroke until the last time you saw him before his re-marriage? A.—Well, he seemed gradually to get more dazed and confused. He would sit a long time in a chair just staring vacantly and very often mistook me for his wife and called me Beatrice, by her name, and there was some excuse for that because she was small and dark, but there again I could get him to be quite alert if I spoke about the old days to him. Q.—For how long? A.—He seemed to gradually get worse, you know. At times he had longer lapses of seeming to be confused and worried and not understanding things. With money he was terribly careless. He would bring out his wallet and hand it to a waiter and say: 'Take what you want', but I must say they never took advantage of him. Q.—That was not very like his former self? A.—No, but he was always very generous. Q.—Was he able to understand, in the ordinary sense, when you were talking to him? Did he follow what you were saying? A.—He might at the start, but when I finished I would say: 'What do you think', and he would say: 'What were you saying'?, as if he had not understood what I was talking about."

Lady Greer said that he was lonely. He had asked her if she would contemplate marrying him. She said: No. They were both too old. She was asked:

E "What can you tell my Lord about his condition? Was he in a fit state to get married? A.—No, definitely not. (Counsel for the plaintiff): Is she an expert? (The witness): He was not in a fit state, even when he made those suggestions to me, and, of course, after that he wanted companionship. He wanted somebody to be there always with him to look after him."

She was asked in cross-examination:

F "It is quite clear, is it not, that from August onwards, in the course of the year, he improved? A.—At times, yes, he decidedly seemed better. Q.—And taking the general picture, there was a fairly steady improvement in the autumn of 1948? A.—I never thought he improved to that extent. Q.—I did not mention any particular event. There was a fairly steady improvement during that autumn? A.—I do not think so."

G She had known the deceased for many years, and that was her opinion.

Another witness, Mr. Starkey, an employee at the block of flats at which the deceased lived, used to see the deceased often before the stroke. Then he did not see him for a while, and later he saw him from time to time. He was asked:

H "And after his stroke what do you say about him then? A.—Well, I did not have a lot to say to him because I did not see him so frequent. But when I see him, which was generally with the chauffeur, where I used to pass the time of the day he used to look at you vacant, seemed to be penetrating right through you as if he did not understand a word or anything like that. Q.—Did he seem to know you after that? A.—Did not know me, not as I know sort of previous ways of conversation, he treated me like a stranger. Q.—After the stroke did he have any more of these chats with you that

you have described ? A.—Not the chats in general. He used to come down and stand and spoke."

The witness demonstrated how this poor old man stood. He was asked about his appearance and he said he was shrivelled up and his clothes seemed to hang on him like a coat-hanger. He was asked:

"And at these occasions you saw him or said 'Good morning' to him, whatever it was, what was the expression of his face, can you describe it ? A.—Well—vacant. He seemed to me as if—well, he could not hear me, he would kind of stand there and look me up and weigh me up and down, and that was all there was to it."

He said in cross-examination that the deceased's appearance got worse as time went on, and another answer he gave to counsel for the plaintiff was:

"Well, he would not stand and talk. I would say: 'Good morning, sir', try and force a bit of conversation. He used to stand and look at me dumbfounded. Q.—He looked at you and walked past without saying anything ? A.—He would stand while the chauffeur made all preparations to get the car ready. He would stand there just like a little child."

When re-examined he was asked:

"Is there anything you observed in his manner when you saw him on those occasions ? A.—Well, he seemed—how can I express myself—well, put it plain speaking, if my father had acted similar to what I saw [the deceased] I should certainly think that my father should have some attention for his head, because he did not seem to me—may be I was wrong, but that was my impression. (KARMINSKI, J.): You would have done what ? A.—I would have certainly taken him somewhere to see what was the matter with him. (Counsel for the defendant): He said: 'to see about his head.' (The witness): He did not appear to me—well, normal. That is the only way I can put it."

I have referred to the evidence of three witnesses who supported the case of the defendant that the deceased was not in a fit condition to get married on May 30, 1949. But, perhaps, the strongest evidence on that came from the plaintiff herself. Her evidence given on the first trial was read at the second, and some parts of it were read to this court. At the time she gave this evidence she was, of course, seeking to upset the will, which was made a few hours after she had married the deceased, and this is how she described the condition of the man with whom she had gone through a ceremony of marriage. She was asked:

"You have given the members of the jury one or two instances as to powers of application. So far as ordinary normal conversation was concerned, what would you say as to his ability to carry on ordinary normal conversation ? A.—He could carry on a conversation, start a conversation for about five minutes, and then, as I have said before, it was just like as if a blind was suddenly pulled down and he would not know any more. He spoke about a gramophone he had had in 1912, that he had won at golf. Sometimes he was all right, but never entered into conversation. You could not make him understand what you were talking about. Q.—You say sometimes he was all right ? A.—Yes. You would start a conversation with him. Then you would ask him what you were talking about and he would not know what you were talking about. Q.—With things like what day of the week it was, and that sort of thing, how was he ? A.—He had not any idea at all, because he thought we were married the Thursday before May 30. On the morning we were getting married, he was going to have lunch with Mr. Ludlow at the club. Q.—Was he able to read his letters and read the papers and so forth ? A.—No."

Later she was asked:

"Between the marriage and the date of [the deceased's] death, were

you asking him frequently what your financial position was going to be under the will ? A.—I did not ask him at all. Q.—Never once ? A.—No. What I was asking him about was to have a wage, as I said, or a dress allowance, because I had only had my £500. I had nothing else at all; and everyone is entitled to a wage or, as I said, a dress allowance. Even the ordinary workman is entitled to that. Q.—Did you tell [the deceased] that ? A.—Yes, I did tell [the deceased] that. He could not understand what I was trying to get at. Q.—Could not understand it ? A.—No, he could not understand that he had to keep me after he got married."

And a later answer:

" [The deceased] had no idea of money at all, because that is how I first got interested in [the deceased]."

B She said with regard to the question about a dress allowance:

" When I did mention it to him, he said : ' Well, we will have to see Charles '. Everything that happened was ' We will have to see Charles '. In the end, I was calling him Charles. During that, there was an appointment made for that reason with Mr. Turnbull, Mr. Elsey and Mr. Culross, for the dress allowance to be brought up."

C It would appear from those answers that the deceased was not even capable of arranging that she should have pocket money or pin money. He was going to the solicitors and to his co-directors. She was asked:

" Had you any doubt at any time that [the deceased] was not perfectly fit to execute that codicil if he had wanted to ? A.—No, because he did not ever do anything with business. He could not read. He could not understand."

Later in her evidence she said:

" [The deceased] thought I was married to him on May 13 when I came out of Mr. Culross's office. Q.—What ? A.—[The deceased] thought he was married all the time. Q.—Are you really saying [the deceased] thought he was married when you left Mr. Culross's office on the 13th ? A.—Yes, he did. Q.—And had entertained the delusion he was married ever since ? A.—Yes, [the deceased] had asked me to marry him on the 10th and he could not take no for an answer. It was just an obsession with him. He did not know why I was sitting in the desk working at the Devonshire Club. F He could not understand why I was still working after he asked me to marry him and I had to point out that there were waiters walking around listening to what he was saying. Q.—I do not want to catch you at all. I want to be perfectly fair to you. You have said that on May 13 [the deceased] thought that he was already married to you ? A.—Yes. Q.—Do you mean that ? A.—Yes, I do. I had to be on duty at twelve o'clock and I could not make him understand I had to go back to the club to start work. G Q.—So that at all times between then and the date that you were actually married [the deceased] must have believed that you were his wife ? A.—Yes. Q.—There is no doubt about that ? A.—He did believe it; he could not understand anything different."

H She described how on the wedding morning he had been up since four o'clock and she spent time helping him to dress. That is some of the evidence given by the present plaintiff in the earlier proceedings. The judge said he accepted the evidence of Lady Greer, and he accepted the evidence of the staff porter at the block of flats. He described the plaintiff as a thoroughly unsatisfactory witness. He said he was clear that he ought not to accept her evidence given on the second trial where it differed from that given on the first trial. He did not say how much of her evidence he accepted in fact.

If this evidence of those three witnesses, and the evidence of the plaintiff herself who had gone through a form of marriage with the deceased were accepted, and if it stood alone, one would think there would be every reason for saying that the deceased was not mentally fit to be married on May 30, 1949. It is necessary, however, to look at another side of the picture. Mr. McGrath, the chauffeur-valet, had been with the deceased for many years. He was called as a witness on behalf of the defendant in these proceedings. He said he had had to dress and undress the deceased after his stroke. He spoke of an attempt at suicide, and of his condition and habits. In cross-examination he said that after August, 1948, the deceased began to take an interest in things again. He took him to Lord's and watched cricket. He was asked:

"And when you drove him back from Lords would he discuss the cricket that had taken place intelligently? A.—Well to tell you the truth not a lot, because we used to get two cushions and like all the old gentlemen he used to go to sleep; and then I used to get the car and go home."

He heard the deceased propose marriage immediately he got into the car on the occasion of the second drive on May 10, and he said how the deceased brightened up at the mention of the name of the plaintiff. He was asked:

"What was the state of the deceased on the day of the wedding?

A.—Well, when I got there he was talking about the marriage, talking about the buttonhole, and I asked him if he wanted to get married in tails or a morning jacket, and he said on an occasion like that he wanted to have his tails. Then, just before we left for the church, he told me to fetch Mr. Turnbull in to the bedroom and there was three glasses and he poured us out a drop of his brandy each for his health, and then he went over to a photograph of our Mrs. Park, that is Mrs. Beatrice, and said: 'To the most beautiful girl in the world', and he said: 'Whatever happens, nobody will ever take your place.'"

That was a striking incident, and it would appear that at that moment, at least, the old gentleman realised that he was contemplating marriage. He was speaking, apparently, to the photograph of his wife, and he said: "Whatever happens, nobody will ever take your place."

Mr. McGrath was asked this further question:

"And you were present at the actual ceremony, were you? A.—Yes. He gave me the wedding ring and wanted me to be best man. Well, I went to the register office and Mr. Elsey was there and being the director I thought it would be nice for him so I asked Mr. Elsey if he would have the ring. I said: '[The deceased] wants me to but I would sooner it would be you', and Mr. Elsey gave it to [the deceased] at the wedding. Q.—During the ceremony did [the deceased] appear to perform his part intelligently? A.—Yes, I was surprised really the way he carried on because I thought, you know, he would have broken down a bit. Q.—That the excitement was too much for him? A.—Too much. Q.—But it was not? A.—No. And he went over and signed the book—well, I was not with him, I stood at the back. He done that all off his own bat. Q.—Have you any doubt at all that he understood precisely that he was marrying the [plaintiff]? A.—He definitely did know. I mean he had been talking about it for a very long while that he wanted to get married, and I think if [the plaintiff] had not married him he would have married somebody else. He wanted to get married, he wanted companionship. He just used to say that he was fed up and lonely; used to tell me I was better off than him—'You have got a wife and family and I have got nobody.'"

Then a further question:

"You never at any time had any doubt at all, did you, that he realised that he wanted to marry [the plaintiff], that he was going to marry [the

plaintiff] and that he married [the plaintiff] ? A.—That was his ambition and he was trying, and he got his way like he did in everything.”

Mr. Turnbull, the co-director, gave evidence in support of the plaintiff's case. He described the condition of the deceased after his stroke. He was asked :

A “As a matter of fact, thereafter were you ever able really to get him to take any serious interest in the business itself ? A.—No. He more or less lost interest in the business side of it altogether. Q.—Did you try to get him to take an interest in the business ? A.—Yes, we gave him some figures. The turnover has gone up or profits are a little better and he would just say ‘Good’ or ‘Jolly good’ or something like that. Q.—It does not show any great lack of intelligence. He never said ‘Bad’ when you told him that profits had gone up ? A.—No, but I expect he might have said : ‘Why have they gone up, what extra business have you been doing’ . Q.—He was just content ? A.—Yes. Q.—Was there another phrase he used a lot when you tried to get decisions from him ? A.—Yes, he would say : ‘I leave it to you.’ ”

B Mr. Turnbull described how, when the question of the settlement arose, the deceased had told him he was going to get married and how Mr. Culross rang up C Mr. Turnbull to go and see him and to take details of the deceased's income. There was a discussion then as to what the settlement should be. As far as one sees from the evidence, though on the day the decision was come to the deceased was more intelligent than he was on other days, it was really a combination of the solicitor and the director who arranged what the plaintiff was to have by way of settlement. She was quite satisfied with the amount which had been D fixed, and he, Mr. Turnbull, was satisfied that the deceased understood that the settlement was £300 a year. He was asked later :

E “What do you say as to his apparent state of mind, according to whether he was interested in a matter or uninterested in a matter ? A.—He used to have a vacant stare on him and not answer at all if he was not absorbing it, but if he was taking it in he would nod his head, or smile, or say : ‘Very good, I leave it to you’ , or something like that. Q.—At any rate, you, with your long knowledge, thought you could tell when he was being intelligent and understanding, and when not taking anything in ? A.—Yes, I think I could. Q.—On what occasions did you see the [deceased] with regard to his marriage ? There was that interview at the solicitors' office. Were there a number of interviews at the solicitors' office before marriage ? F A.—No, I do not think so, not until the Saturday. There were two interviews with Mr. Culross. Q.—At which you were with Mr. Culross but neither [the plaintiff] nor [the deceased] ? A.—That is right. Q.—Did you have any further conversation with [the deceased] elsewhere about his approaching marriage ? A.—Yes. He asked me to ‘Phone Mrs. Leonard Park and request her to remove herself and whatever stuff she had from the flat.’ He G also instructed me ——— Q.—He gave a reason for that, did he ? A.—Yes, he gave as a reason for that that he was going to get married and he wanted them out of the flat to make room for his new wife. I confirmed that to Mrs. Leonard Park on May 19, requesting her to leave the flat by May 27 in accordance with the request made by [the deceased].”

H Mr. Turnbull was asked at the end of his evidence-in-chief :

“Have you any doubt at all as to his understanding precisely that he was getting married that morning ? A.—None at all.”

When he was cross-examined a different picture was presented. I have referred to that part of his evidence which dealt with the settlement which was executed on the Saturday, and with the condition of the deceased on the Saturday, and though the witness said he was better on the Monday he still said he was very

bad on the Monday. There is something running through this case which shows that those who had managed the business were not anxious for the 1949 will or for the 1948 will to stand, for under each the solicitors, Messrs. Culross & Trelawny, were given complete control, and I can well understand that the directors of the company would not like that.

Then there was the evidence of Dr. Urwick, the regular medical attendant. He said that the deceased had a paralytic stroke due to a clot on the brain which affected one side of the body. He was never the same man again. He was inclined to be confused at times, and at other times he would be quite lucid. The deceased told the doctor in May, 1949, that he had met someone he would like to take as a companion, and he told him then that he was thinking of marrying. Dr. Urwick strongly advised him against it, and he said:

"I did not know he was actually going to [be married] . . . He was quite adamant that he was going to marry and he did not say when."

The doctor did not think it was to be in the near future. He said the deceased was certainly a happier man after he met the plaintiff and seemed less depressed. One never quite knew how one would find him, but he thought he would be capable of making a simple will as distinct from making a complicated will. There was no doubt of the serious condition in which he was. Counsel for the plaintiff asked him:

"The time you advised him against marrying was the last time you saw him before the marriage? A.—I did not know he was going to get married. I knew he intended it but I never heard of it until it had actually taken place. Q.—When you saw him on June 7 did he say anything then in regard to his marriage? A.—Yes. He said he had been disappointed it had not been consummated and he told me what he intended [the plaintiff] to have. Q.—Did he say anything about the rooms? A.—Yes. He said she would not share the same room with him and he was disappointed. He also told me what he intended leaving her."

Later the plaintiff was asked about that :

"Did you arrange with [the deceased] before going through the ceremony of marriage that there were to be no physical relations after marriage? A.—Must I answer 'Yes' or 'No'? Q.—I should like you to answer 'Yes' or 'No' and then add any explanation you care to give? A.—My answer is 'No', but if I may carry on that was the reason why I had advice from Mr. Culross regarding a man so much more—many more years—my senior, and in my own mind as men, or even my own sex, get older I am worried about their personal hygiene and just what happens, and that was my main reason for asking other people's advice. (KARMINSKI, J.): What I want to know is, did you discuss this with your husband before marriage, or did not you? A.—Yes. I discussed it with him and all he said to me: 'All I want—I am so desperately lonely and unhappy I do not care. I just want you and only you', and he was perfectly satisfied that the companionship was all he wanted. (Counsel for the defendant): I am not criticising you, I am trying to get at the facts. Did you tell him that you were not in love with him? A.—I was not in love with him, I told him frankly. Q.—And did you tell him that accordingly you would not be prepared to agree to any sort of physical relationship? A.—I told him that, until I got to know him better, I would prefer things to remain as they were on that basis, and if he was prepared to do that so was I. It was my greatest worry."

On June 7, as I have said, the deceased complained to his doctor that he was disappointed.

There was evidence from a member of the club to which the deceased belonged, a member who did not know him very well, but who described the deceased as *compos mentis* as far as he could see, and there was another witness, the

A

daughter-in-law of that member, a young married woman, Mrs. Vernon Smith, who lived with her husband at the Royal Oak Hotel at Hawkhurst, which they kept. The deceased and the plaintiff went down to lunch there one day. She said that the deceased appeared to be just a normal gentleman. She had some conversation with the plaintiff, who, she said, told her she felt very sorry for the deceased; he had had a stroke; he was very lonely; the only thing she did wonder about was that she hoped people would not think that she was a gold-digger.

B

The superintendent registrar in evidence said he thought the deceased was quite normal. He repeated the words and appeared to him to be normal. We are told that the ceremony in the register office does not involve the asking of and answering of questions. It is merely a case of repeating what is said by the superintendent registrar. The superintendent registrar said the deceased played his part quite well, and he had no reason to regard him as other than quite capable mentally. The superintendent registrar afterwards went to the party at the flat and he was a witness to the will of May 30, 1949, which has been held not to be a valid will.

C

There is no doubt that there was evidence on both sides, both ways. It is most admirably dealt with in the judgment of KARMINSKI, J., to which I have referred. What is striking is that, so far as the evidence shows, no one ever suggested before the deceased died that he was mentally unfit to marry. Relations, a brother and his wife, and the solicitor and his wife were present at the wedding, and they appear in the photograph. Directors were present, too. It would be difficult for Mr. Culross to say the deceased was not fit to get married when he, Mr. Culross, drew up the settlement which was executed on May 28, and also had drafted the will which was signed on May 30. There were numerous relations, but not one of them raised any question at the time, so far as we know from the evidence.

D

KARMINSKI, J., in his judgment, said (ante, p. 413):

E

“I think there is force in the argument of counsel for the plaintiff, and I approach the facts of this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will.”

That appears to have been based on a passage or passages in the judgment of SIR JAMES HANNEN, in *Boughton v. Knight* (2), a will case, in which he said in his direction to a jury (L.R. 3 P. & D. 71):

F

“Some years ago the question of what amount of mental capacity was required to make a man responsible for crime was considered in *M’Naghten’s Case* (3). No doubt the question is treated somewhat differently in a criminal suit to what it is here (the difference I will explain presently); but there is, as you will easily see, an analogy between the cases which will be of use to us in considering the points before us. TINDAL, C.J., in expressing the opinion of all the judges, said—‘In all cases every man is to be presumed to be sane until the contrary is proved, and it must be clearly proved, that at the time of

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committing or executing the act the party was labouring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.’ That, in my opinion, affords as nearly as possible a general formula which is applicable in all cases in which the question arises, not exactly, perhaps, in the terms I have read, but to the extent I will explain to you. It is essential, to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong.

H

Now a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence. And so in reference to all other concerns of life,—was the man at the time the act

was done of sufficient capacity to understand the nature of the act? Take the question of marriage. It is always left in precisely the same terms as I have to suggest in this case. If the validity of a marriage be disputed on the ground that one or other of the parties was of unsound mind, the question will be, was he or she capable of understanding the nature of the contract which he or she had entered into. The same will occur in regard to contracts of selling and buying. Again, take the case suggested by counsel, of a man, who, being confined in a lunatic asylum, is called upon to give evidence. First, the judge will have to consider, was he capable of understanding the nature and character of the act that he was called upon to do, when he was sworn to speak the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If so, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness—I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention."

In a later case, *Burdett v. Thompson* (4), SIR JAMES HANNEN, in directing a jury, said (*ibid.*, 73n.):

"It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. That is very different from the proposition that it requires a higher degree of soundness of mind to make a will than to do anything else."

I do not think that any good purpose is served by seeking to draw any such distinction, nor do I believe that there is one. If a man's mental condition is such that he is not capable of making a simple will: "I leave all of which I stand possessed to my wife", or, "I give and bequeath all my property of whatever nature equally between my children", most people would consider that he is not in a fit condition to enter into a contract of marriage. Further considerations may well arise when a complicated testamentary document is propounded, and it must not be overlooked that in such a case there is the question whether the testator knew and approved the contents of the will.

In *Browning v. Reane* (5) administration of the effects of a wife was refused to the husband on the ground that his marriage had been illegally contracted and nullity of marriage was established. In that case SIR JOHN NICHOLL said (2 Phillim. 70):

"Here then the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined: nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy; complete idiocy, total fatuity from the birth, rarely occurs; a much more common case is mental weakness and imbecility, increased as a person grows up and advances in age, from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable,

from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract; though it may not be difficult, in most cases, to decide upon the result of the circumstances; and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind."

It will be observed that SIR JOHN NICHOLL put as a test

"and incapable, from mental imbecility, to take care of his or her own person and property."

It must depend, of course, on the degree of mental imbecility. A person may be slovenly or wildly extravagant, but still capable of entering into a contract of marriage.

In *Durham v. Durham* (6) the petitioner sought a declaration of nullity of his marriage on the ground that, at the time of the celebration of the marriage, his wife was of unsound mind and incapable of contracting marriage. SIR

JAMES HANNEN, P., said (10 P.D. 81):

"All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word 'understand'. If I were to attempt to analyse this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor-General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into."

In *Hunter v. Edney* (otherwise *Hunter*) (6) SIR JAMES HANNEN, P., said (*ibid.*, 95):

"The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject."

In *Jackson (otherwise Macfarlane) v. Jackson* (7) BARGRAVE DEANE, J. ([1908] P. 310) adopted what SIR JAMES HANNEN, P., had said in *Hunter v. Edney (otherwise Hunter)* (6), and he added (*ibid.*):

"Those words are short, concise, and clear, and I think I may fairly use them in applying my mind to the particular facts of the present case."

In 1923 SIR HENRY DUKE, P., heard the case of *Forster (otherwise Street) v. Forster* (8), in which the wife sought a decree of nullity on the ground of unsoundness of mind. There was no appearance on behalf of the husband, and counsel for the wife asked (39 T.L.R. 659):

"Assume that for three weeks before the ceremony he had been drinking large quantities of whiskey, was he, on Feb. 8, 1923, in your opinion, in a condition to understand all the consequences of matrimony. (The President): Did you ever know anybody who was in a condition to understand all the consequences of matrimony? (The witness): No, my Lord."

That shows something of the difficulty of formulating the right test. The President in that case, in the course of his judgment granting the declaration prayed, said (*ibid.*, 661):

"The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. Now that the respondent knew that he had proposed marriage and the effect of the ceremony and its primary consequences I cannot doubt, but whether his mind at the time was in such a condition that he appreciated and understood the effect of the ceremony is more doubtful. The evidence of members of his family has satisfied me that he was not normal, and that there have been in the past recurrent periods during which he behaved in an unaccountable way after consuming large quantities of alcohol. I have had before me, too, a number of mental specialists, who tell me on their responsibility, and indeed on their oath, that there were with the respondent recurrent periods in which he was the victim of what are called 'grandiose delusions'. If I had believed that the petitioner had been imposed upon by a rascal—as I was at one time much inclined to believe—I must have refused her the relief which she sought. But I have come to the conclusion that at the end of January and the beginning of February the respondent really held the deluded belief that he was an officer holding a responsible and trusted command, and that he suffered from delusions as to his own persona, as to his position in the world, and as to his capacity to perform any of the obligations which he undertook—delusions which rendered his life at that time an unreal thing. On that finding I hold that he was mentally incapable of entering into the contract of marriage and I pronounce a decree nisi of nullity of marriage."

The President had been referred to the decision of SHEARMAN, J., in *Baldwin v. Baldwin (otherwise Mann)* (9), in which the judge had held that the husband had not the judgment necessary to enter into a contract of marriage.

Counsel for the defendant referred to *Jemima Cole v. William Cole* (10), of which the headnote reads (5 Sneed's Ten. Rep. 56):

"1. Marriage—Voidable for insanity. Marriage is a civil contract, and may be avoided like any other contract, for want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in all contracts. 2. Same—Same. It is a general rule that those who have not the regular use of their understanding sufficient to deal with discretion in the common affairs of life, or the weakness being so considerable as to amount to derangement, are incapable of contracting a valid marriage. Bishop's Mar. & Div., s. 117.

3. Same—Same—Practice—Proof of Insanity. In an application to annul a marriage, on the ground of the insanity of one of the parties at the time thereof, the proof of such insanity must be clear and unquestionable."

In the opinion of the court delivered by CARUTHERS, J., there is the following passage (*ibid.*, 59):

A "Marriage, by our law, is a civil contract, and may be avoided, like any other contract, for want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in all contracts. In the dark ages, when there was thought to be something sacred and mysterious in the matrimonial relation, and its civil was almost obliterated by its spiritual character, the marriage of persons of unsound mind was held valid. BLACKSTONE, in his 'COMMENTARIES',
B vol. 2, pp. 438, 439, says this was 'a strange determination, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything'. The test question in all such cases is whether the party is capable of making any binding contract. The identity of the doctrine that unsoundness of mind vitiates this as well as all other contracts is well established. But every consideration of policy and humanity
C admonishes us that a contract so essentially connected with the peace and happiness of individuals and families, and the well-being of society, should not be annulled on this or any other ground, not clearly made out. The consequences, in many cases, would be most deplorable. The rights of property would be unsettled and the peace of families destroyed, to say nothing about the effects upon the innocent offspring. The annulment of other contracts would only affect property; but this would do that, and more—it would tell upon the happiness, character, and peace of the parties. The appalling character of these consequences is well calculated to impress the courts with the solemn duty of requiring a clear case for the application of the general principle to this delicate and important contract. It is, however, only a civil contract, and must stand or fall by the usual tests
E applicable to contracts. It is not every unsoundness that will avoid a contract. The degree necessary to produce this effect is fixed by the law, and must be made out by proof. All persons of lawful age are presumed to be capable of contracting, until the contrary is made to appear. So, sanity is presumed, and if the contrary is alleged, it must be proved by the party imputing it. If a state of permanent insanity is once shown, the
F burden of proof shifts, and a lucid interval must be proved by the other side. But the rule is different in a case of temporary insanity, depending on some exciting cause not in perpetual action. The general rule is, 'that those who have not the regular use of their understanding, sufficient to deal with discretion in the common affairs of life, or the weakness being so considerable as to amount to derangement, are incapable of contracting a valid marriage, or making any other binding contract.' Bishop on Mar. & Div., s. 177. SIR JOHN NICHOLL, in *Browning v. Reane* (5), says (2 Phillim. 70): 'If the incapacity be such . . . that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract.' It is difficult to describe any exact, palpable
H line between legal capacity and incapacity. Perhaps this is impracticable, as an abstract thing, in reference to the ability to make a valid contract, as insanity subsists in various degrees, and the line of separation between it and mere imbecility is often faint and imperceptible. The general test is the fitness of the person to be trusted with the management of himself and his own concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired."

The question, I think, is this. Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract. That is the test I would apply, and my reading of the judgment of KARMINSKI, J. (ante, p. 415), satisfies me that he put to himself the right question. He had to make up his mind on the evidence given before him. He was not content to rest his decision on any question of onus of proof. He said (*ibid.*):

"I have come to the conclusion that he could and did understand the nature of the contract he was entering into, and I find that the ceremony of marriage in fact performed on May 30, 1949, between the deceased and the plaintiff constituted a valid and binding marriage between them."

This court ought not to interfere with that finding. Nor do I think that we ought to order a new trial, though I do not pretend I regard the case with a satisfactory feeling. The question of fitness to marry might have been raised in the first action, i.e., on the hearing before PEARCE, J., and a jury. Learned counsel agreed that it could have been set up in the reply or by an amendment of the claim. If that had been raised, the jury would have had to decide not only the question of fitness to make a will, but also the question of fitness to marry. It would have been more fitting and more satisfactory if both issues had been determined at the same time and by the same jury. In the circumstances, I do not think we ought to prolong this litigation, and, in my view, the appeal should be dismissed.

BIRKETT, L.J.: I am of the same opinion and agree with the conclusions which my Lord has already stated. The comparatively simple issue before this court was this. Was KARMINSKI, J., right on the facts and in law in deciding as he did that the marriage which took place on May 30, 1949, between the deceased and the plaintiff was a valid and binding marriage in that the deceased at the time of the celebration of the marriage, or the ceremony of marriage, could, and did, understand the nature of the contract he was entering into? That was a most difficult issue to determine, and the difficulty arose largely because of the extraordinary circumstances surrounding the marriage ceremony at the register office at Kensington. In the present action the plaintiff claimed as the lawful widow of the deceased to have a will of Mar. 1, 1948, pronounced against, and to have a grant to her of letters of administration of the estate of the deceased. The defendant, who was the principal residuary legatee under that will of Mar. 1, 1948, in which the plaintiff had no interest whatever, claimed that at the time of the marriage on May 30, 1949, the deceased was of unsound mind and mentally incapable of appreciating the nature of the contract of marriage he was entering into, and that in those circumstances the marriage was invalid.

I mention that because in the pleadings the defendant set out at considerable length what is called the substance of the case, the facts in which differed in some degree, but in essence did not differ at all, from the substance of the case set out in an earlier action. The startling fact is that the will of May 30, 1949, which was the day of the marriage, had been pronounced against at the instance of the plaintiff after a verdict by a jury that the deceased was not of sound mind, memory and understanding, at the time he executed it. The substance of the case the plaintiff there put forward is essentially the substance of the case the defendant put forward in this action, and that has naturally constituted a very serious difficulty. Counsel for the defendant repeated many times that, if there is a finding by a jury that on the day of the wedding at three o'clock in the afternoon

A man was not of sound mind, memory and understanding, how is it possible to say that at eleven o'clock that morning he was perfectly all right, and he suggested that it was inconceivable that this court would give judicial blessing to that kind of thing. The evidence which convinced the jury in 1950 that the deceased was not of sound mind, memory and understanding was largely supplied by the present plaintiff herself, and it consisted of a long record of very strange and eccentric behaviour on many occasions before the actual ceremony of marriage, e.g., his belief that he was already married to the plaintiff on May 13. That was the difficulty in the case since most people would say that, if a man was in fact of unsound mind, memory and understanding at three o'clock on the day of his wedding, it would not require much to show that at eleven o'clock on that day he was not fit to be married.

Another startling difficulty was that on May 28, two days before the wedding, when the marriage settlement had to be executed, and the preferred ordinary shares were to be settled on the plaintiff, really by common consent, the deceased was utterly incapable of understanding what was happening, and the solicitor and the director of his company were quite unable to make him understand what he was doing. Mr. Culross put it in this way:

“Q.—I think the actual document which incorporated that arrangement [about the deferred ordinary shares] was executed on the Saturday morning before the marriage, was it not? A.—Yes. Q.—At the flat? A.—Yes. Q.—What did you think at the time he actually executed it? A.—At the time he actually executed it I did think he was very bad. He was in a very bad state that morning. We could not get him to repeat what he was doing at all. Q.—Mr. Culross the solicitor was present? A.—Yes, Mr. Culross was present. Q.—And Mr. Culross sought to explain it to him? A.—Yes, he sought to explain it to him and tried to get him to repeat what he was doing, but he would keep repeating something entirely different. Q.—At any rate, you did not think that at the time he executed the document on that Saturday morning he really understood it? A.—No, at that moment, no.”

It is an amazing thing that, two days before this old man of seventy-eight is married, when asked to execute a settlement of certain shares he was utterly incapable even of repeating the words, and when words were put to him he repeated something entirely different.

The evidence detailed by my Lord presented the deceased on the day of his marriage as an old man of seventy-eight, quite senile, suffering from disease, incapable, in the true sense, of looking after himself continuously, and subject to periods such as the one on May 28 when he simply did not know what he was doing, and it is not to be wondered at that Dr. Urwick, his regular medical attendant, strongly advised against the marriage. The question is whether at the time of the ceremony the deceased was mentally capable of understanding the nature of the contract of marriage in the sense indicated by my Lord, so that the marriage could be regarded as valid.

Counsel for the plaintiff, who represented her in the proceedings before PEARCE, J., and a jury, and before KARMINSKI, J., in this case, submitted that there was in fact no inconsistency between the cases he presented on the two occasions. He said that his submission to PEARCE, J., and the jury in *Culross v. Park* (1) was that the deceased was not fit to make a particular will, while, in the second case (ante, p. 408), it was that the deceased, although not fit to make that particular will, which was of rather a complicated nature, was fit to enter into the contract of marriage. He harmonised the two contentions by submitting that the difficulties could be removed if the exact nature of the illness from which the deceased suffered was fully understood. As I understand it, his argument was that the deceased did not suffer from any disease of the mind as those words are usually employed. There was no suggestion that he thought himself to be other than he was. There was no confusion of identity or any

matter of that kind. There was in fact no disease of the mind in the ordinary sense at all. On the evidence of the medical men the position was really this. Here was a man of seventy-eight, who admittedly suffered from arteriosclerosis (which I understand to be something more than the mere hardening of the arteries), from hardened arteries, and also from a weakened heart, and the combination of those things was such that there were times when the heart was unable to supply the millions of brain cells with the necessary blood, so that the brain might work effectively. But there were occasions, said counsel, when the heart was able to perform that function and to supply the brain with all the necessary blood for its proper action. That really depended on these circumstances. If the deceased was sufficiently interested (I think the phrase was) in any particular matter, the necessary stimulus to make the heart function was provided, the blood was supplied, and (in the words of counsel) the deceased had complete understanding. But if the subject under discussion was a matter in which he took no interest, or which bored him and made him listless, the necessary stimulus was lacking and blood was not supplied to the brain. For example, figures and details of the business were matters which the deceased, at the age of seventy-eight, did not appear any longer to be interested in, and it would seem that from 1938 onwards his effective interest in the business had never been what it was in the earlier days when a prosperous business had been built up. But there were some things, golf was mentioned, for example, in which he was keenly interested still, and he could speak about the trophies he had won and of the pleasant days he had spent on the golf links. That was a matter which so interested him that he became clear and coherent because blood was being supplied to his brain. Similarly, it appears that he was a freemason, or, at least, was interested in freemasonry, and that that was a subject which had the same effect on him. So, said counsel, this all-important matter of his marriage was one in which he was keenly interested, and he was completely alert with regard to the actual fact of entering into the marriage contract.

KARMINSKI, J., who, no doubt, heard the same arguments, said that there could, in his view, be no doubt that from the early part of 1949 the deceased was anxious to have a permanent female companion with whom he was prepared to go through a ceremony of marriage. The deceased was a lonely man, quite obviously. The death of his wife after fifty years had been a terrible blow, and it is understandable that an old and ailing man should feel more secure if he had a companion always with him, and the learned judge so found, and if counsel for the plaintiff is right, then that was a matter which would stimulate him, and on the particular matters relating to it his mind would be fully occupied.

KARMINSKI, J., said in his judgment (ante, p. 414), quoting SIR JAMES HANNEN, P., in *Hunter v. Edney (otherwise Hunter)* (6) (10 P.D. 95):

"The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject";

and (ante, p. 414):

"I ask myself the question asked in *Hunter v. Edney (otherwise Hunter)* (6) by SIR JAMES HANNEN, P.: Was the deceased capable of understanding the nature of the contract he was entering into?"

Counsel for the plaintiff submitted that certain matters ought to be kept in mind. He said that there should be knowledge of the ceremony itself and the parties must understand the nature of the contract. The parties must further understand their rights and the responsibilities that marriage creates, e.g., the husband's duty to maintain his wife. And, finally, both parties must be able to take care of their persons and their property. It was not enough that the parties should appreciate that they were taking part in a marriage ceremony or

that they should be able to follow the words of the service. If the parties lacked the qualities referred to in his three submissions, then the marriage was invalid. My Lord has dealt fully with that question and cited the answer quoted in the course of the case with regard to the normal and usual understanding: *Durham v. Durham* (6) (10 P.D. 81); and I think myself, at any rate, that this is quite clear, that KARMINSKI, J., had the all-important question most clearly and vividly before him.

A Counsel for the plaintiff submitted, therefore, that what this court had to do was to consider three things. (i) Did the learned judge misunderstand the evidence given? I do not think anyone could say that KARMINSKI, J., misunderstood the evidence, because as I said in the course of the argument, his judgment, full and complete, gave a most admirable summary of all the important evidence in the case, and certainly on that point no one could say that he misunderstood it. (ii) Did KARMINSKI, J., draw the wrong inferences from the evidence, and, if so, this court was in an equally good position to draw what it considered to be the right inferences. (iii) Did the learned judge make any mistake in the law which he applied to the facts of the case?

On that last matter counsel for the defendant complained of the approach which the learned judge had made to this question when he said (ante, p. 413):

C "Counsel for the plaintiff argued that the capacity required to make a will was of a higher degree than that required to contract a marriage, and he relied on the direction to the jury given by SIR JAMES HANNEN in *Boughton v. Knight* (2) (L.R. 3 P. & D. 72): '... whatever degree of mental soundness is required for any one of these things,—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness,—I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. And you will easily see why. Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention.' SIR JAMES HANNEN expanded and explained this passage in *Burdett v. Thompson* (4), when he said (ibid., 73n), speaking of the making of a will: 'From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will'. I think there is force in the argument of counsel for the plaintiff, and I approach the facts of this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will."

G He said that was important because of the decision of the jury in 1950. I think it is a little unfortunate that the learned judge changed the word. SIR JAMES HANNEN quite clearly was speaking about degrees of unsoundness of mind—whatever degree there may be of soundness of mind, the highest degree must be required for making a will. It is perfectly plain, of course, that there are degrees of soundness of mind, and in one of the early cases which was quoted to us, *Turner v. Meyers* (11) (which, I think, must have been before the court in Tennessee when it gave its judgment (*Jemima Cole v. William Cole* (10), because that court reproduced much of the language used in the case, SIR WILLIAM SCOTT, referring to this question of unsoundness of mind, said (nearly one hundred and fifty years ago) (1 Hag. Con. 417):

H "Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted;

for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject-matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held by the common judgment of mankind to affect his general fitness to be trusted with the management of himself and his own concerns."

Then, in *Boughton v. Knight* (2), in the note which SIR JAMES HANNEN added in the case of *Burdett v. Thompson* (4), to explain the misunderstanding which had arisen on his judgment, he said (L.R. 3 P. & D. 73n.):

"The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it."

So, there can be no doubt that there are degrees of unsoundness of mind, and, of course, there can be degrees of capacity quite apart from unsoundness of mind. Some men are very able and some are not, and it is understandable, for example, that an illiterate, uneducated man, perfectly sound of mind, but not of a high quality, might be able to understand the contract of marriage in its simplicity, as my Lord defined it this morning, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, quite apart from any question of unsoundness of mind. I think, therefore, that the way the case was put was a little unfortunate, and that it was a pity that that matter was introduced into this case at all.

I think the test is as my Lord defined it this morning. On the facts of this case, is it shown that the deceased was not of the mental capacity to understand the nature of the contract? I cannot think that degrees of unsoundness of mind really can have much relevance to that question. It was said, and with truth (my Lord cited the passage in *Durham v. Durham* (6) (10 P.D. 82)), that the contract of marriage is in its essence one of simplicity. The real question finally comes down to this, not of the degree of the unsoundness of mind or any particular degree of capacity, but simply to the question, yes or no, is it shown that this man was not mentally capable of understanding the contract into which he had entered? The test which was applied by KARMINSKI, J., was the proper test, and so all this discussion about degrees I do not think matters, because it is quite plain, when the learned judge's judgment is read, that he had in mind what were the requisites of a valid contract of marriage, and what was to be understood, and that he applied that test to the evidence that was given with regard to the morning of May 30. He dealt with the superintendent registrar's evidence referred to by my Lord and I think he had before him all the essential matters that it was important that he should have in coming to his decision. He quite clearly appreciated the degrees which I have mentioned, and I think he had in mind the submissions which were made by counsel for the plaintiff. He said:

"The evidence in this case is at many points conflicting, and the conflict has not been made easier to resolve because it has come (apart from that of the plaintiff) from witnesses whom I have regarded as reliable and truthful. In my view, the conflicting nature of the evidence can be largely explained by the fact that from the summer of 1948 until his death in June, 1949, the condition of the deceased varied from day to day and sometimes, as Dr. Urwick found, almost from hour to hour. It is important to recognise that the deceased was a man who had been of good business and general intelligence, able to build up and to direct a successful trading company. This

is certainly not a case where a man has from birth been deprived of the usual intellectual faculties or has been in any sense mentally deficient."

That is why I think the judge was influenced by the submissions that counsel for the plaintiff made.

A Finally, after reviewing the whole of the evidence, and saying that Lady Greer was a witness of high standing, whose evidence he accepted, and recognising the conflicting character of the evidence, and having in mind, as I think, all the circumstances of the case on the one side and on the other, and having before him the clear tests which he had to apply to determine the issue before him, he said (ante, p. 415):

B "In the course of his argument counsel for the defendant accepted that no high intellectual standard was required in consenting to a marriage; he further accepted that the burden was on him to prove the invalidity of a marriage in form properly celebrated. If he has failed to discharge that burden of proof, then the plaintiff must succeed . . .";

and the learned judge was clearly of opinion that he had failed to discharge that burden of proof, because he goes on to say (ibid.):

C ". . . but I prefer in this case to answer the question posed to himself by SIR JAMES HANNEN, P., in *Hunter v. Edney* (otherwise *Hunter*) (6). Was the deceased capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject? It is not an easy question in this case to answer. I have had to consider carefully the manifest mental weaknesses and confusions of the deceased, D on the one hand, and his pertinacity and determination with regard to the marriage, on the other. I have come to the conclusion that he could and did understand the nature of the contract he was entering into, and I find that the ceremony of marriage in fact performed on May 30, 1949, between the deceased and the plaintiff constituted a valid and binding marriage between them."

E Therefore, I think that KARMINSKI, J., quite palpably had every one of those conflicting matters in mind. He had in mind most of all, I think, this variation from day to day and differences from hour to hour; and with all that in mind, and the evidence of the actual day of the marriage, and the circumstances surrounding the ceremony, he came to that conclusion. For my part, I do not F feel that it is possible to depart from that decision. I share my Lord's view that in many respects this case is an unsatisfactory one, but we in this court have to decide the issues before us free from bias or prejudice of any kind that liking or disliking may bring about. Looking at the matter in that way, I do not think that this judgment of KARMINSKI, J., ought to be disturbed, and I think that this appeal ought to be dismissed.

G HODSON, L.J.: The defendant has contended that KARMINSKI, J., misdirected himself in law when he said at the outset of his judgment that he approached the facts in this case on the basis that a lesser degree of capacity is required to consent to a marriage than in the making of a will. As I understand the matter, capacity is equivalent to mental capacity, and that is equivalent to soundness of mind, and it was in that sense that the learned judge was using the H word "capacity". The learned judge felt that the distinction was of importance, having regard to the fact that in an earlier case (*Culross v. Park* (1)) the court had pronounced against the will of the deceased made on the same day as the marriage following on the verdict of a jury who answered in the negative the question: "Do you find the testator at the time of the execution of the will was of sound mind, memory and understanding?" In my opinion, there is no sliding scale of soundness of mind by reference to which different matters of which the law is required to take cognisance may be measured. The authority of SIR

JAMES HANNEN in *Boughton v. Knight* (2) (L.R. 3 P. & D. 71) and *Burdett v. Thompson* (4) (ibid. 73n.) do not, I think, support such a proposition. Indeed, in the latter case SIR JAMES HANNEN was at pains to point out (ibid.) that it had been erroneously supposed that he had said it required a greater degree of soundness of mind to make a will than to do any other act. He said he never said that or meant to say that. He repeated that if you are at liberty to draw a distinction between various degrees of soundness of mind, then whatever is the highest degree of soundness of mind is required to make a will. In *Boughton v. Knight* (2) he had pointed out that, in considering the question whether the testator is of sound disposition, you cannot put aside the contents of the will and surrounding circumstances connected therewith, and this passage indicates that one cannot consider soundness of mind in the air (so to speak), but only consider it in relation to the facts and the subject-matter of the particular case.

It is true that the jury answered in general terms the question put to it in the probate action in which the will of the deceased made on May 30 was disputed (*Culross v. Park* (1)), but the question was not answered without a direction from the learned judge as to the facts of the particular case, and the answer to the question cannot be treated as if it were a certificate of insanity concerning the condition of the deceased on that day a few hours after his marriage had taken place.

The contents of a will vary greatly from one case to another, as also the surrounding circumstances, and similar considerations apply to any transaction which a man may seek to carry through. It is true, as SIR JAMES HANNEN, P., pointed out in the case of *Durham v. Durham* (6) (10 P.D. 82), that the contract of marriage is a very simple one which does not require a high degree of intelligence to comprehend, and in *Browning v. Reane* (5) SIR JOHN NICHOLL said (2 Phillim. 70) of marriage that it was

“ . . . the most important contract of life, the very essence of which is consent.”

In dealing with the contract of marriage into which the deceased purported to enter on May 30, the learned judge had these considerations in mind, and I think directed himself correctly. What he said about the approach to the problem cannot be described as a misdirection, since the trial of the issue of capacity in the earlier probate action was, as counsel for the plaintiff pointed out, a trial of a different issue where the evidence was different, and in which the burden of proof lay on different sides. In dealing with the contract of marriage, the learned judge had the right considerations in mind. He concluded by asking himself the right question, namely, the one posed, again by SIR JAMES HANNEN, P., in *Hunter v. Edney* (otherwise *Hunter*) (6) (10 P.D. 95). The question is: Was the deceased capable of understanding the nature of the contract he was entering into free from the influence of morbid delusions on the subject? He answered the question in favour of the plaintiff, and did so deliberately after a review of the evidence, refraining from resting on the ground that the defendant had not discharged the burden of proof. In arriving at his conclusion he gave, as his careful and clear analysis of the evidence shows, due weight to all relevant matters and did not, I think, lay undue stress, as was contended on behalf of the defendant, on the central fact that the deceased was aware that he was being married at the time when the forms prescribed by law for a marriage in a register office were being followed. The evidence accepted by the learned judge pointed clearly to the fact that the deceased had determined to marry the plaintiff in the knowledge that she was the successor to his former wife, with whom he had enjoyed many years of happy marriage. The evidence also showed that he was aware of the duties and responsibilities to her in the sense that he took steps to make a home for her with him at the flat in which he had previously lived, and took steps to make room for her there by securing the removal of other persons. The evidence also shows that he was aware of his duty to make financial provision for her,

Counsel for the defendant contended that, in the senile condition in which the deceased undoubtedly was, he could not take care of his person and property, so that he could not dispose of his person and property by the matrimonial contract any more than by any other contract. In this contention he was supported by the authority of SIR JOHN NICHOLL in *Browning v. Reane* (5), to which I have referred previously. Although this language may, no doubt, be interpreted in such a way as to lend support to the defendant's argument based on the facts of this case, I do not think that the learned judge can be said to have erred in arriving at the conclusion in favour of the plaintiff on this point. Indeed, on the totality of the evidence, leaving out of account the evidence of the plaintiff, unreliable as it was except where it was expressly or tacitly admitted by other witnesses whose evidence the learned judge accepted, I think that the conclusion was right. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lewis W. Taylor & Co.* (for the defendant); *Ager & Ager* (for the plaintiff); *Pritchard, Englefield & Co.*, agents for *Boote, Edgar & Co.*, Manchester (for the parties cited).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re ADLARD'S SETTLEMENT TRUST. *Re* CAMPBELL'S SETTLEMENT TRUST. *Re* FULTON'S SETTLEMENT TRUST. TAYLOR AND OTHERS *v.* ADLARD AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 27, 28, November 12, 1953.]

Settlement—After-acquired property—Settlement on daughter—Covenant by daughter to settle after-acquired property on trusts of settlement—Property acquired more than thirty years later—Received by trustees and held on trusts of settlement—Claim by daughter to recover property from trustees.

By a settlement, dated June 14, 1918, and made between the settlor, of the first part, his daughter A., who had attained the age of twenty-one and was then unmarried, of the second part, and trustees, of the third part, the settlor settled the sum of £3,500 war loan (referred to hereafter as "the trust fund") on trust to pay the income to A. during her life, and, subject thereto, on trust for her children or issue as she should by deed or will appoint, and, in default of appointment, on trust for all her children who should attain the age of twenty-one, in equal shares. If there should be no child of A. who should attain a vested interest, the trust fund was to be held on trust for the statutory next of kin of A. who would have been entitled thereto if she had died possessed thereof intestate and a spinster. By the deed of settlement A. covenanted with the trustees to assign to them all her after-acquired property, to be held by them on the trusts of the settlement. On the same date, viz., June 14, 1918, by means of settlements in identical terms mutatis mutandis with that in favour of A., the settlor settled the same sum on each of his daughters, C. and F., who were also over twenty-one and unmarried at the time. The daughters had no separate advice when they entered into the covenants. Subsequent to June 14, 1918, all three married. A. and C. each had children. F., who was now a widow, had no children. The settlor died on Dec. 23, 1944, and his wife died on Aug. 25, 1951. On their mother's death A., C., and F., and another daughter became entitled absolutely, in equal shares, to the following funds: (i) £8,000 under an appointment, dated June 1, 1934, and made by the settlor in exercise of a power contained in his marriage settlement; (ii) £16,000 under an appointment of the same date, made by the mother in exercise of a similar

power; (iii) £40,000 under a voluntary settlement, dated May 5, 1943, and made by the settlor; and (iv) £10,000 under an appointment made by the mother by her will, dated Dec. 17, 1947, in exercise of a power contained in the settlor's will, dated June 4, 1934. Each of the daughters expressed her desire to receive her share of the funds for herself, but believed at the time that she had no power to do so, and in January, 1952, their respective shares were transferred to the trustees of their settlements. A., C., and F. now sought to recover their shares from the trustees.

HELD: assuming that A., C., and F. could have arrested the funds and retained them in breach of their covenants contained in the settlements of June 14, 1918, they were not now entitled, either at law or in equity, to recover them from the trustees, who had duly received them by reason of the obligations imposed by the covenants and now held them, and were bound to continue to hold them, in accordance with the tenor and true meaning of the settlements from which their obligations were derived.

Re Bowden ([1936] Ch. 71), applied.

AS TO COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 571-580, paras. 833-843; and FOR CASES, see DIGEST, Vol. 40, pp. 493-517, Nos. 422-618.

Cases referred to:

- (1) *Re Ellenborough*, [1903] 1 Ch. 697; 72 L.J.Ch. 218; 87 L.T. 714; 40 Digest 537, 800.
- (2) *Meek v. Kettlewell*, (1842), 1 Hare, 464; 11 L.J.Ch. 293; 66 E.R. 1114; *affd.* L.C., (1843), 1 Ph. 342; 13 L.J.Ch. 28; 2 L.T.O.S. 205; 41 E.R. 662; 25 Digest 534, 236.
- (3) *Kekewich v. Manning*, (1851), 1 De G.M. & G. 176; 21 L.J.Ch. 577; 18 L.T.O.S. 263; 42 E.R. 519; 40 Digest 534, 776.
- (4) *Re Bowden*, [1936] Ch. 71; 105 L.J.Ch. 23; 154 L.T. 157; Digest Supp.
- (5) *Re Kay's Settlement*, [1939] 1 All E.R. 245; [1939] Ch. 329; 108 L.J.Ch. 156; 160 L.T. 172; Digest Supp.
- (6) *Re Brooks' Settlement Trusts*, [1939] 3 All E.R. 920; [1939] Ch. 993; 109 L.J.Ch. 28; 161 L.T. 158; Digest Supp.
- (7) *Allcard v. Walker*, [1896] 2 Ch. 369; 65 L.J.Ch. 600; *sub nom.* *Allcard v. Walker*, *Re Lucas*, *Walker v. Lupton*, 74 L.T. 487; 38 Digest 708, 529.

ADJOURNED SUMMONS by the trustees of three settlements, dated June 14, 1918, and made by Rupert Darnley Anderson (referred to hereafter as "the father") on his three daughters, viz., the first defendant, Mrs. Adlard, the second defendant, Mrs. Campbell, and the third defendant, Mrs. Fulton, respectively, to determine questions in regard to the share of each of the three daughters in certain funds.

By the settlement made on her on June 14, 1918, each of the three daughters covenanted with the trustees to assign to them all her after-acquired property (with certain small exceptions) to be held by them on the trusts of the settlement. The father died in 1944. On the death of their mother on Aug. 25, 1951, the three daughters and another daughter (who was not a party to these proceedings) became entitled, in equal shares, to (a) the parents' marriage settlement funds, under a deed of appointment executed by both parents on June 1, 1934; (b) a fund subject to the trusts of a voluntary settlement made by the father in 1943; and (c) a sum of £10,000 under an appointment made by the mother by her will in exercise of a power given to her by the father's will. After the trustees of the daughters' settlements had received the investments representing the funds and allocated them to the respective settlements, the three daughters, Mrs. Adlard, Mrs. Campbell and Mrs. Fulton, sought to recover their shares from the trustees. By the summons the trustees asked the court to determine, *inter alia*, whether the shares were, by virtue of the covenants by the three daughters, subject to

the trusts of the settlements of 1918 and ought to be retained by them, or whether they should be transferred to the daughters as their absolute property.

L. H. L. Cohen for the plaintiffs, the trustees of the settlements.

Raymond Jennings, Q.C., and *Arthur Bagnall* for the first, second and third defendants, and adult children of the first and second defendants.

Neville Gray, Q.C., and *W. F. Waite* for infant grandchildren of the first and
A second defendants.

Cur. adv. vult.

Nov. 12. **VAISEY, J.**, read the following judgment. The late Mr. Rupert Darnley Anderson was married once only, namely, to a Miss Harland, and I will refer to them respectively as "the father" and "the mother". He died on Dec. 23, 1944, she on Aug. 25, 1951. Of their marriage there was issue, a son and
B four daughters. The eldest daughter, the defendant, Mrs. Adlard, has had issue, two children, each of whom has attained the age of twenty-one, is married, and has an infant child. Mrs. Adlard is now sixty-three years of age. The second daughter, Mrs. Shuttleworth, was married in 1917, and on her marriage there was a settlement similar to those of her sisters with which this case is concerned, but she is not a party to these proceedings. The third daughter, the defendant,
C Mrs. Campbell, aged fifty-eight, has two adult children and an infant grandchild. The fourth daughter, the defendant, Mrs. Fulton, is fifty-six years of age, is a widow, and has never had any issue.

At the date of the three settlements with which this action is concerned, namely, June 14, 1918, Mrs. Adlard, Mrs. Campbell and Mrs. Fulton had all attained the age of twenty-one and were spinsters. One of these settlements was
D made on Mrs. Adlard, another on Mrs. Campbell and a third on Mrs. Fulton. I will refer to these three sisters as "the sisters" and to their settlements as "the three settlements". In each case the parties to such settlement were (i) the father, and (ii) the daughter concerned, in addition to the original trustees. Each of the settlements recited that the father intended to transfer the sum of £3,500 five per cent. war loan to the trustees of the settlement to be held on the trusts thereinafter declared, and also that the daughter who was party thereto was desirous of settling her after-acquired property in the manner thereafter appearing. Each of the three settlements provided as follows. (A) The father, in pursuance of his said intention and in consideration of his love and affection for his daughter, party thereto, covenanted with the trustees to transfer the said sum of war loan to them, and the expression "the said trust fund" used therein was defined as
E meaning the war loan and the investments from time to time representing the same. (B) The trust fund was to be held in trust to pay the income thereof to the daughter, party thereto, during her life, and subject thereto she was given a power of appointment by deed or will among her children or issue, and in default of appointment the fund was to be held in trust for all her children who should attain the age of twenty-one years or, being daughters, attain that age or marry
G under that age, in equal shares. (C) If there should be no child of the said daughter who should attain a vested interest, then, subject as aforesaid, the trustees were to hold the trust fund in trust for the statutory next of kin of the daughter who would have been entitled thereto if she had died possessed thereof intestate and a spinster. (This provision is, of course, material in the case of Mrs. Fulton). (D) Such daughter was empowered by deed executed prior to and in
H contemplation of any marriage or by will to appoint to or for any husband who might survive her an interest for his life in all or any part of the trust fund. (E) In pursuance of her said desire the daughter, party thereto, covenanted with the trustees that any real or personal property to which she should at any time thereafter become entitled, whether in possession, reversion, or otherwise, except (i) personal effects, (ii) any legacy or other property acquired at one and the same time not exceeding in amount £200, and (iii) the income or accumulations of income (whether invested or not) of any fund or property in which she might

have an interest, should, as soon as circumstances would admit, and at the cost of the trust estate, be assigned and assured by her and all other necessary parties to the trustees on trust to retain or sell as therein provided, and to hold the same or the proceeds of sale on the trusts and with and subject to the powers and provisions thereinbefore declared and contained concerning the said trust fund, save and except that, if there should be no child of the said daughter who should attain the age of twenty-one years or, being female, attain that age or marry, then (subject to the foregoing trusts and powers) the trustees should hold the said after-acquired property and the investments representing the same on trust for such persons and purposes as such daughter should by will appoint, and in default of such appointment in trust for the statutory next of kin of such daughter as in the case of the trust fund, as already mentioned. (F) It was declared that it should not be obligatory on the trustees to see to the settlement of any property of the said daughter and no act or omission in such respect should be chargeable as a breach of trust. In the case of each of the three settlements: (i) the father duly transferred the sum of £3,500 war loan to the trustees; (ii) the plaintiffs since 1934 have been, and they still are, the trustees of such settlement; (iii) the income of the war loan or the investments representing the same has been paid to the daughter, party to such settlement, since the date of the settlement; (iv) no appointment has been made by such daughter under any of the powers in such settlement contained; (v) prior to the death of the mother nothing had been actually transferred to the trustees of such settlement under the covenant therein contained for settlement of after-acquired property.

The property affected or supposed to be affected by the several covenants, is the following. (A) Under a marriage settlement, dated Jan. 1, 1889 (hereinafter called "the parents' marriage settlement"), made on the marriage of the father and the mother, two funds were thereby settled, viz., a husband's fund, settled by the father, and a wife's fund, settled by the mother, and, subject to their successive life interests in such funds, the parents had a joint power of appointment by deed among their issue, with the usual trust in default of appointment for their children. By a deed, dated June 1, 1934 (hereinafter called "the 1934 appointment"), the father and the mother irrevocably appointed both funds to their four daughters (viz., the sisters and Mrs. Shuttleworth), in equal shares. The plaintiffs have been the trustees of the parents' marriage settlement since 1934. Death duties became payable on the husband's fund on the death of the father and on the wife's fund on the death of the mother. The net values of these funds after providing for the said duties are respectively about £8,000, for the husband's fund, and about £16,000 for the wife's fund. (B) On May 5, 1943, the father made a voluntary settlement (hereinafter called "the 1943 settlement"), of which the plaintiffs were and are the trustees. By that settlement the father settled a fund on trust for the mother during her life and on her death (in the events which have happened) on trust for his four daughters in equal shares. As the death of the father occurred within three years of the making of the 1943 settlement, estate duty became payable in respect of the settled fund, and the value thereof after payment of such duty is about £40,000. (C) By his will, which was dated June 4, 1934, and proved on Apr. 16, 1945, in the Principal Probate Registry by the mother and the plaintiff, Geoffrey Lewis Taylor, the executors and trustees thereby appointed, the father settled his residuary estate on trust to pay the income thereof to the mother during her life and conferred on her a power to appoint any part of his residuary estate up to a sum of £10,000 to or for all or any of his said daughters to take effect after her death, and, subject to any exercise of that power, his residuary estate was settled on trust as to one equal fourth part for each of his four daughters during her life with remainder on trusts for her children or issue. By a deed, dated Feb. 12, 1947, General Sir Robert Hadden Haining was appointed an additional trustee of the father's will, and ever since the death of the mother he and the plaintiff, Geoffrey

Lewis Taylor, have been the trustees of the will. (D) The mother, by her will, dated Dec. 17, 1947, and proved on Oct. 26, 1951, exercised the power of appointment given to her by the will of the father and appointed the sum of £10,000 (hereinafter called "the £10,000 appointed fund") in equal shares to her four daughters absolutely. She also bequeathed her net residuary estate to her four daughters in equal shares and that estate is believed to be of the value of about £8,000. The executors and trustees of the will of the mother were and are

A William Helm Hadfield and the plaintiff, Claude Pritchard Lewis.

There can be no doubt that, according to the tenor of the after-acquired property covenants contained in Mrs. Shuttleworth's settlement and in each of the three settlements of 1918, the share of Mrs. Shuttleworth and the sisters in each of the funds hereinbefore mentioned was affected, that is to say: (a) the husband's fund comprised in the parents' marriage settlement and the appointment of 1934; (b) the wife's fund comprised in the same settlement and appointment; (c) the fund comprised in the settlement of 1943, and (d) the £10,000 appointed fund. The shares of the three sisters in the net residuary estate of the mother under her will would also be so affected, but the trustees of the three settlements (being the plaintiffs in each case) have elected to take no steps to get them in as they had power to do, as I have already mentioned. Mrs. Shuttleworth's settlement, executed on her marriage, stands on a somewhat different footing to the three settlements and need not be further mentioned.

After the mother's death and when the sisters realised the terms in which they had covenanted, it came as something of a shock to them, and each expressed the strong wish to receive for herself her share in all the before-mentioned funds. For a considerable time all the parties were of opinion and convinced that the covenants could be and should be and must be enforced, and before the end of 1951 schemes of division of the various funds were prepared and submitted to each of the four daughters with an intimation that she would not be entitled to receive her share for herself, and that it would be made over to the trustees of her settlement. None of the daughters raised any objection to the proposal, for the reason that all of them believed that they had no power to do so, and in that belief they accepted the schemes for division. In January, 1952, the schemes were carried into effect and the trustees of the various settlements were placed in full possession of the investments allocated to the respective settlements. It so happened that such trustees were the same persons as were trustees of the parents' marriage settlement and of the settlement of 1943, but I understand that by the end of January, 1952, they had fully discharged all their duties in respect of such last-mentioned trusts, and the funds were held by them entirely and exclusively on the trusts of the three settlements. The amounts are considerable, as I have said. The husband's fund is £8,000, the wife's fund is £16,000, the fund in the 1943 settlement is £40,000, and then there is the £10,000 fund. It may well be that the covenants would not have been enforceable against any of the sisters if it had been necessary to invoke the assistance of the court to enforce them. I thought at one time that the original settlements of the £3,500 war loan were made by the father in consideration of the covenants, although not so expressed, but that may be irrelevant. It further occurred to me that the existence of these covenants might have been the reason why these large sums of money were allowed to go to the four daughters absolutely under the various documents to which I have alluded, and that, but for the existence of those covenants, those funds would have been in some way tied up by the father and the mother, but that, again, may be irrelevant. In any case, there is no evidence of this, and it is quite likely that the existence of the covenants was not present to the minds of their parents any more than it was present to the minds of the daughters. But the fact remains that the covenants were entered into.

This case raises a point for which I can find no direct authority, which is this. Assuming that the daughters could have arrested these funds and claimed to

retain them in breach of their own covenants, can they now claim to recover them from the trustees into whose hands they have, in fact, come and who hold them on perfectly valid trusts? My difficulty is to see what possible equity the daughters can have to do anything of the kind. It may be unfortunate that they were not aware of their possible right to repudiate their obligations at an earlier stage, but it seems to me that the trustees of the three settlements are now under an obligation to continue to hold funds which have come into their hands quite regularly by reason of the obligations imposed by the covenants. Whatever may be their personal views on the matter, I do not see that the sisters are entitled, either at law or in equity, to deprive them of what they hold in fact, and hold in accordance with the tenor and true meaning of the three settlements from which their obligations are derived.

The cases which were cited to me seem to me to establish the position of the trustees and to afford no assistance to the claims of the daughters. The general law as to enforceability of the covenants in equity is stated in *Re Ellenborough* (1), to which the headnote is:

"The decision in *Meek v. Kettlewell* (2) that the voluntary assignment of an expectancy, even though under seal, will not be enforced by a court of equity, has not been overruled by *Kekewich v. Manning* (3)."

But the case nearest to the present seems to me to be *Re Bowden* (4), to which the headnote reads as follows:

"By a voluntary settlement made in 1868 a settlor settled any property to which she might become entitled upon the death of her father and gave the trustees of the settlement full power to receive and give receipts for the same or any part thereof in her name. Her father died in 1869 and during the years 1871-1874 his executors transferred the share of the settlor under her father's will to the trustees of the voluntary settlement. In 1935 the settlor requested the trustees to transfer the funds representing the above mentioned property to her as her absolute property:—Held, that the original trustees had received the settlor's share under a valid authority unrevoked, and that it became impressed with the trusts contained in the settlement."

In his judgment BENNETT, J., said ([1936] Ch. 75):

"In the year 1935 it seems to have occurred to the settlor that she might not have settled what came to her, so on Jan. 23, 1935, she addressed a communication in writing to the trustees requesting them to transfer to her as her absolute property the cash representing the fund. She states that to the best of her knowledge she never authorised the transfer of any such property to the trustees of that settlement. Those are the facts which give rise to the question raised by the summons. Counsel for the settlor submitted that the question should be answered in the affirmative and that the property the subject of the trusts of the settlement should be transferred to her. He based his argument on the authority of *Meek v. Kettlewell* (2) and *Re Ellenborough* (1) and contended that the settlement, being a voluntary settlement, was void and altogether unenforceable. Neither of these authorities supports either of his propositions. All that was decided in *Meek v. Kettlewell* (2) was that where the assistance of the court of equity is needed to enable the trustees of a voluntary settlement to obtain possession of property subjected to the trusts of the voluntary settlement, the property not having been vested in the trustees, a court of equity will render no assistance to the plaintiff. But here nobody is seeking the assistance of the court of equity to enforce the voluntary settlement. Under a valid authority, unrevoked, the persons appointed trustees under the settlement received the settlor's interest under her father's will, and, immediately after it had been received by them, as a result of her own act and her own declaration,

contained in the voluntary settlement, it became impressed with the trusts contained in the settlement. No assistance is required from a court of equity to put the property into the hands of the trustees."

I cannot see that it makes any difference that the period in question here is far shorter. *Re Kay's Settlement* (5) and *Re Brooks' Settlement Trusts* (6) do not, in my judgment, throw any further light on the matter, nor, I think, does *Allcard v. Walker* (7). I have a good deal of sympathy with the sisters and acquit them of any kind of impropriety in endeavouring to avoid or even to evade their obligations. But I can find no ground on which to give effect to their claim now to undo what they covenanted to do and, in fact, did, and I will make the consequent declaration with an appropriate order as to the costs of the action. It may be that the sisters, who are said to have had no separate advice when they executed the three settlements and may well have failed to understand the meaning and effect of these covenants, might have had them set aside if they had sought that remedy at a much earlier date. But as they have enjoyed the income of the £3,500 war loan for upwards of thirty years, it must, surely, be too late for that now. In any case, that issue is not before me. While expressing some sympathy with the sisters, I think that the obligation solemnly undertaken by them under seal ought not to be too lightly repudiated. I incline to think that there ought, in strictness, to have been three separate actions here, but I need not take any objection to the proceedings on that ground. Let the costs and expenses of and incidental to this action of the plaintiffs as trustees of all the three settlements be taxed. Let the costs of the defendants be taxed as between solicitor and client, and let one-third of such costs and expenses and one-third of such costs be raised and retained or paid out of the capital funds in each of the three settlements.

Order accordingly.

Solicitors: *Stanley Attenborough & Co.* (for the plaintiffs); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *W. H. Hadfield & Son*, Farnham (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

LLOYDS BANK, LTD. v. OLIVER'S TRUSTEE AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), October 13, 14, November 18, 1953.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Mortgage of matrimonial home by husband before desertion—Claim for possession by mortgagees—Wife's right to remain in matrimonial home.

On Oct. 22, 1945, the husband mortgaged the matrimonial home to the plaintiff bank by way of legal charge and thereby became a tenant at will to the bank of the property. In 1948 he executed a second legal charge in favour of the bank to secure a further advance. On or about Oct. 13, 1952, he deserted his wife, who obtained an order from BARRY, J., that she be permitted to reside in the matrimonial home and that the husband should not create any right in any other person to evict her or interfere with her residence therein. On Dec. 18, 1952, the husband was adjudicated bankrupt. On a summons for possession by the bank, the wife claimed that she had a right to remain in the matrimonial home notwithstanding that as against her husband and his trustee in bankruptcy the bank had an undisputed claim.

HELD: a wife had no right in the nature of an irrevocable licence to remain in the matrimonial home which arose on entry; the earliest moment at which her right to continue to reside in the husband's house against his will arose when he deserted her; the desertion in the present case had taken place

after the creation of the mortgages; and, therefore, the wife's right was subject to the rights of the mortgagees, who were entitled to possession.

FOR THE MARRIED WOMEN'S PROPERTY ACT, 1882, s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 804.

Cases referred to:

- (1) *Woolwich Equitable Building Society v. Preston*, [1938] Ch. 129; 107 L.J.Ch. 63; *sub nom. Woolwich Equitable Building Society v. Oriston*, 158 L.T. 216; Digest Supp.
- (2) *Weldon v. Weldon*, (1883), 9 P.D. 52; 53 L.J.P. 9; 27 Digest, Replacement, 284, 2289.
- (3) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.
- (4) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.
- (5) *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; 2nd Digest Supp.
- (6) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 31 Digest, Replacement, 698, 7894.
- (7) *Dunn v. Dunn*, [1948] 2 All E.R. 822; [1949] P. 98; [1949] L.J.R. 87; 112 J.P. 436; 2nd Digest Supp.

ADJOURNED SUMMONS for possession of the premises known as 212, 212A, 214 and 216, Capstone Road, Bournemouth, which were charged to the plaintiffs, Lloyds Bank, Ltd., by legal charges dated Oct. 22, 1945 and Jan. 26, 1948.

Harold Brown for the mortgagees, Lloyds Bank, Ltd., the plaintiffs.

Freeland for the first defendant, the trustee in bankruptcy of the mortgagor, Gordon Peter Oliver.

Raymond Walton for the wife of the mortgagor, the second defendant, Gladys Georgina Oliver.

Cur. adv. vult.

Nov. 18. **UPJOHN, J.**, read the following judgment. In this summons a wife, the second defendant, who has been deserted by her husband, the mortgagor of the matrimonial home, is asserting against the mortgagees a right to remain in possession of the mortgaged premises notwithstanding that, as against the mortgagor and his trustee in bankruptcy, the mortgagees have an undisputed right to possession. The whole question I have to determine is whether that claim is good in law.

The mortgagor and his wife were married in March, 1940, and they at once entered into a flat in No. 212 Capstone Road, Bournemouth, and continued to reside there as the matrimonial home until some date in 1948. On Oct. 22, 1945, the husband mortgaged the matrimonial home, together with other premises as to which no question arises, to the plaintiff bank to secure his overdraft up to a limit of £1,600. The mortgage was by way of legal charge and cl. 10 contained the following provision:

"The mortgagor hereby attorns and becomes tenant at will to the bank of such part of the mortgaged premises as are in the occupation of the mortgagor at a monthly rent of 6d. if demanded Provided that neither the receipt (if any) of the said rent nor the tenancy created by the said attornment shall render the bank liable to account as mortgagee in possession."

In 1948 the husband entered into a further legal charge with the plaintiff bank in the same terms as the mortgage of 1945 to secure an advance of a further £500. Later on in the same year the husband and wife vacated No. 212 Capstone Road for a short period, but returned there shortly afterwards. In September, 1952, the wife went into a nursing home, but she came out on Oct. 13 when her husband took her and the children of the marriage to a house of the wife's sister, telling them that they must stay there for a few days.

About this time (the exact date is not in evidence) it is common ground that the husband deserted the wife and she then discovered that, while she was in the nursing home, the husband had removed all the furniture and her clothes from the matrimonial home. Accordingly, on Nov. 18, 1952, the wife applied in the Queen's Bench Division, under s. 17 of the Married Women's Property Act, 1882, for an order against the husband permitting her and the children of the marriage to reside in the matrimonial home until further order. On that summons an order was made by BARRY, J. on Apr. 14 of this year in the following terms:

"(a) That the said Gladys Georgina Oliver and the three children of herself and of the said Gordon Peter Oliver be permitted to reside in and to occupy the lower flat at 212 Capstone Road aforesaid until such time as the husband provides suitable accommodation for the applicant and her three children of the marriage. (b) That the said Gordon Peter Oliver shall take no step by sale or assignment of any right title or interest which he now has in the said property or by any other act whatsoever create any right title or interest in any other person to evict his said wife and the children or any of them from the lower flat at 212 Capstone Road aforesaid or in any way interfere with their residence therein, until such time as the husband provides suitable accommodation for the applicant and her three children of the marriage. That the said Gordon Peter Oliver be restrained and an injunction is hereby granted restraining him from selling or agreeing to sell the said flat or from otherwise creating any right title or interest therein in any person to evict his said wife or children or any of them therefrom or from otherwise interfering with the residence in the said flat of his said wife and children or any of them, until such time as the husband provides suitable accommodation for the applicant and her three children of the marriage."

Pursuant to that order the wife has been put back into possession of the matrimonial home and she remains there pending the determination of this summons. On Dec. 8, 1952, the bank gave a notice to the husband calling in the amount of the overdraft, then some £2,273, and on Dec. 18, 1952, a receiving order was made against the husband on his own petition and in due course the first defendant was appointed his trustee in bankruptcy.

In that state of affairs it is clear that ever since the mortgage of 1945 the only right of the husband and subsequently of his trustee in bankruptcy to remain in possession as against the plaintiff bank was as tenant at will, and that tenancy was brought to an end by the issue or, at any rate, service of the summons for possession: see *Woolwich Equitable Building Society v. Preston* (1); it being conceded that no prior notice to determine the tenancy is required by the terms of the mortgage. From this it follows, first, that no right asserted by the wife on behalf of or as agent of her husband will be of any avail against the plaintiff bank, and, secondly, that any right asserted by the wife independently of the husband—that is, not as his agent, but by virtue of some right conferred on her by matrimonial status—to be effective against the plaintiff bank must arise by virtue of some act or event in the law before the mortgage of 1945. It is useless for the wife to assert any right to remain in possession of the matrimonial home by virtue of her matrimonial status which arose for the first time after the mortgage of 1945, e.g., by reason of the husband's desertion or the order of BARRY, J., for as against the plaintiff bank she could never assert any right to remain in possession which exceeded her husband's interest in the premises.

In these circumstances counsel, in his argument on behalf of the wife, put his claim in two ways. He formulated his first proposition in this way, namely, that on entering into the matrimonial home a wife, as an incident of her matrimonial status, is entitled to an irrevocable licence to continue to reside on the premises so long as they remain the matrimonial home and thereafter during any desertion by the husband and the subsistence of the marriage, subject always to an order being made against her under s. 17 of the Married Women's Property Act, 1882,

ordering her to vacate the matrimonial home. That right attached on the moment of entering into the matrimonial home, and is, he submitted, in the nature of an equity which binds all persons having subsequent dealings with the premises except a purchaser for value without notice of her claim. This right, he submitted, really originated from the old order of restitution of conjugal rights. He cited to me *Weldon v. Weldon* (2). In that case the usual decree ordering the husband to take his wife home and render her conjugal rights had been made. In purported compliance therewith the husband had provided a suitable home for his wife, but he had not proposed to share it with her. The question was whether that was a sufficient compliance with the order, and it was held that it was not. SIR JAMES HANNEN, P., said (9 P.D. 55):

"The principle derived from the law on which the ecclesiastical courts proceeded was, that it is the duty of married persons to live together, and that this duty should be enforced by the decree of the court, unless it could be shown that the complaining party had been guilty of some matrimonial offence for which a judgment authorising living apart might have been obtained by the other. Authority for this proposition is not needed, but I may quote the words of BLACKSTONE: 'The suit for restitution of conjugal rights is brought whenever either the husband or wife is guilty of the injury of subtraction or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other.'"

Pausing there, it does not seem to me that the ancient power of the court to order the spouses to live together affords any support for the broad principle submitted by counsel for the wife. At common law husband and wife on marriage become one, and, although a wife has always been entitled to pledge her husband's credit for necessities if he failed to maintain her, the proposition advanced by counsel for the wife in relation to the matrimonial home would, I venture to think, have startled not only the lawyers but all husbands one hundred years ago.

The position of a wife before the Married Women's Property Acts of the last century has, indeed, recently been stated by DENNING, L.J., in *Bendall v. McWhirter* (3), in these terms ([1952] 1 All E.R. 1309):

"The first question is whether the wife has any right of her own to stay in the house. Under the old common law as it existed until seventy years ago she had no rights at all apart from those of her husband. She was treated by the law more like a piece of his furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street and so he could his wife. The law did not say him nay. It merely gave the wife authority to pledge his credit for necessities. If her husband turned her out, she had to go and find lodgings elsewhere, pledging his credit for the rent, that is, if she could find anyone to trust to his credit."

Counsel, however, submitted that there were three modern cases which supported his general proposition. The first is *Bramwell v. Bramwell* (4), a case in the Court of Appeal. The actual decision there is not in point in the present case, but GODDARD, L.J., suggested that a husband could not bring an action for recovery of land against his wife, for that would be an action for tort which could not be maintained by a husband against a wife having regard to s. 12 of the Married Women's Property Act, 1882, and the only remedy available to the husband was under s. 17. That authority was dealing with a matter of procedure, and, with all respect to the argument, had nothing to do with the true nature of the right of a wife to continue in the matrimonial home.

The next case was *Hutchinson v. Hutchinson* (5), the facts of which were that a wife, whose husband had left her, obtained a decree of judicial separation and continued to live in the house which had been the matrimonial home and of which

A the husband was the owner. The husband claimed, under the Married Women's Property Act, 1882, s. 17, that the wife should forthwith be ordered to give up possession of the house to him. The wife stated that the house was the only home of herself and the son, who was suffering from a serious illness; that it would be injurious, mentally, physically and psychologically to the health of the son if they had to leave the house; that she had refused to accede to her husband's request that she should divorce him; and that the husband had bought another house in which he was living with another woman. The court held that they had a judicial discretion whether or not to make an order for possession under s. 17 of the Act of 1882, that the granting of a decree of judicial separation did not affect the exercise of that discretion, and that in the circumstances no order for possession would be made. Again, I can find nothing in that case which supports the proposition sought to be established. No doubt, it must now be taken to be established by *Bendall v. McWhirter* (3) in the Court of Appeal that a wife who had been deserted has a right as against her husband, subject to an order under s. 17, to remain in occupation of the matrimonial home, but there is nothing in either of the authorities I have mentioned which goes to the length of establishing that a wife has something in the nature of an irrevocable licence which attaches at the moment of entering into the matrimonial home.

C The next case was *Middleton v. Baldock* (6). That was a case on the Rent Restrictions Acts and counsel relied on certain passages in the judgments of SIR RAYMOND EVERSHED, M.R., and of DENNING, L.J. I forbear to examine that case in detail, however, because what the case decided was, not that a wife had anything in the nature of an irrevocable right to remain in possession of the matrimonial home, but that a deserted wife could on behalf of the husband assert a continued right to possession of premises protected by the Rent Acts which the husband was powerless to prevent. But for the reasons I have already given, a right only maintainable as agent of the husband does not help the wife in this case.

D Finally, I was referred to *Bendall v. McWhirter* (3), and, particularly, to the judgment of DENNING, L.J. In that case the Court of Appeal decided that a wife who had been deserted could remain in possession of the matrimonial home as against the trustee in bankruptcy of the husband, the bankruptcy being subsequent to desertion. I do not propose to refer to that judgment at length for it seems to me clear that DENNING, L.J., who stated the law more favourably to the wife than the majority of the court, did not consider that any right to possession arose in the wife before she was deserted. DENNING, L.J., said this ([1952] 1 All E.R. 1311):

E "In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct."

F That authority, in my judgment, also makes it abundantly clear that a wife who has been deserted can, as against third parties only, assert rights on her husband's behalf and in his name.

In my judgment, there is no support to be found in any authority that was cited to me for the broad proposition advanced by counsel for the wife. The proposition that a wife has anything in the nature of an irrevocable licence to remain in the matrimonial home which arises on entry is wholly contrary to the conception of marriage. It is the duty of a husband and wife to live together in such matrimonial homes as the fortunes or vicissitudes of life may dictate,

and it is their duty to agree on that home from time to time. The position was recently stated by DENNING, L.J., in *Dunn v. Dunn* (7) ([1948] 2 All E.R. 823):

"The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion."

However, PILCHER, J., said that he agreed with every word that had been said by DENNING, L.J., on the question of onus, but it seemed to him that in the case of a difference of opinion between the spouses as to the place of the matrimonial home, someone must have the casting vote.

In my judgment, the earliest moment at which the right of the wife to continue to reside in the house of the husband against his will arises is when the husband deserts his wife. In this case that happened long after the mortgages were created and must, therefore, be subject to the mortgagees' rights. In these circumstances it becomes unnecessary to consider in detail counsel's second and even broader proposition which he put forward to overcome the additional difficulty with which he was faced in this case, namely, that after the date of the further charge the premises for a short time ceased to be the matrimonial home. Therefore, even if he established his first proposition, it would be open to the plaintiff bank to contend that the wife gave up her irrevocable licence on going out of possession in 1948 and the licence arose again on re-entry after the mortgages had been effected. Briefly, counsel's proposition was that a wife has on entering the matrimonial home a right to continue in occupation of the matrimonial home and even prior mortgagees are bound by this right when it arises. It was said, for example, that a mortgagee who permits the mortgagor to remain in possession knows that his bachelor mortgagor may marry, whereupon the wife's right to occupation of the matrimonial home will arise on entry. The mortgagee, it is said, must have entered into the mortgage with that possibility in mind, so as to accept that risk and take subject to the after-taken wife's right of possession. I say no more about so fantastic a proposition. There must be judgment for the plaintiff bank for possession against the wife.

Order accordingly.

Solicitors: *Cameron, Kemm & Co.* (for the plaintiff bank); *Cameron, Kemm & Co.*, agents for *F. J. M. Gale & Co.*, Bournemouth (for the first defendant); *D. B. Levinson & Co.*, agents for *Harry Ellis & Co.*, Bournemouth (for the second defendant).

[Reported by MISS PHILLIPA PRICE, Barrister-at-Law.]

BRAY AND ANOTHER v. PALMER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), October 8, 9, 1953.]

Court of Appeal—New trial—Contradictory allegations of parties—Refusal of judge to find cause of accident—Dismissal of claim and counterclaim.

A The plaintiffs were travelling on the highway on a motor cycle owned by the first plaintiff and driven by the second plaintiff, and coming from the opposite direction was the defendant, driving a motor car. The defendant drove to his off-side to avoid a pool of water which had been caused by heavy rainfall on his side of the road, and a head-on collision of both vehicles occurred in the middle of the road. The plaintiffs claimed from the defendant damages for personal injuries received by them which, they B alleged, were due to his negligence. The defendant denied negligence and counterclaimed damages for personal injuries and damage to his car, from the first plaintiff as owner of the cycle which, he alleged, was being driven by the second plaintiff as the servant or agent of the first plaintiff, and from the second plaintiff who, he alleged, was guilty of negligence in the driving of the cycle. He contended that the second plaintiff swerved suddenly to his right- C hand side, thereby causing the collision. The trial judge took the view that the accident must have been due to the exclusive negligence of one or the other side; he rejected the possibility of both sides being to blame; and, being unable to make up his mind which was the right story, dismissed both the claim and the counterclaim.

D HELD: the judge was not entitled to dismiss the claim and the counterclaim on the ground that he was unable to decide which party was in the right; it was his duty to come to some conclusion on the evidence and he should not have excluded the possibility of both parties being in some measure to blame, and, therefore, there must be a new trial.

E AS TO GROUNDS FOR GRANTING NEW TRIAL, see HALSBURY, Hailsham Edn., Vol. 26, pp. 124-128, paras. 245-252; and FOR CASES, see DIGEST, Practice, pp. 592-604, Nos. 2331-2448.

APPEAL by plaintiffs from a decision of OLIVER, J., dated Mar. 4, 1953.

F On Aug. 6, 1951, the plaintiffs, who were riding a motor cycle, were involved in a collision with the defendant, who was driving a motor car in the opposite direction. The plaintiffs claimed damages for personal injuries caused by the defendant's negligence, and the defendant counterclaimed for personal injuries and damage to his motor car. OLIVER, J., dismissed both the claim and the counterclaim and the plaintiffs appealed.

Berryman, Q.C., and G. G. Macdonald for the plaintiffs.

Fox-Andrews, Q.C., and F. C. Williams for the defendant.

G SIR RAYMOND EVERSHERD, M.R.: On Aug. 6, 1951, the two plaintiffs were travelling on a motor cycle southwards towards Bristol on the main road from Gloucester. The road was approximately twenty-six feet wide. Coming in the opposite direction was the defendant, driving a small motor car with passengers in it. There was no other traffic at the material part of the road and the only obstacle in the way of either vehicle was a pool of water (the exact H dimensions of which is a matter in dispute), caused by a gutter having become blocked owing to heavy rains, on the side of the road which was on the left of the defendant. It appears not to be in dispute that the defendant moved towards the centre of the road to avoid driving through this pool. The kernel of the matter, so far as the conflict of evidence is concerned, is the extent of his right-handed movement and whether it was one, or more than one, movement. As they approached the defendant's car, the plaintiffs also moved to their off-side. They said they did so because the defendant left them no room to pass on their

own side. The defendant said it was an inexplicable move on the plaintiffs' part for which there was no justification such as the plaintiffs had suggested. Whatever be the truth, the fact is that the vehicles met head-on in the middle of the road. Neither the motor car nor the motor cycle was proceeding at an unduly fast speed, but, of course, the effect of a head-on collision is to add the two speeds together for the purpose of ascertaining the force of the impact, and the plaintiffs suffered severe injuries. They alleged that the cause of those injuries was the negligence of the defendant, and the defendant, by his counterclaim, said that the collision was due to the negligence of the plaintiffs in their capacities as owner and driver of the cycle. OLIVER, J., heard evidence of other witnesses independent of and not participants in the accident, namely, a man who lived in a nearby house and a policeman, but he did not give any indication of a preference for one set of witnesses to the other in the matter of credibility. He reserved his judgment. After considering the evidence and its mutually repugnant character, he said he was of opinion that the accident must have been due to the exclusive negligence of one side or the other. He put aside the possibility of both parties having been to blame, and then said that, as he was unable to make up his mind which was the right story, on the principle that the plaintiff must prove his case, he rejected both claim and counterclaim. He said:

"One or other of those stories must approximate to the truth. I do not know which. It seems to me that one is as good as the other—or as bad. One of these two parties must have driven abominably. Either for some mad reason the car did go right across, blocked the motor cyclist's road, and put him into the emergency that he had to cut across, or, on the other hand, the motor cyclist was not looking, did not see the car until the last moment, and then, panicking, tried to go across. Either of those might be true. I cannot tell which is true. In those circumstances, I am driven, it seems to me, to do a thing that I have never done before since I have been on the bench, i.e., I am quite unable to say that the one case is more or less probable than the other. They are both wildly improbable, and yet one of them happened."

Counsel for the defendant said that in substance the learned judge concluded—as he was entitled to conclude—that the occurrence in issue was only explicable on hypothesis "A" or upon hypothesis "B", and that there was no duty on a judge so compelling that he must, whatever the evidence and its nature and however great his experience, conclude the matter in favour either of "A" or of "B". I do not find it necessary to express a conclusion whether the judicial duty in such circumstances does require a judge to decide one way or the other. No judge could have been more qualified by his experience to make up his mind between two conflicting stories than OLIVER, J., but I am not satisfied that the premise on which it is said the final conclusion should have been reached is established. MORRIS, L.J., quoting from one of the last passages I have read, has observed: "The judge is saying: 'Both stories are wildly improbable, and yet one of them happened'. If they are so wildly improbable, I am not satisfied that the judge was justified in excluding the possibility of the truth lying somewhere between the two, so that, perhaps, each would be less wildly improbable, or, at least, in excluding the possibility (which it seems to me was open) of both being wrong". JENKINS, L.J., observed: "Unless that was so, the judge seems to me to have stated the case and his conclusions in such a way that one party or the other or both must have suffered an injustice". Whether or not that is so, if the result appears to be so, this court ought to order a new trial, and I have come to the conclusion, with the utmost respect for OLIVER, J., and acknowledging his difficulty and his experience, that his statement of the matter involves either a real flaw, or something that looks so like it that it would not be right to leave the matter thus. I think, therefore, that this appeal must be allowed and a new trial ordered.

JENKINS, L.J.: I agree. There is no doubt that a judge is entitled in an action for damages for personal injury occasioned by the negligent driving of the defendant to reject the plaintiff's case if, in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim; the onus is on the defendant to make out the counterclaim.

A On the part of the defendant it is said, in effect, that the present case was a simple case of the learned judge rejecting the plaintiffs' claim on the ground that they had not discharged the onus which lay on them, and, similarly, rejecting the defendant's counterclaim. In my view, the case is not of that simple character. **OLIVER, J.**, did not simply reject the plaintiffs' and the defendant's evidence, and say: "I do not believe that the accident happened in the way claimed by either side". If he had done that, his decision would not, as far as I can see, be open to any criticism. The judge's reasoning appears, in effect, to have been: "The choice lies between the plaintiffs' story and the defendant's story, either of which may, and one of which must, be true. If the plaintiffs' story is true, they are entitled to succeed, but I am unable to say whether or not it is true, as it is equally possible that the defendant's story may be the true one. On the other hand, if the defendant's story is true, he is entitled to succeed, but I cannot say whether it is true or not, as it is equally possible that the plaintiffs' story may be the true one. I will, therefore, grant no relief either way". This seems to me to fall short of a decision of the case. Having come to the conclusion that the accident happened either in the way asserted either by the plaintiffs or by the defendant, he said, in effect, that he was unable to decide which story was right. With the greatest respect to **OLIVER, J.**, that seems to me to be a denial of justice. It can only mean that the parties are deprived of relief in which they are entitled. In my view, it behoved the learned judge to form some conclusion in the matter and I think the difficulty in which he found himself was in great measure due to his method of approaching the problem, which appears from his observation to the effect that he did not see his way to find that both parties were responsible or both were to blame, and that it seemed to him to be a case of one or the other. Although it has been pressed on us that that question was to be considered in the light of all the evidence, I cannot see anything in the evidence to justify that conclusion. It seems to me that the explanation that both were in some measure to blame is, on the face of it, at least as likely as the explanation that one or other was wholly to blame, and that, unless and until the learned judge had decided that the accident did happen in a particular way, he was not in a position to say that it was not a case in which both were partly to blame. Accordingly, I agree that this is a case in which there should be a new trial.

MORRIS, L.J.: I agree. The case of the plaintiffs and that of the defendant on his counterclaim depended on a variety of allegations set out in the pleadings, which allegations were of a nature which is usual in cases of this kind. **OLIVER, J.**, thought that the stories both of the plaintiffs and of the defendant were wildly improbable. In those circumstances, I find it difficult to see how the case could proceed on the basis that one or other case must substantially be true and that the allegations on one side or the other must be rejected in their entirety. I do not think it was appropriate in this case to reject consideration of the possibility that there may have been some measure of fault on either side.

New trial ordered.

Solicitors: *F. Hollis*, agent for *F. E. Metcalfe & Co.*, Bristol (for the plaintiffs); *Rider, Heaton, Meredith & Mills*, agents for *Bobbett Bros.*, Bristol (for the defendant).

[Reported by **F. GUTTMAN, ESQ.**, Barrister-at-Law.]

Re DELHI ELECTRIC SUPPLY & TRACTION CO., LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), November 4, 5, 6, 9, 10, 11, 1953.]

Company—Winding-up—Foreign tax—Claim by Indian government—Admissibility of proof—Companies Act, 1948 (c. 38), s. 302.

D. Co., a company incorporated in England, carried on business in India under a licence granted by the government of India. In 1947 the company's undertaking was purchased by the Indian government under an option contained in the licence. In 1947 a large part, and in 1948 the balance, of the purchase price was paid and remitted to England. In May, 1949, the company went into voluntary liquidation. From August, 1949, onwards the Indian income tax authorities made several assessments on the company to Indian capital profits tax arising out of the sale of the undertaking of the company. The Indian government claimed in the voluntary liquidation of the company the tax due under these assessments, amounting to about £120,000. The liquidator rejected the claim.

HELD: (i) it was a well-established rule of English law that the English courts would not and could not be used as a means of collecting taxes imposed by another State, and for the purposes of that rule no distinction could be drawn between States adhering to the British Commonwealth and other States.

Re Visser ([1928] Ch. 877), approved.

DICTUM OF LORD MANSFIELD in *Holman v. Johnson* (1775) (1 Cowp. 343), discussed.

(ii) the word "liabilities" in the Companies Act, 1948, s. 302, did not include claims not enforceable according to the laws of this country in the courts of this country;

(iii) therefore, the claim for Indian tax was not admissible to proof in the winding-up of D. Co.

Re Lorillard ([1922] 2 Ch. 638), applied.

AS TO ENFORCEMENT OF FOREIGN REVENUE LAWS, see HALSBURY, Hailsham Edn., Vol. 6, p. 198, para. 241; and FOR CASES, see DIGEST, Replacement Vol. 11, p. 325, Nos. 16-18.

Cases referred to:

- (1) *Re Visser*, [1928] Ch. 877; 97 L.J.Ch. 488; 139 L.T. 658; 11 Digest, Replacement, 323, 7.
- (2) *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7; 78 L.J.K.B. 45; 99 L.T. 805; 11 Digest, Replacement, 322, 6.
- (3) *Henry v. Sargeant*, (1843), 13 New Hamp. 321.
- (4) *A.-G. v. Lutwydgc*, (1729), Bunb. 280; 145 E.R. 674; 11 Digest, Replacement, 322, 4.
- (5) *Boucher v. Lawson*, (1736), Lee temp. Hard. 85, 194 (95 E.R. 53, 125); Cunn. 144 (94 E.R. 1116); 11 Digest, Replacement, 440, 823.
- (6) *Holman v. Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest, Replacement, 325, 16.
- (7) *Planche v. Fletcher*, (1779), 1 Doug. K.B. 251; 99 E.R. 165; 11 Digest, Replacement, 325, 17.
- (8) *Clugas v. Penaluna*, (1791), 4 Term Rep. 466; 100 E.R. 1122; 11 Digest, Replacement, 441, 829.
- (9) *Bernard v. Reed*, (1794), 1 Esp. 91; 170 E.R. 290; 12 Digest, Replacement, 308, 2367.
- (10) *Waymell v. Reed*, (1794), 5 Term Rep. 599; 101 E.R. 335; 11 Digest, Replacement, 441, 830.
- (11) *Alves v. Hodgson*, (1797), 7 Term Rep. 241 (101 E.R. 953); 2 Esp. 528 (170 E.R. 443); 11 Digest, Replacement, 429, 755.

- (12) *James v. Catherwood*, (1823), 3 Dow. & Ry. K.B. 190; 11 Digest, Replacement, 325, 18.
- (13) *Bristow v. Sequeville*, (1850), 5 Exch. 275; 19 L.J.Ex. 289; 155 E.R. 118; 11 Digest, Replacement, 430, 757.
- (14) *A.-G. for Canada v. Schultz*, (1901), 9 S.L.T. 4.
- (15) *Clegg v. Levy*, (1812), 3 Camp. 166; 170 E.R. 1343; 11 Digest, Replacement, 429, 756.
- A (16) *Kahler v. Midland Bank, Ltd.*, [1948] 1 All E.R. 811; *affd.* H.L., [1949] 2 All E.R. 621; [1950] A.C. 24; [1949] L.J.R. 1687; 2nd Digest Supp.
- (17) *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest, Replacement, 435, 791.
- (18) *Milwaukee County v. M. E. White Co.*, (1935), 296 U.S. Rep. 268.
- B (19) *Gooch v. London Banking Assocn.*, (1886), 32 Ch.D. 41; 10 Digest 1000, 6947.
- (20) *Re Art Reproduction Co., Ltd.*, [1951] 2 All E.R. 984; [1952] Ch. 89; 3rd Digest Supp.
- (21) *Re Lorillard*, [1922] 2 Ch. 638; 92 L.J.Ch. 148; 127 L.T. 613; 24 Digest 798, 8275.
- C (22) *Canadian Pacific Ry. Co. v. Roy*, [1902] A.C. 220; 71 L.J.P.C. 51; 86 L.T. 127; 13 Digest 401, 1235.
- (23) *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim*, (1872), 7 Ch. App. 646; 41 L.J.Ch. 732; 27 L.T. 88; 10 Digest 933, 6399.

APPEAL of the Government of India, Ministry of Finance (Revenue Division), from a decision of VAISEY, J., dated July 30, 1953.

D The Government of India claimed to be admitted as creditor in the voluntary winding-up of the Delhi Electric Supply & Traction Co., Ltd., in respect of assessments to Indian capital profits tax. The liquidator rejected the claim. The Indian government applied by summons in the Chancery Division of the High Court under the Companies Act, 1948, s. 307, for an order that the decision of the liquidator rejecting their claim be reversed and the said claim be allowed in full. VAISEY, J., refused the application.

E *Mustoe, Q.C.*, and *R. R. D. Phillips* for the applicants, the Government of India. *Raymond Jennings, Q.C.*, and *O. R. Smith* for the respondent, the liquidator.

SIR RAYMOND EVERSLED, M.R.: The question in this case is whether the applicants, the Government of India, Ministry of Finance (Revenue Division), ought to be admitted to proof in the liquidation of the Delhi Electric Supply & Traction Co., Ltd., for a sum of income tax substantially, though not wholly, consisting of capital profits tax, which is, in India, a form of income tax. The sum involved is a large one, and as regards the capital profits tax arose on the sale of the whole undertaking of the company in India. That sale took place pursuant to an option which was contained in the original licence granted to the company to carry on their electrical operations in or near the city of Delhi for a period of forty-two years. The result of the sale was necessarily to put an end to the business activities of the company, and the company, which is an English company incorporated in this country in 1916, is now being wound-up in England, the necessary resolutions having been passed for a voluntary liquidation of the company on the footing that it was solvent.

H It will be convenient to mention a few dates. The sale to which I have alluded took place early in 1947, and the greater part of the purchase money was paid on Mar. 1, 1947, in India, but was remitted from India to England a few days later. In April, 1947, an Act of the Indian legislature came into force which introduced the capital profits tax, and, as has been said on behalf of the Indian revenue authorities, the tax was applicable to the profit made over or in excess of the book values as the result of the sale. In September, 1948, the balance of the purchase price was remitted to this country, and in May, 1949, the company went into liquidation in the manner I have mentioned.

The subject-matter of the claim consists of more than one assessment, and the claim in respect of the first assessment was dated in August, 1949. I have mentioned those dates because it is right that it should be made clear that no charge or suggestion has been made by the applicants that the liquidator in any way surreptitiously removed the assets of the company from India for the purpose of evading the payment of this capital profits tax.

The liquidator, however, rejected the claim of the Government of India to prove, and, in accordance with the procedure applicable under the Companies Act, 1948, s. 307 (1), and the rules made under that Act, the Government of India applied to the judge having cognisance of these matters for a reversal of the liquidator's decision. The substance of the application was as follows:

"an application on behalf of the Government of India, Ministry of Finance (Revenue Division), of Aldwych, Strand, London, a creditor of the above-named company, for an order that the decision of Samuel Henry Taylor, the liquidator of the above named company in the voluntary winding-up thereof, rejecting the claim of the Indian government may be reversed and that the said claim may be allowed in full."

The application came before VAISEY, J., and he, on July 30, 1953, made an order in this form: "The court doth not think fit to make any order on the said application"—in other words, the application failed or was refused. The appeal is now made from the learned judge to this court to reverse the decision of the judge and to give effect to the application which I have already read.

The arguments before us have ranged over a wide area, and a large number of authorities has been cited. I think, however, for my part, that the point is really a short one, and I hope that counsel for the applicants will forgive me if I do not, in the course of this judgment, refer to all the points which they took before us or to all the cases which they cited. The question shortly stated is whether the liability, which is one that the company would have been bound to discharge in India (i.e., so long as the company operated in India, or remained subject to the effective jurisdiction of the Indian courts), is a liability for which the liquidator must make provision under the terms of the Companies Act, 1948, and, in particular, s. 302 of that Act.

Section 302 provides:

"Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company."

Section 316, which is the first of a number of "Provisions applicable to every mode of winding-up", provides:

"In every winding-up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value."

Section 307 (1) is in this form:

"The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound-up by the court."

A There can be no doubt that, for example, a trading obligation incurred in the ordinary way by this company in India would be a liability within the language of the Act which I have read. Prima facie, at any rate, an Indian creditor claiming as such by virtue of some trading contract entered into in India would be entitled to come to the courts of this country and establish and enforce here his claim. But it is said that there is an old-established principle of our law that the courts of this country cannot be used as a means of collecting taxes imposed by another State, and it is further said that the liabilities mentioned in s. 302 of the Act of 1948 do not include liabilities of a kind which cannot be enforced here—in particular, liabilities in respect of taxes imposed by a foreign State.

B I think it logical and convenient first to examine the so-called rule in regard to collecting taxes claimed by foreign countries and to arrive at a conclusion whether such a rule does exist, and, if so, what is its scope. The existence of such a rule has, undoubtedly, been assumed for very many years. According to LORD TENTERDEN, it is attributable in origin to LORD HARDWICKE, as will later appear. What is, perhaps, remarkable, however—and it is the fact—is that, though the rule has been referred to from time to time as being well established, it is only rarely and recently that its validity has been directly tested in cases at all comparable to the present, and it has never been so directly tested in this court.

C The most recent of the cases in which the matter was directly in issue was *Re Visser* (1), before TOMLIN, J. The plaintiff in that action was the Queen of Holland and the defendants were executors of the deceased Visser. The action was in form an administration action as commonly experienced in the Chancery Division of the High Court. By the claim, the plaintiff asked for a declaration that she was a creditor of the estate of the late Visser and for an account and if necessary an order for the administration of the estate of the deceased person. D An application was then made by the defendants to strike out the plaintiff's claim on the ground that it disclosed no reasonable cause of action by reason of the fact, as was alleged, that in the claim the plaintiff was seeking to enforce, whether directly or indirectly, a foreign revenue claim, the plaintiff being a foreign sovereign.

E The numerous cases to which we have been referred in the present appeal were referred to in the course of the argument in *Re Visser* (1), and TOMLIN, J., stated his conclusions in the following terms ([1928] Ch. 884):

F “My own opinion is that there is a well recognised rule, which has been enforced for at least two hundred years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.”

G Having again examined all the cases and such references in the text-books as have been found for us I am of the same opinion as was TOMLIN, J. I think that the alleged principle is properly formulated in the way I have already stated, viz., that the courts of this country will not and cannot be used as a means of collecting taxes imposed by another State. That convenient and, as I think, correct statement is derived from the reported argument of Mr. Simon, K.C., in one of the two earlier cases in which the matter was directly in issue, viz., *Sydney Municipal Council v. Bull* (2), before GRANTHAM, J. The claim there was a direct claim, i.e., an action brought by the council directly against the defendant, Bull, claiming, H not national tax, but local rates or local revenue. Mr. Simon is reported as having put his argument in this form ([1909] 1 K.B. 91):

“International comity does not extend to the recognition of liabilities imposed by a State on its subjects for its own domestic management and regulation.”

I pause there to say that the word “subjects” must, I think, mean “persons subject to its jurisdiction”. The argument goes on (*ibid.*):

"For that reason the penal laws of a foreign country are not subject-matter of an action in this country."

Then there is a reference to DICEY'S CONFLICT OF LAWS, and the argument proceeds:

"nor are suits for the recovery of penalties, pecuniary or otherwise, for any violation of statutes enacted by a foreign State for the protection of its revenue or other municipal laws . . . For the same reason the courts of one State cannot be used as a means of collecting the taxes imposed by another . . ."

Mr. Simon cited as authority in support of that last proposition an American case, *Henry v. Sargeant* (3), to which I shall have occasion to make some reference hereafter.

For myself, I say at once that I think that on general principles both of justice and convenience there is (to say the least) much to commend the rule as I have stated it, though, undoubtedly, there may be hard cases such as this may well be. If there were no such rule, the result, as it seems to me, would be somewhat arresting. There is no apparent limit to the revenue legislation which any country may bring into operation, and if all revenue claims were liable to be enforced in other countries the consequences would be, to put it no higher, arresting. That, however, is another matter and beside the present point. The question is, since this court is now asked to re-examine the matter, what is the authority for the existence of this rule as I have attempted to formulate it? Of the two earliest cases to which we were referred one (cited by counsel for the liquidator) was *A.-G. v. Lutwydgc* (4), decided in 1729. I am not of opinion that that case assists in the present matter. The plaintiff was the English Attorney-General and he sought to recover a sum due or alleged to be due on a bond which was executed at Dumfries in Scotland. PENGELLY, C.B., said (Bunb. 281):

"Before the union [of England and Scotland] this court had no jurisdiction of the revenues in Scotland . . ."

I think that only means in its context that the court in England had no jurisdiction to collect for English purposes revenues in Scotland and I doubt whether it has really any bearing on the rule that we are now considering.

Then we were referred by counsel for the applicants to *Boucher v. Lawson* (5). That was a case concerning the freight of certain goods and the point which emerged was that the voyage had involved exporting gold from Portugal which, according to Portuguese law, was an illegal traffic. In the course of his judgment, LORD HARDWICKE, C.J., used this language (Lee temp. Hard. 89):

"But if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade . . ."

When the matter was later before the court, LORD HARDWICKE observed (*ibid.*, 198):

"I think the unlawfulness of the trade makes no difference, for it is not material to us what the law of Portugal is, but what the law of England is, and here in England it is not only a lawful trade, but very much encouraged."

Whether that case was cited because it was before LORD HARDWICKE and was possibly the origin of LORD TENTERDEN'S attribution of the relevant statement to LORD HARDWICKE, I do not know, but I think it has a remote bearing on the present problem. Its consequence may be, as counsel for the applicants naturally and properly stated, that the rule in its origin was derived from a desire not to hinder but rather to promote all forms of trading. In those days the revenue

laws likely to be involved if the rule existed would not be in regard to what we now know as income tax (which had not then emerged on the experience of mankind), but rather in regard to customs duties, which tended, no doubt, to interfere with trade.

The first real statement of the rule is to be found in two cases before LORD MANSFIELD, *Holman v. Johnson* (6) and *Planche v. Fletcher* (7). *Holman v. Johnson* (6) was a case in which the seller of tea under a contract made with the buyer in Dunkirk, sued for the price. The buyer had in fact smuggled the tea into England and it was proved that the seller knew when he made his contract that such was the intention of the buyer, but the seller was himself in no way implicated in, nor was he concerned with, the smuggling operations. The contract of sale between him and the buyer in Dunkirk was such a contract as he might have made with any other buyer, whatever had been the later intention or activity of the buyer. For that reason it was held that the plaintiff was entitled to recover. But in the course of the judgment appears the classic statement of LORD MANSFIELD from which, according to the books as they are now available to us, everything else has flowed. The statement is (1 Cowp. 343):

“For no country ever takes notice of the revenue laws of another.”

That statement was repeated almost in the same terms in the later case I have mentioned, *Planche v. Fletcher* (7). The facts of that case again were far removed from those of the present. It concerned the insurance of a ship which was intended to go, and did go, direct to Nantes though it had been cleared to Ostend, it being the apparent but not the actual intention that the vessel should call at Ostend and not go direct to Nantes. That circumstance affected the customs duties which might be exacted. It was suggested that the sailing direct to Nantes was a fraud on the underwriters, but that suggestion was clearly rejected by LORD MANSFIELD, and in the course of his judgment he made use again of the formula (1 Doug. K.B. 253):

“One nation does not take notice of the revenue laws of another”—

substantially the formula that he had used in *Holman v. Johnson* (6).

There are three cases which came before LORD KENYON, C.J., and it was part of the applicants' case that LORD KENYON did not accept LORD MANSFIELD'S dictum, but proceeded on some different principle. If that were so, it would, no doubt, weaken the authority of the original formula of LORD MANSFIELD. I am, however, of the opinion that there is no dissent between LORD MANSFIELD and LORD KENYON. Indeed (as will appear in a moment) I think it clear that LORD KENYON accepted as established the rule which LORD MANSFIELD had formulated. The three cases are *Clugas v. Penaluna* (8), *Bernard v. Reed* (9), and *Waymell v. Reed* (10). I need not refer fully to them all, but I will take first *Clugas v. Penaluna* (8). That was a case in which a contract had been made in Guernsey for the sale of brandy and gin to a buyer, but (unlike the case of *Holman v. Johnson* (6)) it was part of the bargain not only that the buyer should buy in Guernsey the brandy and the gin, but that the seller should participate in the operation in smuggling the brandy and gin into England, for it was part of the arrangement that the seller should pack the brandy and gin in a particular manner appropriate to the later smuggling operation. It was, therefore, held that the seller, being particeps criminis with the buyer, could not recover in this country. He could not, in other words, set up the contract which disclosed his own wrong in being a party to the smuggling operation. Let me read the judgment of BULLER, J. (4 Term Rep. 467):

“If goods be bona fide sold in Guernsey, and delivered there in the fair course of trade, the seller may recover the price of them here, though they be afterwards smuggled into this country. But here the plaintiff himself was assisting in the act of smuggling, by the means of packing the goods; for the spirits were delivered in ankers, which are used for the purpose of smuggling;

and if he take part in the transaction, it taints the whole of it. And this distinguishes the case of *Holman v. Johnson* (6) from the present."

The leading judgment of LORD KENYON, C.J., had been to the same effect. I should add that at the end of the report there is the observation by LORD KENYON that this case was in other respects distinguishable from *Holman v. Johnson* (6).

I have paused a little over *Clugas v. Penaluna* (8) because it seems to me that there is no question of any reluctance or refusal on LORD KENYON's part to adopt as a valid principle of law what LORD MANSFIELD had stated in the earlier cases.

The second case, *Bernard v. Reed* (9), is really to the same effect as *Clugas v. Penaluna* (8) and I can pass over that case without more reference to it. As regards *Waymell v. Reed* (10), it will be found that in that case LORD KENYON in terms accepted and treated as good law the proposition which LORD MANSFIELD had earlier stated. I need not refer to the details of the case, but I will read two or three sentences from LORD KENYON's judgment, which was as follows (5 Term Rep. 599):

"It is sufficient, in order to dispose of this case, to advert to the distinction laid down by LORD MANSFIELD in *Holman v. Johnson* (6), to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by LORD MANSFIELD, at the end of *Holman v. Johnson* (6), comes up to the present case."

Those three cases, therefore, cannot, in my judgment, be used to support the suggestion that there was any conflict between LORD MANSFIELD and LORD KENYON, or that LORD KENYON doubted the validity of the proposition which LORD MANSFIELD had enunciated.

The next cases in the series are cases relating to a specific matter of stamp duty, and they differ in this respect. In the first of them, *Alves v. Hodgson* (11), it appears that the absence of a stamp on a contract made in a foreign country invalidated the contract altogether in that country, so that it could not be proceeded on there or anywhere else. In two other cases, *James v. Catherwood* (12) and *Bristow v. Sequeville* (13), the evidence was that the absence of a stamp only affected in the foreign country its admissibility in evidence as distinct from its validity, and it was, therefore, held that in this country (the rules of evidence going according to the *lex fori*) there was nothing to prevent the admissibility of the contracts in evidence notwithstanding the absence of stamps which would have made them inadmissible in the courts of the country of their origin.

James v. Catherwood (12) I have mentioned specifically because that was the case in which LORD TENTERDEN (then ABBOTT, C.J.) attributed the origin of the rule, as I have earlier stated, to LORD HARDWICKE. The chief justice in his judgment said (3 Dow. & Ry. K.B. 191):

"This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of LORD HARDWICKE, that in a British court we cannot take notice of the revenue laws of a foreign State. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence, what the law of that country was, in order to ascertain whether the instrument was or was not valid. Nothing must be taken by the motion."

The note of the reporter at the foot is:

“Vide *Holman v. Johnson* (6), 1 Cowp. 343, where LORD MANSFIELD, C.J., says: ‘no country takes notice of the revenue laws of another.’”

That statement of ABBOTT, C.J., may, I think, be in some respects rather wide, but it does not matter for present purposes whether it is entirely correct or whether it is not.

A In the third case which I have mentioned, *Bristow v. Sequeville* (13) (which was, like the second case, a case where a document, by reason of the absence of the stamp, was inadmissible according to the laws of the foreign country being the country of its origin) ROLFE, B., says this about the first case in this series of three, *Alves v. Hodgson* (11) (5 Exch. 279):

B “The marginal note of *Alves v. Hodgson* (11) is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The marginal note is in these terms: ‘The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp.’ I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide, that where a stamp is required by the revenue laws of a
C foreign State before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree.”

I have referred to those last three cases because it seems to me that they have, when examined, only this bearing on the matter in hand, viz., that they show that in certain circumstances the courts will “take notice” of the revenue laws of a foreign country in the sense that where the revenue laws, i.e., the stamp
D laws, of a foreign country affect the validity of the contract in the country of origin, then these courts may hold, as in *Alves v. Hodgson* (11), that no contract has been made which could be sued on either in the foreign country or anywhere else. But those cases do not touch the question with which we are directly concerned, viz., whether the courts of this country can be used to collect revenue
E of another country, whether imposed as stamp duty, income tax, customs duty, or in any other way. I think, however the matter goes further than that. Having looked at those cases, it seems to me that they show a general rule in the form stated by LORD MANSFIELD (whatever be its exact scope) as treated by lawyers in this country in the eighteenth century as well established. I think it equally clear that the rule has continued thenceforward to be accepted. As I have
F already said, its origin may well have had to do with questions of freedom of trade and the direct application to that problem of customs duties imposed by foreign countries, but that is, so to say, no more than the accident of its birth, and does not affect the existence of the principle and its applicability to other forms of revenue which may from time to time emerge. I think, then, that these cases show that, though the full import of the words: “No country will take notice
G of the revenue laws of another country,” may require explanation or even qualification, the true rule was then regarded, and should be now regarded, as well established that claims by representatives of a sovereign foreign State to recover penalties or the revenues of that State will not be enforceable in these courts.

I have used the two words “penalties” and “revenues”. We have not in
H this case been concerned with penalties, but I observe that there is a certain affinity between the two. The distinction between that which is penalty and that which is mere revenue may in some circumstances obviously be somewhat fine. So much, however, for the earlier cases.

I now come to the three instances, much later in date, when direct application of the rule came before the courts. The first was a Scottish case, and though, of course, the law of Scotland is not the law of England, still this rule, as will later appear, was always treated as, and was stated by LORD MANSFIELD as, a

rule of private international law. In any event, the courts of this country will always pay regard to the decisions of the Scottish courts. The case was *A.-G. for Canada v. Schultz* (14), in which certain goods of the defendant had been seized in Canada and the Canadian courts had affirmed the validity of the seizure and ordered the defendant to pay costs incurred in the Canadian courts when that matter was there decided. The Attorney-General for Canada then sued Schultz in Scotland to recover the costs. It was contended by the defendant that the costs were vitally concerned with and inseparable from the penalty of the seizure and that, therefore, the suit would not be entertained by the Scottish courts. The Scottish courts held in favour of that contention, that the costs not being capable of dissociation from the penalty could not be recovered in the Scottish courts.

The next case is one to which I have already alluded, *Sydney Municipal Council v. Bull* (2). I do not propose, because I think it unnecessary, to take time examining the details of that case. It was a claim directly made against Bull to recover local revenue charged by the municipality of Sydney. The argument of Mr. Simon, which I have already read, was accepted by GRANTHAM, J., and the suit was dismissed.

The third case is *Re Visser* (1), to which also I have already made considerable reference. I only now add one or two more citations from the judgment of TOMLIN, J. I have quoted his own conclusion at the end of his judgment and expressed my agreement with it. At the beginning of his judgment the learned judge says ([1928] Ch. 881):

"The short ground for the application [to strike out the statement of claim] is that these courts do not take notice of the revenue laws of a foreign State, and that the foreign State cannot sue in this country for the recovery of taxes falling to be paid under the foreign law."

The second part of the statement is the particular application of the general rule earlier stated. The learned judge observed that in DICEY'S CONFLICT OF LAWS there appeared, for the first time in the 1922 edition, the word "revenue" in addition to the word "penalty". It is significant that there was no new edition of DICEY until 1922 after the decision of GRANTHAM, J., in 1909 in *Sydney Municipal Council v. Bull* (2). I shall refer to DICEY presently, but the learned judge, in that part of his judgment, accepts the revised statement of DICEY appearing in the third edition as it has since appeared in later editions. The learned judge deals particularly with the stamp duty cases, *Alves v. Hodgson* (11), *Clegg v. Levy* (15) and *Bristow v. Sequeville* (13), two of which I have already mentioned, and says this, with which I agree (*ibid.*, 883):

"They [the stamp duty cases] really turn upon this, that where you are suing on an instrument or contract—a foreign instrument or contract—you have to establish its validity according to foreign law, but if it is valid according to foreign law, it is none the less valid because of a provision of revenue law. If, on the other hand, the revenue law does not operate to invalidate the instrument, but only affects its admissibility in evidence, then it is plain, on *Bristow v. Sequeville* (13), that the instrument would be admissible in evidence in our law. Now that seems to me to be the explanation of those cases, and all that those cases do is to indicate that however unwilling the courts may be to recognise foreign law, there are certain cases in which, although they do not enforce the foreign revenue law, they are bound to recognise some of the consequences of that law—namely, those cases where, as one of the terms of the law, contracts are rendered invalid by the foreign law."

Again, I respectfully agree and adopt that conclusion of the learned judge on those stamp cases.

The existence of this rule and its particular application to the recovery of revenue has since, as I think, been further recognised, not only in the courts, but also by Parliament in this country. In *Kahler v. Midland Bank, Ltd.* (16)

reference to the existence of the rule is to be found both in the judgments in this court and in the speeches in the House of Lords. The matter was not directly at issue and I do not, therefore, suggest that the references which I am about to make amount to more than dicta, but they are dicta of authority in these courts, and they recognise, as I have said, the existence of this rule and treat it as well-established. In the Court of Appeal the leading judgment in the *Kahler* case (16) was delivered by myself, and I used language which I hope I may be permitted to quote. I should, perhaps, in order to make the reference clear, explain that the question involved, very briefly, was this. The plaintiff, Kahler, claimed to be entitled, as against the Midland Bank, to certain securities. The Midland Bank was the bailee of those securities for a Czech bank and the question was whether the Midland Bank could properly hand over the securities to the plaintiff. The answer to his claim was that they held them to the order of the Czech bank and that any transfer out of the name of the Czech bank would involve an infringement of Czechoslovak currency laws, the contract relevant for consideration being held to be governed by Czech law, with the result, as this court and the House of Lords held, that the Midland Bank could not be required to do something which would involve an infringement of the law applicable to the contract on the part of the Czech bank. In the passage to which I am alluding I say ([1948] 1 All E.R. 819):

"It is, indeed, conceded that, save with the necessary permission, the Bohemian bank could not consent to the transfer of the securities in the defendants' books from its own name to that of the plaintiff without a contravention on its part of the regulation to which the bank is subject, and, in my judgment, recognition of this fact does not amount to an enforcement of the 'revenue laws' of another country. Assuming in the plaintiff's favour that the currency regulations in question can properly be described as 'revenue laws', it is, it seems to me, necessary for the plaintiff to show that the English courts will not in any circumstances 'have regard to' such laws, even though it is not in any proper sense of the term 'enforcing' them."

In the House of Lords I find the following passages relevant to cite. LORD NORMAND, after referring to *Ralli Brothers v. Compania Naviera Sota y Aznar* (17) says ([1949] 2 All E.R. 629):

"The principle on which they were decided is that the courts of this country will not compel the fulfilment of an obligation when performance includes the doing in a foreign country of something which the laws of that country make it illegal to do, but a judgment in rem compelling the delivery of securities held in London would not involve the doing of anything in a foreign country. I think that the dismissal of the appeal does not involve the enforcement of Czechoslovakia revenue law or penal laws."

LORD REID said (and it is not relevant for this purpose that LORD REID's opinion was a minority opinion) (*ibid.*, 635):

"In my judgment, those regulations do not come within the category of confiscatory or fiscal legislation of a foreign country which English courts cannot recognise."

Finally, LORD RADCLIFFE said (*ibid.*, 642):

"... I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the 'penal or revenue laws' of another State the existence of which our courts are traditionally disposed to ignore."

In each of those citations it is, I think, plain that those from whose observations I have quoted are treating as a well-established axiom or principle of the law the principle formulated long ago by LORD MANSFIELD. But, as I have said, it is not

merely recognition of the principle by the courts that is to be found in the books, but recognition also, as I think, by Parliament. In 1933 there was passed a statute known shortly as the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and that Act was designed to enable persons who have obtained judgments in foreign countries with whom certain conventions have been made by His Majesty to enforce those judgments direct, i.e., to execute them directly in this country without the necessity first of obtaining a judgment of the courts of this country. The kind of judgment which might be so enforced is defined or specified in s. 1 (2) thus:

"Any judgment of a superior court of a foreign country to which this Part of this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if . . . (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty . . ."

There is a similar reference in s. 10 in regard to the issue of certificates of judgments obtained in the United Kingdom with the object of obtaining reciprocity in the foreign country. The matter is stated thus:

"Where a judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, has been entered in the High Court . . ."

I am not, of course, suggesting that that Parliamentary language carries the present question any further than this, that it is an apparent recognition by Parliament of the special category, to say the least, into which claims for revenue or penalties are traditionally in this country, and, I think I may add, in other countries, regarded as falling. I have indicated that the rule is not, as I follow it, merely a rule of English municipal law. It is treated also as a rule of private international law.

With that introduction, I refer to the passage in DICEY to which (in the 1922 edition) TOMLIN, J., had referred in *Re Visser* (1). In the sixth edition, which is the present edition of DICEY, the passage is to be found at p. 152, thus:

"Rule 22.—The court has no jurisdiction at common law to entertain an action (1)—for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State . . ."

In the comment which follows there is set out a statement of LORD LOUGHBOROUGH, which, I think, is worth while reading. He said (*ibid.*, p. 153):

"The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who comes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like—and cannot be affected in this country by proceedings against him in that which he has left beyond the limits of which proceedings do not extend."

I read that passage as supporting the view which I have earlier intimated on my own part, that there is a good ground in justice for a rule such as this, even though, as I concede, there may from time to time be, and, perhaps, here is, a hard case to be found. The passage in DICEY, as I have said, was accepted by TOMLIN, J., and I also accept it. Its counterpart in American law is to be found in BEALE'S *CONFLICT OF LAWS* and in the case [*Henry v. Sargeant* (3)], among others, to which Mr. Simon referred in *Sydney Municipal Council v. Bull* (2) as establishing a formulation of the proposition which I adopt as correct. In BEALE, 1935 edition, the matter is dealt with in vol. 3, p. 1633 et seq. The learned author refers first to the English decisions, to which I have already made considerable allusion, and he then treats the matter as it has come before the courts in the United States.

The first case which he mentions is *Henry v. Sargeant* (3). The author says:

"The American cases treating this problem begin with *Henry v. Sargeant* (3). In that case action was brought against defendants, the selectmen of Chester Vermont, to recover a tax which was claimed to have been illegally assessed under Vermont law, and also to recover damages for causing the arrest of plaintiff for refusing to pay the tax. The New Hampshire court examined the law of Vermont and gave judgment for plaintiff. PARKER, C.J., said: 'It is said that the court will not enforce the penal laws, or the revenue laws, of another State. But this principle is not applicable in this case, nor can it be true to that extent. There is no attempt to enforce the penal or revenue laws of Vermont in this action. If there were, it would be held that this was not to be done through the instrumentality of the courts of another State; as, for instance, if the attempt was to collect a tax assessed in Vermont by a suit here.'"

The matter later came twice before the Circuit Court of Appeals in New York, and as regards one of those cases there is a citation of the basis of the rule by a very learned judge, JUDGE LEARNED HAND. He, concurring specially in the decision of the Circuit Court of Appeals, used this language:

"While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign State, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state."

I have read that passage out of respect to JUDGE LEARNED HAND, but if that were the true basis of the rule, it would, beyond doubt, greatly limit its application. As I understand the rule as applied in England, its origin is not of the limited character stated by JUDGE LEARNED HAND. However that may be, in the United States of America it is clear that the problem is apt to be, and frequently has been found to be, of a rather special character, because there the problem has arisen as between States in the Union, whether there is an obligation on the courts of one State to enforce the revenue claims or judgments of another State in the Union, having particular regard to the article in the Constitution of the United States, art. IV, s. 1, known as the "Full faith and credit clause." An example of that application of the problem came before the Supreme Court of the United States in *Milwaukee County v. M. E. White Co.* (18). That was a case where the question was whether the courts of one State ought to give effect to a judgment for tax made in another State. Article IV, s. 1, known as the "Full faith and credit clause" of the constitution, is expressed thus:

"Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State."

It was held by a majority of the Supreme Court that in the light of that provision it was the duty of the State in question to give effect to the judgment for tax of another State, and the court left expressly open the question whether either within or without the Union the proposition that one State should not enforce the revenue claims of another State was to be treated as valid or not, and if not, to what extent.

I have referred to all these matters since we have been given the advantage of a most careful argument and very full research made by the learned counsel before us. Having completed my citations, it seems to me that they provide, indeed, a formidable and weighty authority for the acceptance, at any rate in this court, of the rule in the form in which I have stated it, and for the formulation of which I acknowledge my indebtedness to LORD SIMON when at the Bar. Counsel for the applicants has contended that whatever might have been the

political philosophy two hundred years ago justifying such a rule, in existing conditions it has become archaic and disregards the obvious fact that from time to time the courts of this country may have to consider and do consider in detail the revenue laws of other countries, particularly countries adhering to the British Commonwealth. Counsel for the applicants has gone further and said that he has found indications in the books that learned judges have expressed the view that the scope of the rule in modern times should be reviewed. By way of example, he referred to the case which I have already mentioned, *Ralli Bros. v. Compania Naviera Sota y Aznar* (17). That was a case which involved the application of the principle which LORD NORMAND stated in a passage in the speech I have already read, viz., that the courts of this country will not enforce contracts, the performance of which according to its terms in a foreign country will be illegal in that place of performance. SCRUTTON, L.J., said ([1920] 2 K.B. 300):

"In my opinion the law is correctly stated by PROFESSOR DICEY in CONFLICT OF LAWS, 2nd ed., p. 553, where he says: 'A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed'—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English courts. The only authorities on the point require re-consideration, in view of the obligations of international comity as now understood."

Any observations of SCRUTTON, L.J., deserve, and invariably obtain, the greatest consideration, but, in my judgment, what was in the mind of the learned lord justice was the broad scope which the words, unqualified and unexplained, of LORD MANSFIELD might bear, and he was not intending in any way to throw doubt on the validity of the more limited proposition that the courts of this country will not be used as a means of collecting the revenue of a foreign country. Indeed, as I have already mentioned, in 1950 three members of the House of Lords obviously regarded that more limited principle as well established.

If, then, the rule be well established and be correctly stated in the way I have stated it, what is the effect of the Companies Act, 1948, s. 302, which says that the property of the company shall be applied in paying all liabilities? It is said that, by that section, every liability has to be provided for, including a liability of this nature, i.e., a liability for tax due in a foreign country, particularly in a foreign country where the company has been trading and has earned the money in respect of which tax is assessed. It is said that that is so because, according to ordinary language and the ordinary interpretation of the section, such a claim as that with which we are concerned is a liability, notwithstanding the rule to which I have referred and notwithstanding that it may be the fact that the Government of India might not, under the rule, be able to come to this country and directly sue to recover the sum that was due.

I am unable to accept that view of s. 302. In my judgment, and allowing for the fact that "liability" is a word of the widest import, and was deliberately used accordingly (see, e.g., what PEARSON, J., said in *Gooch v. London Banking Assn.* (19) (32 Ch.D. 47)), still, if a liability or an obligation such as that with which we are here dealing is within the section, then it will follow that the liquidator has a statutory duty in relation to it. He is, as has been said, a trustee under the statute in favour of the Government of India as a creditor. In other words, the acceptance of the proposition that this claim is a liability within s. 302 is inevitably acceptance also of the proposition that the claim is one enforceable in these courts by the Government of India, for the liquidator could then and on this hypothesis, at the suit of the Government of India be compelled to give effect to the statutory duty or statutory trust in favour of the Government

of India. I cannot accept the proposition that the liquidator ought to be treated as a trustee quoad the amount here claimed for the Government of India, at the same time accepting the view that the Government of India could never as cestui que trust or otherwise enforce its claim. That seems to me to lead to an absurd conclusion.

A Put, then, in another way, I think the present claim, made in accordance with the procedural provisions of the Companies Act, 1948, s. 307, is in substance and effect, though not, perhaps, in form, a proceeding to enforce, or to attempt to enforce, payment of the tax which the Government of India allege to be due to them. It is in that connection, I think, not irrelevant to observe that under the original counterpart of s. 307, viz., s. 133 of the Companies Act, 1862, it was not open to a creditor to make an application (as could the liquidator or a contributory) in a form such as the present application. He would have had to bring an
B action to recover his claim against the company, or (I assume), if the liquidator had parted with the money, against the liquidator. Now he cannot effectively bring any proceeding in that form, or, if he did, it would inevitably fail. The difference, I think, is merely procedural. The substance of the matter is the same. The Government of India, claiming to be a creditor, is, by these means, which are the only means available to them, seeking to enforce the claim.

C The result, in my judgment, is that, construing "liabilities" as I do, in the widest sense, and so as to include present and future and contingent liabilities, and so forth, I think the word must still be so construed as to exclude claims that are not enforceable according to the laws of this country in the courts of this country. Here, after all, by the terms of the Act, is an estate being administered, and
D prima facie where an estate is being administered, whether it be the estate or property of a company in liquidation, or the estate of a deceased person, the rules governing the administration will be the rules applied by the *lex fori*, i.e., the laws of the country where the property is being administered.

Thus, I think, there is a true and valuable analogy to be found by considering the case of a debt which is statute-barred according to the laws of this country. WYNN-PARRY, J., in *Re Art Reproduction Co., Ltd.* (20), decided that a liquidator
E in a voluntary winding-up of a solvent company could not pay a statute-barred debt without the consent of the contributories. We are not at the moment concerned directly with that matter, but I have always understood that statute-barred debts are not provable in the liquidation of a company. For the moment, however, I refer to this matter of statute-barred debts by way of analogy, and I have found assistance for present purposes in the case in this court of *Re*
F *Lorillard* (21). The facts of that case were of a rather special character. A testator was domiciled in New York, but died in England, and he left assets and creditors in both countries. The principal administration was in the United States, but there was also administration of his estate in England, the English
G administration being, as was stated, ancillary to the American. It appears that the English administrator had discharged all the debts and had in hand a surplus which he was proposing to distribute among the English beneficiaries. The American estate was, however, less ample, and it had been exhausted without
H paying all the American creditors—in particular certain American creditors (and this is the significance of the case) whose claims were good in America but whose claims were bound to be defeated if prosecuted in England because they were barred here by the English Statute of Limitations. Two summonses were brought before EVE, J. The first summons was by the administrator in England for directions what he should do with the surplus in his hands. Ought he to pay it to the English beneficiaries, or was he precluded from doing so by the fact that he had notice of these creditors in America even though they had deliberately abstained from trying to prove in the English administration? The second summons was a summons issued by the American administrator asking that the balance might be ordered to be handed over to him. The learned judge treated

the matter as one in his discretion whether he should order the English administrator to hand over to the American administrator, and in his discretion he answered the question negatively. The Court of Appeal expressed the view that there was no reason to interfere with his discretion. The significance of the matter is that in the judgments of LORD STERNDALE, M.R., and of YOUNGER, L.J., can be found references to the situation and rights quoad the English estate of these American creditors. Thus, LORD STERNDALE, M.R., says ([1922] 2 Ch. 644):

"There are debts in America which according to English law are statute-barred, but not so according to the law of New York. If claims in respect of these debts had been made here they would rightly have been rejected."

And then again later (*ibid.*, 645):

"The American creditors, however, did not present their claims, presumably knowing that if they did so they would be rejected."

YOUNGER, L.J., said (*ibid.*, 646):

"The only persons whom the American administrator claims to represent, the so-called American creditors, would, if they brought in their claims in this country, be defeated by the statute."

Those remarks were directly relevant to the decision because on the basis of those statements the judges in this court were saying: "Although the administrator here has notice of these claims they are not enforceable here, and therefore he has no duty towards these American creditors." That was a clearly relevant consideration in deciding whether this court would vary the decision of EVE, J., when he directed the English administrator not to pay to the American administrator but to hand over the surplus assets to the English beneficiaries. As I say, I find that case of assistance as indicating that in the administration of any estate, be it the property of a company in liquidation, or the estate of a deceased person, the question how you shall administer it, and, in particular, what liabilities you ought to accept and discharge, is a matter to be dealt with *prima facie* by the *lex fori*, that is, the law of England.

A point was taken by counsel for the applicants that, though the rule which found expression in *Re Visser* (1) be well established as a rule of common law, the effect of the Companies Act, 1948, and its deliberate use of the wide word "liabilities", was for the purpose of that Act to override the common law rule. He cited *Canadian Pacific Ry. Co. v. Roy* (22), which is an illustration of the well-known proposition that a corporation (e.g., a local authority in common instances) which by statute is given powers to do particular things, cannot be held liable at common law for, say, nuisance for doing that which the statute empowers the corporation to do or contemplates that it should do. I accept, of course, the proposition that, if the terms of the Companies Act, 1948, were clear and imperative, that would necessarily supersede the common law rule. For example, if s. 302 said "liabilities whether enforceable in the courts of this country or not," there would be no room for an invocation of LORD MANSFIELD's rule, but, in my judgment, the terms of the section are not so clear and are not so imperative. Indeed, I find no difficulty in treating the use of the word "liabilities", consistently with giving it its widest scope, as meaning liabilities in the sense of claims capable of enforcement in these courts and so as not to include every liability of every kind, be it a statute-barred debt or an obligation of a kind which no court here could ever enforce.

Counsel for the applicants finally argued that, accepting the rule as I have stated it, still it should not apply to States within the so-called "consortium" of the British Commonwealth. I can find no possible basis on which a distinction could be drawn between States adhering to the British Commonwealth and other States. I have already said that this case may in all the circumstances appear to be a hard case, and I can see that in modern conditions there may be good

arguments for some relaxation of the rule as between States of the Commonwealth. But that is plainly a matter to be regulated by executive action, by convention or agreement between governments, who could decide to what extent and subject to what conditions, if any, the revenue claims of one member State ought to be treated as enforceable in other member States.

A I have, during the course of what, I am afraid, has been an over-long judgment, assumed that we are here dealing with a sum certain which in India should be treated as having been due or as being due from the company to the Indian government. It has been convenient so to treat it, though it is, perhaps, right that I should say that in truth, as I understand it, the actual amount of the assessment is still not finally determined. The liquidator obtained leave to challenge the amount of the assessment without prejudice to his contention (which was communicated in India to the authorities concerned) that, in any circumstances, B no part of it could be admitted to proof. I mention the fact because counsel for the applicants contended that certain observations to be found in letters, and in the declaration of solvency, and in the language of certain orders made, and the conduct generally of the liquidator, in some way amounted to an admission on the liquidator's part from which he could not now resile so as to make this case C an exception to the general rule which I have stated if the rule were otherwise applicable. In my judgment, there is no ground for saying that any of the facts which I have mentioned amount to such an admission or prevent the liquidator quite properly from taking the point he has taken and contending that this debt cannot be admitted to proof.

D The result is that I agree with the conclusion of VAISEY, J. I agree with him also that the paucity of direct authority may well be due to the fact that for so long a period this rule has been regarded as too well-established to make effective challenge possible. However that may be, and without more, I concur with the learned judge and for the reasons which he gives, and think accordingly that this appeal fails and must be dismissed.

E JENKINS, L.J.: I agree. The appeal raises in effect two questions: first, whether the claim made by the Government of India to tax assessed on the company under Indian law is in the eye of English law a claim enforceable by legal process in this country against the company or against its assets situated here; and, secondly, if it is not, whether it is nevertheless a claim for which the liquidator should be held bound to provide as one of the liabilities of the company within the meaning of the Companies Act, 1948, s. 302.

F As to the first question, DICEY'S CONFLICT OF LAWS, 6th ed., p. 152, states the rule to be that the court has no jurisdiction at common law to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State. As regards penal and revenue laws (for with political laws we are not here concerned) I am satisfied that this proposition is well founded. Of the many authorities cited to us, I need only refer to *A.-G. for Canada v. Schultz* (14), *Sydney Municipal Council v. Bull* (2), *Re Visser* (1), and G the observations made in *Kahler v. Midland Bank, Ltd.* (16), by LORD NORMAND ([1949] 2 All E.R. 620), LORD REID (*ibid.*, 635), and LORD RADCLIFFE (*ibid.*, 642). These are passages to which my Lord has already referred, but I may, perhaps be forgiven for repeating what was said by LORD RADCLIFFE (*ibid.*, 642):

H "For my part I should not regard the application of this principle to this case as a concession of extra-territorial operation to foreign currency regulations. I should regard it rather as an insistence that in applying the proper law of a contract—a conception which is inescapable in private international law—it is the full complex of substantive law that must be applied . . . But, however that may be, I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the 'penal or revenue laws' of another State the existence of which our courts are traditionally disposed to ignore."

The view taken in these cases seems on the whole to be borne out by the American decisions, to some of which we were referred, though in cases arising as between different States of the Union the issue is liable to be obscured by considerations turning on the special relationship of such States to each other under the Federal Constitution. It is true that the earlier cases, which I do not propose to review in detail, while including decisions expressive of recognition of the existence of a rule broadly of this nature, provide no very satisfactory account of its origin, and, indeed, little or nothing in the way of actual authority for its application in circumstances at all resembling those of the present case. Its origin may, perhaps, be said to be lost in the mists of antiquity, and the best authority for it to reside in the consensus of opinion of generations of lawyers. Be that as it may, the later cases to which I have referred provide weighty recognition of its existence. I am satisfied, as was TOMLIN, J., in *Re Visser* (1), that it does exist, and, in my view, its existence is called for by cogent considerations of convenience, international comity, and public policy.

Accordingly, I accept the rule and would respectfully adopt the re-statement of it by TOMLIN, J., in *Re Visser* (1), at the conclusion of his judgment, in the passage which my Lord has already read ([1928] Ch. 884):

"My own opinion is that there is a well-recognised rule, which has been enforced for at least two hundred years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain."

A third way of formulating the rule, which LORD RADCLIFFE seems to have had in mind in making the observation in *Kahler v. Midland Bank, Ltd.* (16), to which I have already referred, is to state it as being to the effect that the law of England does not accord extra-territorial validity to the revenue legislation of foreign States. This mode of stating it may, perhaps, be said to have the merit of pointing to the reason why the courts of this country will not entertain proceedings to enforce, or act as collectors of, taxes imposed by the laws of foreign States.

I should add on this aspect of the case that the exception of judgments in respect of taxes and the like from the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (see s. 1 (2) (b) and s. 10 of that Act) affords some indication of statutory recognition of the rule. Accordingly, I answer the first of the two questions above posed in the negative.

As to the second question, i.e., whether, given acceptance of the rule, the claim in respect of Indian tax is, nevertheless, one of the liabilities of the company for which the liquidator should be held bound to provide under the Companies Act, 1948, s. 302, I do not see how this can be. It is, no doubt, true that "liabilities" is a term of wide import: see *Gooch v. London Banking Assocn.* (19); but I think its meaning must be limited to obligations capable of enforcement (whether immediately or prospectively or contingently) in the courts of this country.

Given the acceptance of the rule, the claim here in question cannot answer that description. Nor, in my view, is the argument for the Government of India advanced by the submission that, on the liquidation of a company, its assets are subjected to a trust for the discharge of its liabilities, for if the trust is a trust for the discharge of the company's liabilities it cannot extend to claims which are not liabilities. On this aspect of the case, I derive some assistance from analogy with a statute-barred debt, which cannot be paid even in the winding-up of a solvent company unless the contributories consent: see *Re Art Reproduction Co., Ltd.* (20).

Further, in my opinion, there is no distinction, for the purposes of the rule, between an action against the company while a going concern for enforcement of the claim and an appeal to the court in the winding-up of the company

against the liquidator's rejection of a proof in respect of the claim. Both forms of procedure invoke the aid of the courts of this country to enforce the claim, and both have for their ultimate object a judgment or order for the payment by the company, or out of its assets, of the amount claimed. This seems to me to be directly obnoxious to the rule even in the form in which it is stated in DICEY'S CONFLICT OF LAWS, above cited. A fortiori, I think an appeal to the court in the winding-up of the company is obnoxious to the rule as re-stated by TOMLIN, J., in *Re Visser* (1), for it clearly invokes the aid of the English court in the collection for the benefit of a foreign State of a tax imposed by the revenue laws of that State.

If the third method, suggested above, of stating the rule is accepted, then inasmuch as English law does not accord extra-territorial validity to the revenue laws of a foreign State, the short answer is that this claim, albeit enforceable against the company in India under Indian law to the extent of any assets of the company situated there, does not, in the winding-up of this English company under English law, or in the distribution in the course of such winding-up, and in accordance with English law, of its assets situated here, rank as a debt or liability of the company at all.

It is, in my view, nothing to the purpose to say that this is a liability enforceable under Indian law and that it must, therefore, rank as a liability in the winding-up in England of this English company. The question whether it is to rank as a liability or not must be determined by reference to English law: compare *Re Lorillard* (21), where the Court of Appeal was clearly of opinion that debts owing in America, which were statute-barred according to English law, but not according to American law, would not be recoverable in the English administration of a deceased person's estate.

A subsidiary argument was raised on behalf of the Government of India to the effect that the liquidator had recognised or admitted the claim in such a way as to preclude him from now contesting it. I am satisfied that there is no substance in this contention. I am also in complete agreement with my Lord that India's membership of the British Commonwealth of Nations cannot of itself in any way affect the conclusion at which we have arrived. Accordingly, I would dismiss this appeal.

MORRIS, L.J.: Although my mind has been much exercised in regard to some aspects of this matter, I have reached the same conclusion. The survey of the authorities in the course of the submissions addressed to us has led me to the view that the rule which is recorded in *Re Visser* (1) is one that must be regarded as established in our law, even if it were thought that its very first origins could not with certainty be discovered. If some disadvantages can be pointed to as resulting from the rule, it can with much force be shown that these are offset, and, perhaps, outweighed, by considerations of convenience. Some of these considerations are recorded in DICEY'S CONFLICT OF LAWS, 6th ed., p. 154. But whatever view may be held as to these matters, I consider that it is now too late successfully to submit that the rule has not been accepted in our law.

SIR RAYMOND EVERSLED, M.R., has reviewed the cases, and I could not add anything to the reasoning, with which I am in agreement, by which the authoritative nature of the rule has been demonstrated. The anxiety that I entertained during the arguments was whether, assuming that the principle or rule could not be impeached, it followed that the claim, or some claim, of the applicants must be rejected.

I think it is only fair to the liquidator to have in mind that the purchase price which was received by the company was transferred to this country long before the voluntary liquidation. Incidentally, the transfer also took place before the legislation was passed by which a capital gains tax was levied. We are, however, not in any way concerned with any question as to the quantum of any tax which may be due in India. The liquidators have very properly reserved and kept

open the opportunity for challenging in India the correctness of the actual amount of the tax demanded. The matter must proceed before us on the assumption that some tax is due in India.

On this footing the issue before us depends on the meaning of the word "liabilities" in the Companies Act, 1948, s. 302. In *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (23), JAMES, L.J., in dealing with the language of s. 98 of the Companies Act, 1862, used these words (7 Ch. App. 648):

"A duty and a trust are thus imposed upon the court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right."

If in the light of this guidance the word "liabilities" is given a wide meaning, does it cover a claim to tax by the applicants? It follows from acceptance of the rule of principle recorded that the applicants could not have sued the company in this country for tax. But on the assumption that some tax is owed in India so that there is a liability in India, can it be said that such liability is denoted by s. 302? I have felt it a disturbing thought that a company incorporated in this country that has carried on its activities in another country may be allowed to end its existence without having discharged such financial obligations as it may be ascertained to owe to the government of that other country, though possessed of resources to discharge them. The question for decision is, however, whether, if the rule or principle recorded in *Re Visser* (1) is accepted, some tax owed abroad is covered by the word "liabilities" in s. 302. If the rule may be regarded as having amongst its consequences the avoiding of situations of international embarrassment, then the disturbing thought to which I have referred can, perhaps, be offset by the consideration referred to by VAISEY, J., in his judgment, that rules of general application sometimes press hardly one way and sometimes another.

I have come to the conclusion that if the claim of the applicants were allowed, subject to ascertainment of quantum, the substance and reality of the matter would be that the English court would be collecting tax for the benefit of another State. That would involve an invasion of the principle which, as I think, must be definitely recognised. I considered during the arguments whether it could be said that the English court, in declaring what were the liabilities of a company that has operated in another country, would have regard to the law of that country when fixing and declaring what liabilities must be allowed for proof as liabilities within s. 302, but apart from any guidance which may be deduced from *Re Lorillard* (21), to allow the present claim would inevitably, I think, violate the established principle.

Appeal dismissed.

Solicitors: *Stanley Johnson & Allen* (for the applicants); *Sanderson, Lee & Co.* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

SMEATON HANSCOMB & CO., LTD. v. SASSOON I. SETTY
SON & CO.

[QUEEN'S BENCH DIVISION (Devlin, J.), November 6, 19, 1953.]

Arbitration—Claim within time fixed by agreement—Claim to be made within fourteen days from final discharge of goods—Breach by beneficiary of fundamental term of contract—Goods delivered of kind specified in contract, but short in measure and substantially undergrade.

Sale of Goods—Description—Sale of mahogany logs—Delivery of mahogany logs, but short measure and substantially undergrade.

By a clause in a contract dated May 22, 1951, for the sale of about thirty-five tons of round mahogany logs f.o.b. Lagos for shipment to Liverpool: "Should any dispute arise with respect to any matter connected with this contract, the buyers shall nevertheless accept the goods as shipped and make due payment . . . such payment, however, shall not affect their right, if any, to claim compensation for breach of this contract by the sellers. Such difference shall be referred to arbitration . . . Any claim must be made within fourteen days from the final discharge of the goods and before they are removed." Final discharge of the ship carrying the logs was completed on June 6, 1951, and on July 12 or 13, 1951, the buyers complained to the sellers' agents of the quality of the logs, there being a shortage in measure as well as a serious percentage undergrade, which complaint they confirmed by letter on July 16, 1951, when they also claimed to reject the consignment.

HELD: (i) it was a principle of construction that exceptions in a contract were to be construed as not being applicable for the protection of those for whose benefit they were inserted if the beneficiary had committed a breach of a fundamental term of the contract, and a clause requiring a claim to be brought within a specified period was an exception for this purpose, but in the present case the goods delivered were round mahogany logs, and the fact that there was a shortage in measure as well as a substantial percentage undergrade did not render the performance totally different from what the contract contemplated and so was not sufficient to bring that principle into operation; and, therefore, the sellers were entitled to rely on the time clause.

Per DEVLIN, J.: There is no reason why a clause should not be worded so as to provide that a limitation point should not deprive the arbitrator of jurisdiction, and that it should be for him and not for the court to determine the point finally, so far as it is a question of fact. I think that the authorities accept a third category of this sort. At any rate, on the authorities, if the point is dealt with in the arbitration, whether as a limitation point or as one going to the jurisdiction of the arbitrator which the parties leave him to determine for himself, his finding—subject, of course, to a Case Stated—is conclusive. Furthermore, if I have to choose between construing a clause which provides that any claim must be made within fourteen days either as a clause that bars the claim altogether or as a clause that goes to the jurisdiction of the arbitrator, I should choose the former, for I can see no reason for holding that a clause which is, in form, a limitation clause, should be construed so as to affect the authority of an arbitrator or the validity of his appointment.

AS TO LIMITATION CLAUSES IN ARBITRATION AGREEMENTS, see HALSBURY, Simonds Edn., Vol. 2, p. 19, para. 47; and FOR CASES, see DIGEST, Vol. 2, p. 337, No. 165.

Cases referred to:

(1) *Pinnock Brothers v. Lewis & Peat, Ltd.*, [1923] 1 K.B. 690; 92 L.J.K.B. 695; 129 L.T. 320; 21 Digest 239, 682.

- (2) *Atlantic Shipping & Trading Co. v. Dreyfus (Louis) & Co.*, [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 12 Digest, Replacement, 284, 2193.
- (3) *Ayscough v. Sheed, Thomson & Co.*, (1924), 93 L.J.K.B. 924; 131 L.T. 610; 21 Digest 239, 681.

SPECIAL CASE stated by arbitrator.

By a contract in writing dated May 22, 1951, the sellers, Sassoon I. Setty Son & Co., agreed to sell, and the buyers, Smeaton Hanscomb & Co., Ltd., agreed to buy, about thirty-five tons of round mahogany logs in fair quality at the price of £24 per ton, based on forty cubic feet per ton, Hoppus quarter girth measure tape under bark, 144 divisor, f.o.b. Lagos, nett, for shipment to Liverpool. The contract contained certain provisions as to quality and size and the following clause dealing with disputes:

"Should any dispute arise with respect to any matter connected with this contract, the buyers shall nevertheless accept the goods as shipped and make due payment as already provided; such payment, however, shall not affect their right, if any, to claim compensation for breach of this contract by the sellers. Such difference shall be referred to arbitration . . . Any claim must be made within fourteen days from the final discharge of the goods and before they are removed."

At the date of the contract the goods were already on the high seas, having been shipped from Lagos on Apr. 27, 1951. The ship arrived at Liverpool about May 27, 1951, and discharged twenty-one round mahogany logs together with one Sida (walnut) log, the property of the sellers, final discharge of the vessel being completed on June 6, 1951. The buyers, through their Liverpool agents, arranged for Alfred Dobell & Co., one of the recognised panel of firms appointed for the purpose, to measure and grade, and the shipping company to weigh and load on to railway wagons at the quayside, the twenty-one round mahogany logs and forward them, together with the Sida log, to their sawmills at High Wycombe. Alfred Dobell & Co.'s detailed specification, dated July 3, 1951, disclosed a shortage in measure as well as a serious percentage undergrade. On July 12 or 13, 1951, the buyers complained of the quality of the logs to the sellers' agents by telephone, and on July 16, 1951, confirmed the complaint by letter, claiming to be entitled to reject the consignment and to the return of the payment which they had made against documents before the ship arrived at Liverpool, plus computed freight and delivery charges from ex ship Liverpool to their sawmills. The buyers appointed an arbitrator, and the sellers, having failed to do likewise after service of a notice dated Sept. 15, 1952, in accordance with s. 7 of the Arbitration Act, 1950, the dispute was referred to the buyers' arbitrator as sole arbitrator.

The questions of law for the decision of the court were (i) whether, on the facts found and on the true construction of the contract, the buyers were entitled to maintain any claim against the sellers in the arbitration, (ii) if the answer to the first question was in the affirmative, whether, on the facts found and on the true construction of the contract, the buyers were entitled to reject the goods, and (iii) if the answers to the first and second questions were in the affirmative, whether, on the facts found, the damages payable by the sellers to the buyers included the cost of transporting the logs from ex ship Liverpool to the sawmills at High Wycombe. Depending on how the court answered these questions, the arbitrator made various awards.

Widgery for the buyers.

Adrian Hamilton for the sellers.

Cur. adv. vult.

Nov. 19. **DEVLIN, J.**, read a judgment in which he stated the facts and continued: The first question stated is whether the buyers are entitled to maintain any claim against the sellers. This question raises the point that the claim

was not brought within the period prescribed by the contract, that is, within fourteen days of final discharge and before the goods were removed. It was not, in fact, brought until after fourteen days from the completion of final discharge at Liverpool, and until after the goods were removed from Liverpool to the buyers' place of business at High Wycombe.

Counsel for the buyers makes three answers to this point. The first is that the claim is not out of time, because the place of the final discharge of the goods was not Liverpool, but High Wycombe; alternatively, because the time must be taken to run from the date when Messrs. Dobell completed their detailed specification. I think, with respect, that both these points are quite unarguable.

Secondly, counsel submits that the sellers can rely on this clause only if they have delivered goods that correspond with the contract description. He cited an obiter dictum by ROCHE, J., in *Pinnock Brothers v. Lewis & Peat, Ltd.* (1) ([1923] 1 K.B. 695). It is, no doubt, a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract, and that a clause requiring the claim to be brought within a specified period is to be regarded as an exception for this purpose: see *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* (2). In that case, the fundamental term was the implied condition of seaworthiness, which is treated, as LORD SUMNER said ([1922] 2 A.C. 260), as "underlying the whole contract of affreightment". The same principle has been applied to cases of deviation and other fundamental terms. I do not think that what is a fundamental term has ever been closely defined. It must be something, I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. If, for example, instead of delivering mahogany logs the sellers delivered pine logs and the buyers inadvertently omitted to have them examined for fourteen days, it might well be that the sellers could not rely on the time clause. ROCHE, J., in *Pinnock Brothers v. Lewis & Peat, Ltd.* (1), dealt with the same point in relation to another clause in the same contract which sought to exclude the right of rejection, and in relation to that he said ([1923] 1 K.B. 697): "... the delivery in this case could not be properly described as copra cake at all". In the case I am considering the goods delivered are described throughout as round mahogany logs, and it does not appear that anyone quarrelled with that description. What the arbitrator found was that there was "a shortage in measure as well as a serious percentage undergrade". That finding is not, in my view, sufficient to bring into operation the principle on which counsel for the buyers relies.

Counsel for the buyers' third point raises a question on the construction of this type of clause. He submits that clauses of this type in contracts which also contain an arbitration clause have been held on the authorities to fall within one or other of two categories. In one category they are treated as true limitation clauses, which bar the claim for all purposes, whether in the arbitration or at law. In the other category, they have no effect except in conjunction with the arbitration clause. In this second category, the object of the clause is merely to fix a limit to the time within which the party aggrieved may claim to enjoy the benefits of arbitration; if he does not act within the time prescribed he loses his right to arbitrate, but his claim in law is unaffected. Counsel submits that, on the true construction of this clause, it does not fall into the first category, but into the second, and all that befell the buyers was that they lost the right to arbitrate, or, conversely, that the sellers obtained the right to object to the arbitration proceedings as being out of time. That was, counsel contends, the only right which the clause gave to the sellers, they failed to exercise it at the appropriate time by objecting to the arbitration, and there is now nothing left

in the clause. It is, of course, admitted that counsel for the sellers at the arbitration took the point on the clause, and, indeed, the question with which I am dealing is stated on that point. But counsel for the buyers submits that that is not good enough. The only effect, he says, that can be given to the clause is to deprive the arbitrator of jurisdiction. The party, therefore, who wishes to exercise his rights under the clause can do so only by objecting to the jurisdiction; if he fails to do that, he loses the benefit of the clause. There is, in fact, a dispute about whether counsel for the sellers at the arbitration did, or did not, in terms protest against the arbitrator exercising jurisdiction. That is a point which I could determine only on motion by taking evidence *ab extra*. There is no protest noted in the Special Case, and for the limited purpose of these proceedings I shall assume that none was made.

I do not think that all clauses of this type must be placed in one or other of the two categories which counsel for the buyers has specified. If a clause provides that an arbitrator is to be nominated within fourteen days, I can see the force of an argument that a party must either take the objection to an appointment as being out of time or waive it, and that he cannot in effect say: "I do not object to your appointment as arbitrator, but I am going to leave it to you to determine whether you were properly appointed or not". Perhaps he can. I do not know and I need not decide it. For this clause goes, not to the appointment of the arbitrator, but to the making of the claim which the arbitrator has to determine. I can see no reason why a party should not say in effect: "I agree that you are quite properly appointed and have jurisdiction, and I want you to determine whether this claim was made within the contract time or not". On the argument of counsel for the buyers that the clause is limited to arbitration proceedings, it must be read as if it provided that any claim in the arbitration must be made within fourteen days. That does not, on the face of it, touch the jurisdiction of the arbitrator. There is no reason why a clause should not be worded in that way so as to provide that a limitation point should not deprive the arbitrator of jurisdiction, and that it should be for him and not for the court to determine the point finally, so far as it is a question of fact. I think that the authorities accept a third category of this sort. In *Ayscough v. Sheed, Thomson & Co.* (3) VISCOUNT CAVE (131 L.T. 612) seemed to think there was one, and so, I think, did ROCHE, J., when, in *Pinnock Brothers v. Lewis & Peat, Ltd.* (1) ([1923] 1 K.B. 696), he dealt with *Ayscough v. Sheed, Thomson & Co.* (3). At any rate, on these authorities, if the point is dealt with in the arbitration, whether as a limitation point or as one going to the jurisdiction of the arbitrator which the parties leave him to determine for himself, his finding—subject, of course, to a Case Stated—is conclusive. Furthermore, if I have to choose between construing a clause which provides that any claim must be made within fourteen days either as a clause that bars the claim altogether or as a clause that goes to the jurisdiction of the arbitrator, I should choose the former, for I can see no reason for holding that a clause which is, in form, a limitation clause, should be construed so as to affect the authority of an arbitrator or the validity of his appointment.

Accordingly, I answer the first question stated in the negative, and, consequently, the other questions do not arise.

Order accordingly.

Solicitors: *William A. Crump & Son* (for the buyers); *Parker, Garrett & Co.* (for the sellers).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

DRIVE YOURSELF HIRE CO. (LONDON), LTD. v. STRUTT
AND ANOTHER.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), October 28, 29, 30,
November 2, 3, 4, 24, 1953.]

Rent Restriction—Sub-tenancy—Covenant by sub-tenant not to assign without consent of both superior landlord and tenant—Assignment with consent of tenant only—Enforcement of covenant by superior landlord—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3).

Landlord and Tenant—Lease—Assignment—Covenant not to assign without consent—Enforcement by head lessor—Assignment of sub-lease—Head lessor not party to sub-lease—Law of Property Act, 1925 (c. 20), s. 56 (1).

By a lease dated Oct. 27, 1931, the predecessor in title of the plaintiffs demised to the first defendant a dwelling-house to which the Rent Restrictions Acts applied for a term of twenty years expiring on Nov. 11, 1951. This lease contained a covenant by the first defendant not to assign, underlet, or part with possession of the premises without the consent in writing of the landlord, and on Apr. 20, 1932, with his written consent, the first defendant sub-let the premises to D.S. for a period of years expiring on Nov. 10, 1951. The consent of the superior landlord was given on condition that the under-lease should contain a covenant by the under-lessee (D.S.) not to assign, let, or part with possession of the premises without his warrant or that of his successors in title, and, in accordance with this, para. 2 (x) of the sub-lease contained a covenant by D.S. not to assign, etc., without the written consent of the first defendant and the superior landlord. The power of re-entry and determination for breach of covenant was reserved only to the first defendant. On Jan. 27, 1937, with the written consent of the superior landlord and the first defendant, D.S. assigned her lease to W.E., Ltd., subject to the performance by W.E., Ltd. of the covenants in the original sub-lease. On Feb. 28, 1951, the first defendant executed a licence to W.E., Ltd., to assign to the second defendant, the assignment being executed on May 21, 1951, without the consent of the plaintiffs who, by that time, had become the reversioners. After the expiration of the under-lease on Nov. 10, 1951, and of the head lease on Nov. 11, 1951, the second defendant continued in occupation of the premises. In an action for possession of the premises, the second defendant claimed the protection of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a "sub-tenant" to whom the premises had been "lawfully sub-let".

HELD: in view of the definitions of "tenant" in s. 12 (1) (f) and (g) of the Act of 1920, the expression "sub-tenant" in s. 15 (3) of the Act included, not only an original sub-tenant, but also an assignee of a sub-tenant; to bring himself within the terms of the sub-section, however, the second defendant was required to show that the assignment to him was lawful, and, since the assignment was made in breach of the covenant contained in para. 2 (x) of the sub-lease, which had been expressly inserted at the request of and for the protection and benefit of the superior landlord, the assignment could not be said to be lawful although the superior landlord was not a party to the sub-lease and could not forfeit it for breach of the covenant; and, therefore, the second defendant was not entitled to the protection of s. 15 (3).

Per DENNING, L.J.: Under the provisions of s. 56 (1) of the Law of Property Act, 1925, the superior landlord could take the benefit of the covenant inserted in the sub-lease by requiring his consent to be obtained, even though he was not a party to the instrument.

Decision of LYNKEY, J. ([1953] 1 All E.R. 1036), reversed.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (f) and (g) and s. 15 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 999 and p. 1019.

Cases referred to:

- (1) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B. 107; 174 L.T. 279; 31 Digest, Replacement, 639, 7471.
- (2) *Maley v. Fearn*, [1946] 2 All E.R. 583; [1947] L.J.R. 276; 176 L.T. 203; 31 Digest, Replacement, 711, 7975.
- (3) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 34 Digest 169, 1322.
- (4) *Lee v. Carter (K.), Ltd.*, [1948] 2 All E.R. 690; [1949] 1 K.B. 85; [1949] L.J.R. 7; 31 Digest, Replacement, 426, 5529.
- (5) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; *sub nom. Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- (6) *Boyer v. Warbey*, [1953] 1 All E.R. 269; [1953] 1 Q.B. 234; 117 J.P. 106.
- (7) *Haywood v. Silber*, (1885), 30 Ch.D. 404; 54 L.T. 108; 30 Digest, Replacement, 513, 1530.
- (8) *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; [1937] Ch. 610; 107 L.J.Ch. 32; 157 L.T. 105; *affd.* C.A., [1938] 1 All E.R. 546; [1938] Ch. 351; 107 L.J.Ch. 212; 158 L.T. 338; Digest Supp.
- (9) *Stromdale & Ball, Ltd. v. Burden*, [1952] 1 All E.R. 59; [1952] Ch. 223; 3rd Digest Supp.
- (10) *Dutton v. Poole*, (1678), 1 Freem. K.B. 471 (89 E.R. 352); T. Jo. 102 (84 E.R. 1168); 1 Vent. 332 (86 E.R. 215); 3 Keb. 786, 814, 830, 836 (84 E.R. 1011, 1028, 1038, 1041); 2 Lev. 210 (83 E.R. 523); T. Raym. 302 (83 E.R. 156); 12 Digest, Replacement, 47, 251.
- (11) *Martyn v. Hind*, (1779), 2 Cowp. 437 (98 E.R. 1174); 1 Doug. K.B. 142 (99 E.R. 94); 19 Digest 428, 2652.
- (12) *Marchington v. Vernon*, (1787), 1 Bos. & P. 101, n.; 126 E.R. 801; 12 Digest, Replacement, 47, 254.
- (13) *Carnegie v. Waugh*, (1823), 2 Dow. & Ry. K.B. 277; 1 L.J.O.S.K.B. 89; 31 Digest, Replacement, 293, 4307.
- (14) *Gilby v. Copley*, (1683), 3 Lev. 138; 83 E.R. 618; 12 Digest, Replacement, 47, 252.
- (15) *Chesterfield & Midland Silkstone Colliery Co., Ltd. v. Hawkins*, (1865), 3 H. & C. 677; 34 L.J.Ex. 121; 12 L.T. 427; 159 E.R. 698; 12 Digest, Replacement, 45, 232.
- (16) *Cooker v. Child*, (1673), 2 Lev. 74; 83 E.R. 456; 17 Digest 197, 79.
- (17) *Chelsea & Walham Green Building Society v. Armstrong*, [1951] 2 All E.R. 250; [1951] Ch. 853; 2nd Digest Supp.
- (18) *Tweddle v. Atkinson*, (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 121 E.R. 762; 12 Digest, Replacement, 234, 1752.
- (19) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest, Replacement, 234, 1754.
- (20) *Gosling v. Woolf*, [1893] 1 Q.B. 39; 68 L.T. 89; 30 Digest 419, 624.

APPEAL by the plaintiffs from an order of LYNKEY, J., dated Mar. 30, 1953, and reported [1953] 1 All E.R. 1036, dismissing a claim for possession of a dwelling-house to which the Rent Restrictions Acts applied.

Belcourt for the plaintiffs.

L. A. Blundell and *Hyamson* for the first defendant, Emily Strutt.

M. Waters for the second defendant, James George Groville Dugdale.

Cur. adv. vult.

Nov. 24. The following judgments were read.

SOMERVELL, L.J.: In these proceedings the plaintiffs are claiming possession of a first floor flat. Under a lease dated Oct. 27, 1931, the premises were let by the plaintiffs' predecessor in title to the first defendant, Miss Strutt, for twenty years from Nov. 11, 1931. That lease contained a covenant to deliver up the premises on the expiration of the term in 1951 and such delivery up was not made in circumstances which will appear. The lease contained a covenant not to assign or under-let without the written consent of the landlord, such consent not to be unreasonably withheld. In 1932 the first defendant desired to underlet the premises to a Mrs. Sykes. The plaintiffs' predecessor in title, a Mr. Payne, consented to this, but on terms that were contained in a licence dated Apr. 19, 1932, which reads as follows:

"I the undersigned hereby consent to an under-lease from Apr. 1, 1932, to Nov. 10, 1951, determinable at the option of the said Emily Strutt on Nov. 11 in any of the years 1934, 1936, 1938, 1940, 1942, 1944, 1948, or 1950, at a rent of not less than £150 a year by Miss Emily Strutt of 11, Chester Street, London, to Mrs. Dorothy Sykes of 6, Deanery Street, London, of the premises demised by a lease dated Oct. 27, 1931, and made between myself of the one part and the said Emily Strutt of the other part such under-lease to contain a covenant by the under-lessee not to assign let or part with the possession of the premises or any part thereof without the warrant of myself or those claiming under me provided that this licence is restricted to the particular under-lease hereby authorised and save as aforesaid the covenant in the said lease contained against assignment or under-letting shall remain in full force and effect."

One of the points in this case is whether this document is to be regarded as contractual as between the parties, and, if so, whether it imposed any obligation on the first defendant other than the insertion of the covenant in the sub-lease.

The covenant with which the appeal is concerned is contained in para. 2 (x) of the sub-lease which is as follows:

"The tenant agrees with the landlady as follows . . . Not to assign under-let or part with the possession of any part of the demised premises or any part thereof without the written consent of the landlady and the superior landlord such consent however not to be unreasonably withheld in the case of a respectable and responsible person."

Mrs. Sykes was minded to assign her interest in the premises to Wroxall Estates, Ltd. In accordance with the covenant the consents of the first defendant and the head landlord were obtained in a document dated Jan. 26, 1937, which reads as follows:

"We, the undersigned, Arthur Samuel Roberts Payne and Emily Strutt hereby give our licence and authority to an assignment by Dorothy Sykes of all her estate in the premises demised by a lease dated Apr. 20, 1932 and an extension of lease dated Nov. 21, 1932 (both made between the said Emily Strutt of the one part and the said Dorothy Sykes of the other part) unto Wroxall Estates, Ltd., for use and occupation by Commander James George Greville Dugdale of Wroxall Abbey in the county of Warwick provided that this licence is restricted to the particular assignment hereby authorised and save as aforesaid the covenant in the said lease contained against assignment or under-letting shall remain in full force and effect."

The assignment to the second defendant by Wroxall Estates was made on May 21, 1951. The plaintiffs' consent was not asked for or obtained. The second defendant's interest came to an end on Nov. 10, and the first defendant's on Nov. 11. The plaintiffs, who by that time were the reversioners, claimed

possession, and the second defendant alleged that he was entitled to remain in possession under s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The sub-section reads as follows:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejection, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

The first point submitted on behalf of the plaintiffs is that that sub-section does not apply to or protect assignees of sub-leases. In considering the argument one must bear in mind the definitions under s. 12 (1) (f) of the Act of 1920. The expression "tenant" includes any person from time to time deriving title under the original agreement. Under s. 12 (1) (g) the expressions "tenant" and "tenancy" include "sub-tenant" and "sub-tenancy" and the expression "let" includes "sub-let". These, I think, are the relevant definitions which govern the construction of the sub-section unless the context otherwise requires. It is clear, I think, that the second defendant is a sub-tenant. The fact that he is an assignee does not prevent his being a sub-tenant, but it is said that he is not a sub-tenant to whom the premises were sub-let—the sub-letting was to Mrs. Sykes. The context, therefore, requires that the only sub-tenant to be considered is an original sub-tenant, because the words are inapt to cover an assignee. There is, I think, force in this, and I doubt whether the legislature directed its attention to the position of assignees. Having regard, however, to the definition in s. 12 (1) (f) and the purpose of the section to be gathered from its terms, I have come to the conclusion that it should be construed as covering assignees. Leaving aside for the moment the meaning of "lawfully", it would seem clear that, if the assignee is to get the protection of the section, the assignment to him must be "lawful". One could imagine a case where the head landlord was a party to the sub-lease which required his consent for an assignment. In such a case he must plainly be able to rely on the unlawfulness of an assignment made without his consent. It is, I think, equally clear that he must be able to rely on the unlawfulness, if it exists, of the original sub-letting. One, therefore, has to expand the words after sub-tenant so as to read

"to whom the premises, or any part thereof have been lawfully assigned by or under a sub-tenant to whom they have been lawfully sub-let."

I will now turn to the meaning of "lawful". In *Norman v. Simpson* (1) the court took the view that premises were unlawfully sub-let if the head lessor had a subsisting right of re-entering. That formula was considered in *Maley v. Fearn* (2). In that case a tenant had sub-let in breach of a covenant which required that there should be no sub-letting except with the consent of the landlord. It was held that the part sub-let had not been lawfully sub-let, but the court doubted whether, if the sub-letting was contrary to the terms of the covenant, it would be necessary to show that it gave rise to a right of re-entry. MORTON, L.J., was a party to both decisions and in the latter decision he expressed the opinion that a right of re-entry was not a necessary condition of unlawfulness. I agree with this. It is said here, in the first place, that, as the head landlord was not a party to the sub-lease, he cannot rely on the fact that his consent was neither sought nor obtained. It is said in the second place that the first defendant had a right to release Wroxall Estates from the provision which required the head landlord's consent and that she did so.

I think the first question to be considered is whether there was any implied obligation arising out of the licence. It was suggested in the pleadings that

A the first defendant impliedly undertook to impose the term on and, if necessary, enforce the term against the under-lessee and her successors in title. I think this is putting the obligation too widely. It has been said countless times that terms cannot be implied unless it is necessary to give efficacy to the agreement. It is suggested here, on behalf of the defendants, that Miss Strutt, even if she knew that the head landlord would object if approached, could release her sub-lessee from the term requiring the head landlord's consent. If this were right, the agreement which the licence document evidences would, it seems to me, have no efficacy at all. The position would be precisely the same as if the first defendant's consent only was required. I think, therefore, under this contract the first defendant impliedly undertook not to release or waive her right to require the superior landlord's consent.

B Although I do not myself think it would have affected the result I will deal here with the suggestion that the first defendant through her solicitors waived or purported to waive the position with regard to the superior landlord's consent. The solicitors concerned did not give evidence so the matter turns on inferences from letters. On Nov. 30, 1950, the solicitor for Wroxall Estates wrote to Miss Strutt:

C "Your tenants, Messrs. Wroxall Estates, Ltd. wish to assign the lease to their managing director, Mr. James Dugdale. We are therefore writing to ask for permission for the assignment of the premises to Mr. Dugdale. We do not know whether you will require references having regard to Mr. Dugdale's position in the company, but if you do require them please let us know and we will forward them. Do you know whether under your own lease it is necessary for you to obtain the permission of your own landlord to an assignment of the under-lease? If so, it will be necessary to get the permission of the Drive Yourself Hire Company (London), Ltd. who we understand are the superior landlords."

D Miss Strutt herself sent an answer to that:

E "I do not think it is necessary for me to get permission for me to grant an assignment of 1A Chester Street. I should like references as per usual. I have been laid up for weeks with a concussion owing to falling on my head and am only allowed any urgent business. I will get someone to speak to my lawyer. I see no reason against Mr. Dugdale having the lease, Yours truly, Emily Strutt."

F The matter was referred to her solicitors and they wrote on Jan. 1:

G "We act for Miss Emily Strutt and she has now forwarded to us your letter to her of Nov. 30 with instructions. She regrets that this letter has not been answered before, but this has been through the illness of our client. We think it as well for the usual references to be submitted of Mr. Dugdale and perhaps you will kindly let us have these at your convenience. There appears to be no necessity to obtain the permission of our client's superior landlords to grant your clients, Wroxhall Estates, Ltd., a licence to assign the lease to Mr. Dugdale."

I I read this last letter as dealing with the question put in the first, namely, as to the head-lease. Those are the letters, and the consent given by the first defendant was dated Feb. 28. It contains a fairly long recital which unfortunately omits any reference to the clause of the sub-lease which deals with assignments. The learned judge thought that the letter of Jan. 1 ought to be treated as a consent to the assignment of the sub-lease without requiring Wroxall Estates to obtain the consent of the plaintiffs. He relied, I think, on contemporary references to the sub-lease dealing with repairs as evidence that the solicitors had the terms of the sub-lease before them. The only explanation, to my mind, of these and some later letters consistent with honesty, which everyone accepts, is that both firms of solicitors had completely failed

to remember or remind themselves of para. 2 (x) of the sub-lease. There was, therefore, a breach of that provision. The question is whether that prevents the assignment being lawful within s. 15 (3) of the Act of 1920 having regard to the fact that it is the superior landlord, who was not a party, who is seeking to say that the assignment was unlawful. The provision here was, I think, an unusual one. It may well be that as a general rule breaches of provisions in a sub-lease of which the sub-lessor can take advantage would be irrelevant in considering the position of a sub-tenant or assignee in cases where the head landlord was the plaintiff. The provision which was broken here was, however, one inserted for his protection under an agreement by the first defendant with him, the terms and implications of which I have already dealt with. I have come to the conclusion that in those circumstances there was not a lawful assignment to the second defendant within s. 15 (3), as construed to bring assignees within its ambit. I should, perhaps, have mentioned that the plaintiff's objection to the second defendant is not personal, but based on the fact that the assignor, being a limited company, could not have claimed the protection of the Acts.

Various other points were argued which it is not necessary to consider. It was submitted that, if the second defendant was within s. 15 (3) the plaintiffs could maintain that there had been a breach of para. (d) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which deals, inter alia, with cases where the whole of the premises have been assigned or sub-let. If that were right, it would give the court jurisdiction to make an order, if the court thought it were reasonable to do so. The learned judge came to the conclusion that the submission failed although he indicated that, if the plaintiffs had brought themselves within that paragraph, he would have thought it reasonable to make an order. I express no opinion on this point which had better be left over until it is necessary to decide it. The point on which I differ from the learned judge is a narrow one. The word "lawful" is not an easy one to construe and apply, but for the reasons which I have given I think in the special circumstances which existed in this case the defence fails. I would allow the appeal.

DENNING, L.J.: The first question is whether in s. 15 (3) of the Act of 1920 the word "sub-tenant" includes not only the original sub-tenant, but also an assignee of a sub-tenant. I think it does, but, if this is done, I think the words "lawfully sub-let" must be expanded so as to include the process by which the assignee becomes sub-tenant. They include, not only the original sub-letting, but also the assignment. All the steps by which the sub-tenant becomes a sub-tenant have to be lawful before he can get the benefit of s. 15 (3). This means, at any rate, that they must not be in breach of contract, for to break a contract is an unlawful act: see *South Wales Miners' Federation v. Glamorgan Coal Co.* (3). In the present case all the steps by which the second defendant, Commander Dugdale, became sub-tenant were clearly lawful except the last step by which Wroxall Estates, Ltd., assigned the sub-lease to him. The sub-lease contained a specific covenant that the sub-tenant would not assign the premises

"without the consent of the landlady [Miss Strutt] and the superior landlord, such consent not to be unreasonably withheld in the case of a respectable and responsible person."

In so far as the covenant required the superior landlord's consent, it was inserted at the express request of the superior landlord and for his benefit. Indeed, he insisted on it. When Wroxall Estates, Ltd., assigned the sub-lease to Commander Dugdale, they ignored that obligation. They obtained the consent of the landlady, Miss Strutt, but did not obtain the consent of the superior landlords. If Wroxall Estates, Ltd., had asked the superior landlords for their consent, the superior landlords could quite reasonably have

refused to give consent, because Commander Dugdale would have become a protected tenant whereas Wroxall Estates, Ltd., were unprotected: *Lee v. K. Carter, Ltd.* (4).

Notwithstanding the fact that Wroxall Estates, Ltd., did not obtain the consent of the superior landlord in accordance with the covenant, the judge has held that the assignment to Commander Dugdale was lawful. The reason he gave was that the superior landlords were not parties to the sub-lease and could not enforce the covenants in it. It was for Miss Strutt alone to enforce it, and, if she thought fit to release Wroxall Estates, Ltd., from the obligations of it, the superior landlords could not complain. There is, I think, one short and decisive answer to this reasoning. When Mr. Payne, the predecessor of the superior landlords, gave his consent giving Miss Strutt, the tenant, permission to grant a sub-lease, he insisted that the under-lease should contain a covenant by the under-lessee not to assign the premises without the warrant of the superior landlord and those claiming under him. The consent thus given by Mr. Payne to Miss Strutt became a contract between them as soon as it was acted on. It was clearly an implied term of that contract that Miss Strutt, the tenant, should not release the sub-tenants from the obligation to get the superior landlord's consent, and the benefit of this implied term ran, I think, with the reversion so that not only Mr. Payne but also his successors in title could take advantage of it: see *Smith v. River Douglas Catchment Board* (5) and *Boyer v. Warbey* (6). If Miss Strutt did release the sub-tenants (Wroxall Estates, Ltd.), she herself was acting unlawfully, because she was breaking the implied term. If she did not release the sub-tenants, then the sub-tenants (Wroxall Estates, Ltd.) were acting unlawfully in that they assigned in breach of their obligation to her to obtain the superior landlord's consent. In either case the process was unlawful.

If I am wrong, however, in holding that there was such an implied term – and if the correct view is that Miss Strutt fulfilled all her obligations to the superior landlord by inserting the covenant in the sub-lease—which is what the judge thought, then I am still of opinion that the action of Wroxall Estates, Ltd., was unlawful. They deliberately broke a covenant which was inserted for the benefit of the superior landlord. Such a breach was, I believe, unlawful although the superior landlord was not a party to the instrument. I say this because the case seems to me to fall precisely within the words of s. 56 (1) of the Law of Property Act, 1925, which says that

“A person may take . . . the benefit of . . . any . . . covenant . . . respecting land or other property, although he may not be named as a party to the . . . instrument.”

In the course of the argument ROMER, L.J., drew attention to the preceding covenant in the sub-lease whereby the sub-tenant, in case of the premises being destroyed by fire, agreed in certain circumstances to pay to the superior landlord the loss thereby occasioned to him. Surely the superior landlord could, under s. 56 (1), take the benefit of that covenant. So, also, under this covenant about assigning the superior landlord can, I think, take the benefit of it by requiring his consent to be obtained. I do not say that for breach of it the superior landlord could forfeit the sub-lease. He clearly could not do so, because the proviso for re-entry was not inserted for his benefit. Only the covenant was for his benefit. But he is, at least, entitled to say that an assignment in breach of the covenant is unlawful. It should be noticed that in *Haywood v. Silber* (7) this court insisted on such a covenant being inserted in a sub-lease for the benefit of the superior landlord, and they would not have done so if they had thought it was no good to him.

Counsel for the second defendant argued, however, that s. 56 (1) must be limited to persons “with whom some agreement or covenant is purported to be made”, relying on the observations of SIMONDS, J., in *White v. Bijou*

Mansions, Ltd. (8). If the covenant had been formally expressed to be "with" the superior landlord, it would, he said, have been enforceable by the superior landlord, although he was not a party, but, as it was not so expressed, it was not enforceable. But, as SOMERVELL, L.J., pointed out in the course of the argument, that may be too narrow an interpretation to place on the words used by SIMONDS, J. Enforceability depends, not on the form of the obligation, but on the substance of it. A covenant is, for this purpose, sufficiently made "with" a person if it is, on the face of it, made directly for his benefit in such circumstances that it was intended to be enforceable by him. In support of this view I would refer to the recent case of *Stromdale & Ball, Ltd. v. Burden* (9), where DANCKWERTS, J., as one ground of his judgment, held that an option to purchase was enforceable by a company as an "agreement . . . respecting land" although the company was not a party to the instrument and the agreement was not expressed in terms to be "with" the company. Much of the difficulty that has surrounded s. 56 has arisen from an inadequate knowledge of the history of the subject. It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed, it said quite the contrary. For the two hundred years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract. That was clearly laid down by the Court of Exchequer Chamber in 1677 in *Dutton v. Poole* (10). One hundred years later it was so well accepted that LORD MANSFIELD in *Martyn v. Hind* (11) said (2 Cowp. 443) it was a matter of surprise how a doubt could have arisen about it, and BULLER, J., said in *Marchington v. Vernon* (12) (1 Bos. & P. 101 n.) quite categorically that

" . . . if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it."

Finally, in 1823, the Court of King's Bench, then in its golden age, including as it did ABBOTT, C.J., and BAYLEY and HOLROYD, JJ., specifically so held: see *Carnegie v. Waugh* (13); and in 1844 JOSEPH CHITTY in his highly authoritative work on PLEADING, 7th ed., vol. 1, pp. 4, 5, treated the law as settled accordingly. He would be a bold man who would say that a principle supported by the names I have mentioned did not represent the law of England, especially when it is so eminently just and reasonable.

So much for simple contracts. It was different with contracts under seal, as ABBOTT, C.J., himself pointed out in *Carnegie v. Waugh* (13). There was an inflexible rule that no one could sue on an indenture inter partes unless he was named as a party to it. Numerous examples of this rule will be found from *Gilby v. Copley* (14), in 1683, to *Chesterfield & Midland Silkstone Colliery Co., Ltd. v. Hawkins* (15) in 1865. But that rule was strictly confined to indentures made between parties, that is, indentures which specifically named the parties to it in a formal way, as by saying: "This indenture made between John Doe of the one part and Richard Roe of the other part": see CHITTY, *ibid.*, at p. 3. The rule never applied to a deed-poll or to an indenture which was not expressed to be made between parties. The result was that if the indenture did not specifically name the parties in formal fashion, but started off simply by saying that: "This indenture witnesseth that John Doe and Richard Roe have agreed as follows", stating their agreement and followed by their signatures, then the common law allowed a third party to sue on a covenant contained therein which was made expressly for his benefit. This was laid down in 1673 in *Cooker v. Child* (16), and was applied in striking fashion recently by VAISEY, J., in *Chelsea & Walham Green Building Society v. Armstrong* (17).

Such was the state of the law in 1845 when Parliament passed s. 5 of the Real Property Act, 1845. That section abolished the technical rule about indentures so far as land was concerned. It enabled a person to take the benefit of a covenant over or respecting land, although he was not named as a party to the indenture. Naturally enough, that section only applied to indentures because in 1845 they were the only documents in which the law needed to be remedied. In all other cases at that time a third party could sue. In 1861, however, came the unfortunate case of *Tweddle v. Atkinson* (18) in which the Court of Queen's Bench departed from the law as it had been understood for the previous two hundred years and held, quite generally, that no stranger could take advantage of a contract, although made for his benefit, and that was assumed, without argument, to be the law by the House of Lords in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* (19). I do not pause to consider whether this new rule was legitimately introduced into the law. Incidentally, the courts of the United States of America have not adopted this new rule. They have followed the original common law, which is much more in accord with the needs of a civilised society. So is the Scots law. But what I do suggest is that the rule in *Tweddle v. Atkinson* (18) was itself greatly modified by s. 56 of the Law of Property Act, 1925. Just as the Real Property Act, 1845, modified the old technical rule about indentures, so the Act of 1925 modified the new technical rule about contracts generally. Section 56 (1) applies, not merely to indentures, but to any instrument of agreement, and it applies not only to land, but to any property, real or personal. It says that:

"A person may take . . . the benefit of any . . . agreement . . . respecting . . . property, although he may not be named as a party to the . . . instrument."

I can think of no words more apt to do away with the rule in *Tweddle v. Atkinson* (18), leaving the courts free, in cases respecting property, to go back to the old common law, whereby a third party can sue on a contract made expressly for his benefit, and be rid also of the old rule about deeds inter partes.

In support of this view I would like to give some modern instances. First, there is the important decision which I have already mentioned of *VAISEY, J.*, in *Chelsea & Walham Green Building Society v. Armstrong* (17). A man who had mortgaged a house sold it to a purchaser. In the deed of transfer (which was not inter partes) the purchaser covenanted that he would pay the future instalments to the building society. The building society was not a party to the transfer, but *VAISEY, J.*, held that the building society could enforce the covenant by direct action against the purchaser. For this purpose he went back to the old case, *Cooker v. Child* (16), but he could not have done this unless the rule in *Tweddle v. Atkinson* (18) had been done away with so as to permit him to go back to the old common law. If it is permissible to go back to *Cooker v. Child* (16), in the second volume of *LEVINZ's* reports, why not also go back to *Dutton v. Poole* (10) in the same volume? especially as it has never been overruled by any court of competent authority. Next there is the recent decision of *DANCKWERTS, J.*, in *Stromdale & Ball, Ltd. v. Burden* (9). A deed of licence (which was inter partes) gave an option to purchase to a company which was not a party to the deed. The company could not have sued at common law because the deed was inter partes. But by virtue of s. 56 (1) of the Law of Property Act, it was held entitled to do so. Finally, in regard to simple contracts, I would refer to the cases I mentioned in *Smith v. River Douglas Catchment Board* (5), namely, commercial credits, pension agreements, and household insurances. No court would, I fancy, deny the third party a remedy in such cases, and the remedy is to be found by recourse to the old common law.

My conclusion is, therefore, that s. 56 (1) applies so as to entitle the superior landlord to take the benefit of this covenant although he was not named as a party to the under-lease in which it was contained. The assignment to

Commander Dugdale was unlawful because the consent of the superior landlord was not obtained. He is, therefore, not protected by s. 15 (3) of the Act of 1920. In these circumstances there is no reason to consider paras. (a) and (d) of sched. I to the Act of 1933 and I do not do so. I agree with my Lord that this appeal should be allowed.

ROMER, L.J.: I agree. The first question to consider is whether the protective provisions of s. 15 (3) of the Act of 1920 extend to an assign from a sub-lessee or whether they are confined to sub-lessees themselves. The sub-section refers in terms only to sub-tenants to whom premises have been sub-let and it is not altogether easy to fit assignees into the language which the draftsman used. Nevertheless, a person to whom a sub-lease is assigned undoubtedly becomes the sub-tenant of the immediate reversioner, and it would be a curious intention to attribute to Parliament that an original sub-lessee is protected, but not an assignee from him, in cases, for example, where the head lessor has expressly approved both the sub-lease and the assignment thereof. In my opinion, assignees of underleases are, in fact, within the sub-section, not merely as a matter of expectation, but by virtue of the definitions of "tenant" in s. 12 (1) (f) and (g) of the Act of 1920. The difficulty of applying the language of s. 15 (3) to under-tenants by assignment is not such, in my judgment, as to oust these definitions from the sub-section by reason of the excluding preface to s. 12 (1) "except where the context otherwise requires". I think that s. 15 (3) may reasonably be read as applying both to sub-lessees and their assigns, but so that no assign can invoke it unless both the sub-lease and the assignment thereof are "lawful" in relation to the superior lessor or lessors who would, but for the sub-section, be entitled to possession of the premises sub-demised. Whether the word "lawfully" has an even wider scope it is not, for present purposes, necessary to consider.

On the construction which I have attributed to s. 15 (3) the second defendant, Commander Dugdale, is entitled to rely on it provided that the assignment to him by Wroxall Estates, Ltd. was valid not only as against Miss Strutt but as against the head lessors when Miss Strutt's lease fell in, on which date this defendant was in possession (in reliance on s. 15 (3)) of the whole of the premises demised. Was, then, this defendant's assignment "lawful" as against the head lessors? To answer this question it is necessary to inquire as to the relevant rights which Mr. Payne acquired in relation to the property and to which the plaintiffs have, at all material times, been entitled as his successors. Mr. Payne was the freeholder of the property, and it is quite clear that, when he leased it to Miss Strutt, he attached considerable importance to retaining control over the persons who might from time to time occupy the premises under a title deriving from her. Such control could, in fact, only be achieved with certainty by his insisting on being a party himself to all subsequent dispositions of the property by way of assignment or sub-lease. After the grant of the lease to Miss Strutt there was a variety of ways in which the property might change hands during the term of the demise. Miss Strutt might, for example, assign the term and subsequent assignments might follow, or she might grant a sub-lease and other persons might acquire an interest by assignment or under-lease from the sub-lessee. Mr. Payne might have so arranged matters when he granted the head-lease that none of these subsequent devolutions could be validly effected except by instruments which imposed on the taker of each successive interest a covenant contractually enforceable by the head lessor against assigning or sub-letting except with his own consent. This course, however, is somewhat burdensome, especially in the case of a large estate, and, whether for this reason or some other, Mr. Payne did not think proper to adopt it; instead he introduced into the licence to Miss Strutt a condition, the effect of which was that her sub-lessee should covenant with her not to assign or further sub-lease without both her consent and his, and

this condition was duly incorporated by way of covenant in the under-lease which Miss Strutt, in pursuance of such licence, granted to Mrs. Sykes.

A It was contended before us on behalf of the second defendant that, in these circumstances, Miss Strutt, the covenantee, could at any time, and without the head lessor's consent, and, indeed, without reference to him at all, release Mrs. Sykes and any person claiming through or under her, from the burden of this covenant. Whether, in fact, she released Wroxall Estates, Ltd., from their obligation to her to obtain the plaintiffs' consent when the company assigned the sub-lease to the second defendant depends on the effect of the letters which passed at the time and is a matter that may be open to question, but, if she did, I am satisfied that she had no right, as against the plaintiffs, so to do. I quite agree with my brethren that the licence which Mr. Payne granted to Miss Strutt to sub-let gave rise to an implied promise by this lady not to release from its operation any person claiming through her who became bound by covenant. Such a release would render the condition on which the licence was given altogether useless and abortive to the head lessor. If Miss Strutt had not agreed to accept the condition, she would not have got the licence at all; the condition was, in fact, the consideration for the licence and it would be against conscience that she should take the benefit and disregard the obligation. I do not for one moment suggest that this was what she intended to do when the company asked for her consent to assign to the second defendant, for neither she, nor, apparently, her solicitors, had any appreciation of the plaintiffs' rights, but, had the plaintiffs ascertained that it was proposed to effect an assignment without their own consent, I have no doubt but that the court would, on their intervention, have restrained the company from acting in disregard of such consent and Miss Strutt from purporting to authorise them to do so. The plaintiffs did not, however, hear of the assignment to the second defendant in time to apply to the court and it was, accordingly, carried through without their knowledge.

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E It is in these circumstances that the question arises whether the second defendant can claim that the assignment was "lawful" and thus defeat the claim which the plaintiffs have brought for possession of the premises. In my opinion, this question must be answered in the negative. So far as Miss Strutt and Wroxall Estates, Ltd., and Commander Dugdale are concerned it may well be that the assignment was perfectly valid. Miss Strutt gave her consent to it and at no time subsequently challenged it in any way. The company acted in breach of their covenant with Miss Strutt, but I think myself that it would have been difficult for her to have made this the subject of legal complaint in view of the letters which passed, and, in any event, as I have said, she never attempted to do so. Nor could either Miss Strutt or the company set up any invalidity in the assignment as against Commander Dugdale.

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G In my judgment, however, the matter by no means rests there. One of the results of s. 15 (3) is, undoubtedly, to foist on landlords, in many cases, tenants whom they do not wish to have and whose right of occupation may be of unforeseeable duration. This effect of the sub-section was presumably known to the legislature, and I think that the word "lawfully", which was inserted for the protection of the landlord, should be given a reasonably wide construction. It seems to me that the mere fact that a sub-lease or an assignment thereof is "lawful" as between the parties thereto does not of itself render it lawful as against a superior lessor. Now, when Wroxall Estates, Ltd., took their assignment from Mrs. Sykes the position would appear to be (although the point was not argued before us and I do not wish to be taken as expressing any definite opinion on it) that the company were entitled to see the head-lease to Miss Strutt as well as the sub-lease by her to Mrs. Sykes: *Gosling v. Woolf* (20); but not the licence which Mr. Payne gave to Miss Strutt: Law of Property Act, 1925, s. 45 (3). It may be that, notwithstanding s. 44 (3) of that Act, the company had constructive notice of the licence, but the position as to this is somewhat obscure and it would

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be unsafe to deal with the case on the footing that they had. Even on the assumption, however, that the company neither knew nor had notice of the licence and of the implied obligation on Miss Strutt arising thereout, they knew of the covenant in the sub-lease requiring the head lessor's consent. They knew also that when they took their own assignment this covenant was duly observed in that Mr. Payne's written consent thereto was obtained as well as that of Miss Strutt, and they must surely have known, as a matter of ordinary common sense, that the covenant was introduced solely for the benefit of the head lessor, and not for the benefit of anybody else. As to Miss Strutt (who played an essential part in the transaction, for it could not lawfully have gone through without her consent), she knew, or must be taken to have known, of her obligation to her own reversioner which was implicit in the licence and it is nothing to the purpose that it had escaped her mind when she acted (if in fact she did so act) in disregard of it.

In view of all of these considerations it is not possible to say, in my judgment, that the assignment was "lawful" within the meaning and intendment of s. 15 (3) of the Act of 1920. It was, in fact, executed in plain breach of the rights of the plaintiffs, who had and have a greater interest in the property than any of the parties who were engaged in the transaction. The second defendant cannot, therefore, in my opinion, rely as against the plaintiffs on the assignment as being a lawful document of title and I agree that the appeal must be allowed. On this view of the matter it becomes unnecessary to decide any of the other points which were argued before us (some of which, at least, I think are difficult), and I prefer to express no concluded opinion on them.

Appeal allowed.

Solicitors: *Merton Naydler* (for the plaintiffs); *Farrer & Co.* (for the first defendant); *Child & Child* (for the second defendant).

[Reported by MISS PHILIPPA PRICE, Barrister-at-Law.]

HAWKSLEY v. FEWTRELL AND ANOTHER.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.JJ.), November 12, 13, 16, 1953.]

Jury—Verdict—Given in judge's absence—Validity.

In an action for damages for false imprisonment and malicious prosecution the judge left the court before the jury had finished deliberating, and their verdict, which was a simple verdict in favour of the defendants, was given to the associate in his absence. The associate discharged the jury and on the next day of the sitting of the court the judge entered judgment for the defendants.

HELD: the verdict of the jury was a public verdict and not a privy verdict requiring to be affirmed or altered before the judge in open court, and, though it was undesirable that the verdict should be given in the absence of the judge (dicta of SCRUTTON, J., in *Fanshaw v. Knowles* ([1916] 2 K.B. 549) and of SCRUTTON, L.J., in *Banbury v. Bank of Montreal* ([1917] 1 K.B. 442), adopted), his absence did not of itself render it a nullity.

AS TO THE GIVING OF A VERDICT BY A JURY, see HALSBURY, Hailsham Edn., Vol. 19, p. 316, para. 658; and AS TO GROUNDS FOR A NEW TRIAL, see *ibid.*, Vol. 26, pp. 124-128, paras. 245-249.

Cases referred to:

- (1) *Fanshaw v. Knowles*, [1916] 2 K.B. 538; 85 L.J.K.B. 1735; 115 L.T. 339; 30 Digest, Replacement, 276, 427.
- (2) *Saunders v. Freeman*, (1561), 2 Dyer, 209a (73 E.R. 461); 1 Plowd. 209 (75 E.R. 321); 30 Digest, Replacement, 288, 586.

- (3) *Banbury v. Bank of Montreal*, [1917] 1 K.B. 409; 86 L.J.K.B. 380; 116 L.T. 42; 30 Digest, Replacement, 288, 588.
- (4) *Doe d. Lewis v. Baster*, (1836), 5 Ad. & El. 129 (111 E.R. 1115); 6 Nev. & M. K.B. 541; 30 Digest, Replacement, 293, 651.
- (5) *Bentley v. Fleming*, (1845), 3 Dow. & L. 20; 1 C.B. 479 (135 E.R. 627); 14 L.J.C.P. 174; 5 L.T.O.S. 73; 30 Digest, Replacement, 273, 393.
- (6) *Ellis v. Deheer*, [1922] 2 K.B. 113; 91 L.J.K.B. 937; 127 L.T. 431; 86 J.P. 169; 30 Digest, Replacement, 288, 583.
- (7) *Baker v. Oakes*, (1877), 2 Q.B.D. 171; 46 L.J.Q.B. 246; 35 L.T. 832; 16 Digest 179, 841.

APPEAL by the plaintiff against an order of FINNEMORE, J., dated Apr. 20, 1953, in an action for damages for false imprisonment and for malicious prosecution, in which he gave judgment in accordance with the verdict of the jury in favour of the defendants. The plaintiff contended that the verdict was a nullity on the ground that it was given to the associate in the absence of the judge, and that there had been misdirection of the jury.

Lloyd-Jones, Q.C., and *Leonard Halpern* for the plaintiff.
Elwes, Q.C., and *Stabb* for the defendants.

SINGLETON, L.J.: This appeal arises out of an action brought by the plaintiff against two police officers for damages for false imprisonment and for malicious prosecution. The case was heard before FINNEMORE, J., and a jury on Thursday and Friday, Apr. 16 and 17, 1953, and on Monday, Apr. 20, the learned judge directed that judgment be entered for the defendants. The more important point raised on the appeal is that there was no verdict of the jury on which judgment could be given. It arises in this way. After the direction given to them by the judge, the jury retired at 3.35 on the Friday afternoon. They did not return to court until twelve minutes past six, by which time the judge had left without, so far as we have been told, any intimation to the parties. The verdict of the jury, which was in favour of the defendants, was taken by the associate, after which he discharged the jury. On the Monday morning, counsel for the defendants applied for judgment. Counsel for the plaintiff opposed the application in these terms:

"I oppose the application on this ground, my Lord. After a retirement of some two and a half hours the jury returned to the court and gave what, in my submission, was an informal verdict to the associate. After that they were discharged. In those circumstances, I beg to move for a new trial inasmuch as that, before your Lordship today, there is no final formal verdict of a jury, and so far as I can see one cannot now be obtained, because that jury is no longer in existence."

Counsel referred to a note in the ANNUAL PRACTICE, 1953, under Ord. 36, r. 39, and to *Fanshaw v. Knowles* (1), in regard to which the judge said: "I know. I read it on Friday while the jury were out." I am not sure that the judge meant that he had read the whole of the report of that case. It may be he meant he had read the note in the ANNUAL PRACTICE.

After hearing counsel for the plaintiff, FINNEMORE, J., said:

"I do not think there is anything in the point at all. There was for a long time doubt whether the very strict rules which apply in the taking of a verdict from a jury in a criminal case applied in the same measure to a civil jury. The case to which reference has been made, *Fanshaw v. Knowles* (1), showed quite plainly that they did not. Quite apart from that, it has happened in many cases that a jury have deliberated for a very long time and that the judge has not been present when the jury have come back, and it has been the practice for a long time that, if they have given a proper, plain, straightforward verdict, as in this case, with no qualifications and no

point calling for legal argument, or anything of that kind, the verdict has been accepted as the verdict of the jury, and in due course, normally the next day, formal judgment has been asked for and has been entered. That is what I propose to do here. Judgment will be entered for the defendants."

Counsel for the plaintiff asks this court to say that that judgment is wrong and that there must be a new trial. He was not able to refer us to any case in which it had been held that a verdict so given was of no effect, but he relied on what was said in the Court of Appeal in *Fanshaw v. Knowles* (1) to the effect that a verdict given, or taken, in the absence of the judge is a privy verdict and is a nullity unless it is followed by a verdict given in open court in the presence of the judge. The decision of the court in *Fanshaw v. Knowles* (1) was that the rule that any separation of the jury after the judge's summing-up in a criminal case invalidates their verdict does not apply to a civil case. As the headnote shows, the history of the law as to separation of juries was considered. DARLING, J., had put questions to the jury and had left the court before they answered them. They did not answer them all that evening, and they were told to attend again the next morning, when the judge would be present. In the morning they gave further answers on which the judge entered judgment for the plaintiff. The defendants' appeal was dismissed. It was argued that the verdict was bad in that the jury had been allowed to separate before giving their verdict. LORD READING, C.J., said ([1916] 2 K.B. 543):

"We have had the advantage of an interesting and learned argument upon the subject. The defendant has urged that the same rule must apply in a civil trial. On the other hand it has been argued for the plaintiffs that the old rule of law which would prevent the separation of the jury before they give their verdict after they have retired to consider it is one that no longer applies to civil trials; that the rigidity of the old rule has been relaxed in civil trials, just as it has been relaxed even in criminal trials partly by custom, and recently by the Juries Detention Act, 1897. In COKE UPON LITTLETON, 227b, it is stated that 'By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unless it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court.' It is clear, therefore, that at the time of this work being written there was a distinction to be drawn between civil and criminal cases. In the one case, that is in the civil trial, a privy verdict could be given, and then the jury were allowed to eat and drink and they could either confirm or alter that verdict, that is that privy verdict, when the verdict was given as a public verdict. In BLACKSTONE'S COMMENTARIES, iii. 377, it is stated, dealing with verdicts between party and party, that 'A verdict is either privy or public. A privy verdict is when the judge hath left or adjourned the court: and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged.' It appears, therefore, that the jury when they had once agreed could return an informal verdict called a privy verdict, and that when they had done

A that they were entitled to eat and drink, as is said in COKE UPON LITTLETON, which was already a relaxation of the rigidity of the old rule; and in BLACKSTONE's time he says that when they were agreed they gave their privy verdict in order to be delivered from their confinement. It seems, therefore, not only were they allowed to eat and drink if they had given their privy verdict, but in BLACKSTONE's time they were no longer confined, and they could on the next morning, when they gave their public verdict, alter the privy verdict or affirm it as they pleased. Now that shows that when BLACKSTONE's COMMENTARIES were written it was clear that in civil trials B juries were allowed to give a verdict after they had separated. The progress in the liberty afforded to juries is shown by the allowance of the release from confinement, which is stated in BLACKSTONE, but not in COKE UPON LITTLETON; and even in COKE UPON LITTLETON a reference to the case of *Saunders v. Freeman* (2) (1 Plowd. 211) shows that after there had been a privy verdict the jury were then allowed to eat and drink and lie together. It appears to have been by custom that juries were allowed to do this. The words are 'and then the same juries for their ease as is the custom to eat and drink together for them aforesaid and to lie together until the morrow aforesaid and then to give their verdict aforesaid openly before the aforesaid C justices at Northampton.' So that going back to the time of Queen Elizabeth there had already existed some relaxation which is shown by the custom mentioned in PLOWDEN and extended gradually till we get to the date of BLACKSTONE's COMMENTARIES."

The Lord Chief Justice said further (*ibid.*, 547):

D "The conclusion to which I have come upon this point is that in civil trials the separation of the jury does not invalidate the verdict. I think that it is a practice which should be resorted to only in rare instances and where special circumstances demand it. The danger of allowing the separation is pointed out by BLACKSTONE. It is a danger which none the less exists in the present day. There are, of course, circumstances which make it necessary or desirable that the jury should return on the next day for the purpose of E hearing a further direction from the judge, or perhaps of settling some point of controversy between the jury as to the evidence, or perhaps for some explanation of the summing-up of the learned judge which some of the jury may not properly have appreciated. The practice in modern times has been, within the knowledge of all who practise in these courts, to allow a verdict F to stand which is given after the consideration of the jury in such a case as the present. It does not happen often, and no doubt for the reason which I have pointed out it is thought undesirable by the judges that it should happen; nevertheless it may happen, and when it does, unless there is something more in the case and in the circumstances of the finding of the verdict than the mere fact of the separation of the jury, the verdict will not G be invalidated."

WARRINGTON, L.J., said (*ibid.*, 549):

H "I am of the same opinion, and I only wish to add a very few words. The defendant contends that in a civil action the mere fact that the jury are allowed to separate avoids the verdict, that is, if they are allowed to separate after they have received the learned judge's charge and been asked to consider their verdict. Now I think the authorities which have been referred to as to the power of a jury to give a privy verdict are conclusive that that question must be answered against the contention of the defendant. Those authorities seem to me to establish this: first, that on giving such a verdict as that the jury in recent times have been allowed to separate; secondly, that such a verdict was not final, but that when the jurors give their formal verdict they may, at any rate where they have had a further consultation

since their separation, either alter or reverse the privy verdict. If that is so, I think it follows necessarily that they may give that which alone is their final verdict after they have separated. In my opinion, therefore, the bare question which is asked here, namely, whether in a civil action after the jury have been charged they can be allowed to separate without avoiding their verdict, must be answered in the affirmative."

The judgment of WARRINGTON, L.J., points strongly in favour of the plaintiff's contention in this case, but he was not considering the question before this court. Indeed, he referred to what was asked in that case as "the bare question which is asked here." SCRUTTON, J., who was sitting as an additional member of the court, said (*ibid.*):

"Secondly, I think that in civil actions the practice of juries separating should be resorted to as seldom as possible for the reason given by BLACKSTONE: 'It is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged.' I cannot help noting, speaking for myself, that in this case and in the last case before the court considerable difficulty, if not the whole difficulty, has arisen from the fact that the learned judge who tried the case has not stayed while the jury were deliberating, so that when they found themselves in difficulty they have not had the judge to advise them. I think myself it is the duty of the judge to stay to assist the jury so long as the jury are deliberating on their verdict, and the fact that in two cases here we have had appeals which I think would have been prevented if the judge had stayed supports my own personal feeling on the duty of the judge in these matters.

That shows that there had been two cases at that time, one following the other, in which a question as to the judge leaving before the jury returned their verdict had been called in question, and SCRUTTON, J., expressed his own personal feelings in the matter. In the same year *Banbury v. Bank of Montreal* (3) was before the Court of Appeal. There had been two hearings. On the first hearing before LORD READING, C.J., the jury had failed to reach agreement. On the second, before DARLING, J., the jury had answered questions, and they had added a rider to their answers to the questions, and the judge had later given judgment for the plaintiff. The appeal of the defendants was allowed on grounds which it is unnecessary to state, and judgment was entered for the defendants. SCRUTTON, L.J., said ([1917] 1 K.B. 442):

"The jury added a rider that the plaintiff should return all securities. The judge was not there when the verdict was given, a practice which is most unsatisfactory and has already once been commented on unfavourably in this court; and therefore no attempt was made to find out whether the jury meant that the securities were really valueless after the bank's claim was exhausted, or had not troubled to value them in view of their rider that the bank should have them. On this part of the case a new trial must have been ordered had not we ordered judgment to be entered for the defendants."

I should imagine that the hearing before DARLING, J., and a jury had taken place before the judgment of the Court of Appeal in *Fanshaw's* case (1). SCRUTTON, L.J., was sitting in the Court of Appeal in both cases, and if he had regarded the verdict of the jury in *Banbury v. Bank of Montreal* (3) as a nullity he would surely have said so. The judge was not there when the verdict was given, he said, and for the second time he condemned the practice as most unsatisfactory. The point which is now taken could have been raised as an additional ground of appeal by the bank. I am unable to say when the practice to which SCRUTTON, L.J., referred began, or how far it has extended, though I should not like to think it is a general practice in any sense. It may well be that it commenced through difficulties on circuit, when a judge had to move from one circuit town to another. He could not leave a jury in a criminal case, but,

perhaps, he could in a civil case, or he may have been content to rely on the agreement of counsel.

Two cases were cited to us, one in London and the other on circuit. I take the reports from which the point appears most clearly. In *Doe d. Lewis v. Baster* (4), tried before LORD DENMAN, C.J., in Michaelmas term, 1835, the report shows that (6 Nev. & M. K.B. 542):

A "The jury retired to deliberate and were absent for upwards of three hours, in the course of which time his Lordship and the counsel on both sides left the court, it having been previously agreed, that the associate should be left to receive the verdict. The jury, upon their return, handed in a written verdict, by which they found 'that the machinery was the same, but that the annoyance had been increased during the application of the horse power.' "

B In the following term counsel obtained a rule nisi to set aside the verdict and to have a new trial, and that was argued. I only cite the case for the purpose of showing what was done by the agreement of counsel. WILLIAMS, J., said (*ibid.*, 545):

C "It is quite clear, that by the mutual consent of the parties, the officer of the court was substituted for the judge, for the purpose of taking the verdict."

In *Bentley v. Fleming* (5), heard in 1845, before CRESSWELL, J., at Liverpool, the side-note reads (3 Dow. & L. 23):

D "Upon the trial of a cause, in which three issues were raised, each going to the whole cause of action, it was agreed on both sides that the verdict should be taken by the associate in the absence of the judge, who, before he retired from the court, directed the associate to take the verdict upon each of the issues separately. Upon the return of the jury, the associate asked them whether they found for the plaintiff or the defendant; and the foreman answered 'for the plaintiff.' The defendant's counsel requested the associate to put the questions left to the jury by the judge, to which the plaintiff's counsel objected; whereupon the associate refused to put the questions, and ultimately a general verdict was entered for the plaintiff. *Held*, that the neglect to take the verdict upon each of the issues, was a miscarriage on the part of the officer of the court in taking the verdict; and the court, therefore, made a rule absolute for a new trial, without costs on either side."

F It was not suggested in either of those cases that the verdict was a nullity. If it was by reason of its not being given in the presence of the judge, the court must have said so, for it would seem that agreement of counsel cannot turn a nullity into a reality. It might well lead to most unfortunate results for litigants and for jurors if a verdict returned in the absence of the judge must be held to be a nullity. Notwithstanding that which is said in COKE UPON LITTLETON and in BLACKSTONE'S COMMENTARIES, it seems that, for general convenience, there has existed for a long time a practice in which an officer of the court has taken the verdict of a jury in the absence of the judge. The proper practice is that stated in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 19, pp. 316, 317, paras. 658, 659:

H "658. The verdict of a jury of issue must be given in open court, in the presence of them all, and in cases of treason and felony in the presence of the defendant. It must be unanimous, except that in civil causes the verdict of a majority may be taken by consent. It is forthwith entered on the record by the officer of the court, and the sealing and signing required of juries of presentment are dispensed with. The jury are then discharged. 659. A jury once discharged after giving a verdict upon which judgment has been entered cannot be re-called to rectify the same, but there must be a new trial if the court considers that injustice has been done."

In *Ellis v. Deheer* (6) ATKIN, L.J., said ([1922] 2 K.B. 120):

"This was a trial by jury, and in order to determine the issues in the action it was necessary that there should be a unanimous verdict of all the twelve jurymen. In accordance with the ordinary practice the verdict is, or ought to be, delivered in open court by the foreman in the presence of the other jurymen, and if it is so delivered in their presence, and none of them protest, there is a *prima facie* presumption that they all assented to it."

"Open court" means when a judge is sitting. The ANNUAL PRACTICE, 1953, at p. 2002 under the note "The court or a judge" contains this passage:

"The words 'the court' mean the court sitting in banc—that is, a judge or judges in open court; they do not include a judge at chambers . . ."

We are, of course, dealing only with a verdict given in a civil cause, a suit between parties. SCRUTTON, L.J., years ago drew attention to the undesirability of departing from the regular practice. The mere fact that the parties have to come back on another occasion adds to the cost of litigation to some extent, and there are other considerations: (i) The jury might wish further guidance from the judge, or they might desire to be reminded of some part of the evidence. (ii) The question might arise as to how long they should be kept together in the hope of their arriving at an agreement, or as to the taking of a majority verdict. (iii) Answers given by a jury may give rise to a difficulty which cannot be cleared up if they have been discharged.

Counsel for the defendants, while accepting what SCRUTTON, L.J., said, added that, if a judge left before the jury returned a verdict, he did so at his risk. I feel that the risk is rather that of the parties. The parties, and the jury, are entitled to expect that the judge will remain if they have to do so—that is, in the absence of unforeseen circumstances. I am not prepared to hold that the mere fact that a verdict in a civil case is returned, or is taken, when the judge is not present renders it a nullity. There must have been a number of cases in which a verdict has of necessity been taken in those circumstances, and there is no decision of the courts which supports the plaintiff's contention. This court ought not to hold that the verdict is a nullity in the absence of any other ground. If we did so, it would add to the difficulties of both litigants and jurors. In my opinion, this point fails.

[HIS LORDSHIP held that the further grounds of appeal failed also and said that, in his opinion, the appeal must be dismissed.]

BIRKETT, L.J.: I am of the same opinion. The first point taken by the plaintiff is unusual in that, as I understand it, it has never been raised in a court before. That ground of appeal was stated in this way—that the learned judge was wrong in law in directing on Apr. 20, 1953, that judgment be entered for the defendants when no verdict of the jury had been taken by the learned judge from them prior to their discharge on Apr. 17, 1953. The facts are really not disputed, and, in my opinion, no injustice was done by the procedure followed. That, of course, does not end the matter, but it is an ingredient for consideration. Counsel for the plaintiff on the Monday morning made the suggestion to the learned judge that the jury might have changed their minds between the Friday night and the Monday morning after further consultation, and have returned a different verdict in court. I share the view of the judge that that was a little fanciful. Had there been any ground for suggesting that any injustice had been done here to the plaintiff, the whole case would, in my opinion, have quite a different complexion.

[HIS LORDSHIP stated the facts and continued:] The point presented by junior counsel to FINNEMORE, J., on the Monday was presented by senior counsel in this court—that the absence of the judge, when the jury returned their verdict and the associate received it, made the proceedings a nullity so far as the verdict was concerned. Counsel said there was no verdict in law at all, that this was a privy

verdict, and a privy verdict was a nullity unless it was turned into a public verdict, which could only be done by the jury publicly returning their verdict to the judge. To be a valid verdict, the verdict must be returned in open court, and unless the judge was present it was not an open court, and, indeed, in his submission, it was no court at all. To constitute a court in the true sense of the term the presence of the judge was essential, and the judge had no power to delegate his duties. Counsel made two quotations from BACON'S ABRIDGEMENT in support of that submission.

No authority was produced that was directly in point on the submission that, in the absence of the judge when it was given, the jury's verdict was null and void, and in all the learning in the many volumes of state trials where almost every conceivable point relating to juries has been determined and discussed, there is no mention of the point. *Fanshaw v. Knowles* (1) was cited in support of the submission, although it was recognised that the question there in issue was quite different from the issue in the present appeal. The learning which was cited in support of the submission in that case was relied on in so far as it applied to the point in this case, and the submission was that the verdict was a privy verdict, which there were no means of turning into a public verdict. I am of opinion that the term "privy verdict" cannot properly be applied to the verdict returned in the circumstances of this case. A privy verdict was a verdict given for the purpose of alleviating the hardship suffered by jurymen in olden days. In the office of the clerk of the peace of 1682, the words of the oath given to the party sworn to take charge of a jury on its retirement were:

"You shall well and truly keep every person sworn of this jury in some private and convenient room without light, drink, fire, candle or lodging";

MACAULAY, in most memorable language, has dealt with the situation as it existed at the famous trial of the seven bishops in 1688; and in 1854, when the Common Law Procedure Bill was being discussed in the House of Lords, LORD CAMPBELL, C.J., himself relates the attempts which he there made to overcome what he termed the barbarous custom of imprisoning and starving juries to compel unanimity. Indeed, as we know from the citations in this case, it was not until 1870 that the Act was passed which permitted a jury to have a fire. In olden days, when a jury had agreed on their verdict and had communicated it privately to the judge, those hardships could be alleviated, but that private verdict, delivered for the purpose of alleviating their hardship, was no verdict at all unless it was in some way turned into a public verdict, which, according to the learning recorded in *Fanshaw's* case (1), could only be done by the jury returning their verdict in open court before the judge.

I do not think that that learning and that decision have any bearing on the circumstances of this case. We are not told the circumstances in which FINNEMORE, J., left the court on the Friday, or the instructions or directions which he left to the officer of the court, the associate. From what FINNEMORE, J., said on the Monday morning, I think a fairly clear inference can be drawn, because when counsel was arguing before him the possibility of the jury changing their mind the judge said:

"Are you suggesting that, if the judge had been sitting in court, they would have returned a different verdict, or what? (Counsel:) There is always that possibility. (FINNEMORE, J.): There is not the least possibility of it that I can see. If the jury had come back and said: 'We do not understand something', or, 'We want guidance on something,' then, of course, they would have been asked to come back today and they would have been given the extra direction and they would have given their verdict. If they come back to court with a perfectly plain verdict, what is wrong with that?"

It looks as though the instruction of the judge to the associate was to receive the verdict if it was a plain verdict, but if any complication of any kind arose, then the jury were to be asked to return. The shorthand note shows exactly what happened. The jury returned into court, and the associate said:

"Members of the jury, are you agreed upon your verdict? (The foreman of the jury): Yes, we are. (The associate): Do you find for the plaintiff or defendants? (The foreman of the jury): We find for the defendants. (The associate): That is the verdict of you all? (The foreman of the jury): Yes. (The associate): Thank you. You are discharged from further service."

When the jury returned into court, the associate received that verdict and recorded it for the learned judge to see on the Monday morning, and certainly it could not be said that there was anything private or privy except in a highly technical sense. It was a thing publicly done and publicly recorded in the presence of all the jurymen, no doubt of counsel, and no doubt of such members of the public as had remained in court interested in the result. There was no secrecy, or anything of that kind, which the administration of justice has always been strong to avoid, and, in my view, this could not properly, in the circumstances of the case, be termed a privy verdict.

The question would, therefore, seem to be this. Is it essential to the validity of the verdict of a jury in a civil case that the judge himself shall be in court to receive it at the time the jury returns, and the associate, as the officer of the court, receives the verdict? I agree very fully with what SCRUTTON, J., said in 1916 in *Fanshaw v. Knowles* (1), and what, as a lord justice, he affirmed in 1917 in *Banbury v. Bank of Montreal* (3). In *Fanshaw v. Knowles* (1) he said ([1916] 2 K.B. 549):

"I think myself it is the duty of the judge to stay to assist the jury so long as the jury are deliberating on their verdict, and the fact that in two cases here we have had appeals which I think would have been prevented if the judge had stayed supports my own personal feeling on the duty of the judge in these matters."

In *Banbury v. Bank of Montreal* (3) he said ([1917] 1 K.B. 442):

"The judge was not there when the verdict was given, a practice which is most unsatisfactory and has already once been commented on unfavourably in this court . . ."

I want strongly to indorse what was said in 1916 and 1917 about the desirability of the judge being present in court while the jury are deliberating. A jury may want further assistance during their deliberations. Their verdict, when delivered, may be ambiguous and require explanation. It may be a verdict that the judge cannot accept. The jury may agree on some questions and disagree on others. The parties may be asked to consider whether they will take a majority verdict. It is plain that in circumstances such as these nothing can be done until the judge is present, and it is, therefore, in my view, most desirable that he should be present while the jury are deliberating.

But the question really for this court is this. Is it essential when none of the things which I have enumerated occurred? FINNEMORE, J., on the Monday morning said, in the passage which I have quoted, that, if there had been any trouble of that kind, the jury would have had to come back, and he also said on the same day:

" . . . that, if they have given a proper, plain, straightforward verdict, as in this case, with no qualifications and no point calling for legal argument, or anything of that kind, the verdict has been accepted as the verdict of the jury, and in due course, normally the next day, formal judgment has been asked for and has been entered "

A The learned judge was stating from his experience that this situation was not unknown and not uncommon. In many cases, no doubt, where this procedure has been followed no question at all has been raised, since it is only where trouble has occurred about the verdict that ordinarily those matters come into court. But the submission was made that the verdict must be returned in open court, and that, in the absence of the judge, there was not merely no open court, but there was in truth no court at all. The passage was read from the ANNUAL PRACTICE to which my Lord has referred, with the authorities there cited in support of the view that a court means the judge sitting in open court. The use of the term "open court" is customarily designed to emphasise the publicity of English judicial proceedings. These things must be done in open court, they must be done publicly and they must be done for all men to see. That, I think, is the usual use of the words "open court". The passage which has been cited, and the authorities which support it, seem to show that "open court" means the court where the judge is sitting.

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E In the present case it is clear that the judge had instructed the associate to receive the verdict in his absence in the court-room in the presence of the jury, and everything in fact happened on the Friday afternoon exactly as it would have happened if the judge had been seated in his chair. The associate would have asked those questions, would have received those answers, and in obedience to the direction of the judge would have discharged the jury, and, presumably, he received the verdict and discharged the jury under the judge's direction just as though the judge had actually been sitting there giving the instructions at that moment. I do not think there was here any delegation of the judge's duty in the sense in which counsel for the plaintiff submitted there had been delegation, because the act which the associate did under the direction of the judge was the act which he would have done had the judge in fact been present in person. I still think it is a difficult point, but I would decide it in this way. It is quite plain that the practice which was followed that afternoon was not unknown. SCRUTTON, J., referred to two cases in 1916, and in 1917 to a further case, and he never said: "All this renders it a nullity." He said: "I express my personal view that for the judge to be absent is unsatisfactory"—not that there was no court. Not that everything which was done was of no validity. He confined this statement to his personal view.

F
G In *Bentley v. Fleming* (5) before CRESSWELL, J., it was agreed between counsel on both sides that the associate should take the verdict. The learned judge left the court, having previously handed certain questions to the associate. On the argument which took place on that verdict no one ever suggested that the whole proceedings were a nullity because the judge was not present. TINDAL, C.J., who delivered the judgment of the court, said (3 Dow. & L. 25) that if the associate had followed the direction which he had received from the judge, all would have been well, and it is very difficult to imagine that he had in mind that if the judge was not there the whole thing was a nullity.

H In 1836, in *Doe d. Lewis v. Baster* (4), the same point was raised. The jury retired to deliberate and were absent for upwards of three hours. Counsel and the judge left the court, LORD DENMAN, C.J., the judge, with the agreement of counsel permitting the verdict to be returned in his absence. When the matter came up for argument, LORD DENMAN, C.J., LITLEDALE, J., PATTESON, J., and WILLIAMS, J., all delivering judgments, never said one word to the effect that the proceedings were a nullity because the judge was not present in court. For more than a hundred years, therefore, there have been occasions when the procedure followed by FINNEMORE, J., on this Friday afternoon have been followed in courts. I agree with my Lord that it is impossible to believe that the parties can by agreement add validity to that which is in its very nature invalid, and if a judge is compelled to leave the court when the jury is deliberating, as he may well be for reasons which can easily be

formulated, and in his absence the jury returns with a single verdict which the associate has been instructed to receive, and if in the event of complications arising the jury are to be asked to return, I cannot think that, in the light of past experience and of what would appear to have been the practice to be followed in cases of emergency, the absence of the judge makes the verdict of the jury invalid. I am, therefore, of opinion that the first, really important, point in this case fails.

[HIS LORDSHIP held that the other grounds of appeal failed and said that he agreed that the appeal should be dismissed].

HODSON, L.J.: The main question in this appeal is this. The plaintiff contends that the judge was wrong in entering judgment for the defendants, because the verdict was given by the jury to the associate in the absence of the judge. In making that submission the plaintiff relies, in the first place, on the passages in COKE UPON LITTLETON and in BLACKSTONE'S COMMENTARIES which have already been read from the judgment of the lord chief justice in *Fanshaw v. Knowles* (1). Those passages had to do with the difference between a privy verdict and a public verdict, a public verdict being one which must be given in open court, whereas a privy verdict could previously be given to any of the judges available in order to release the jury from their confinement in civil cases.

At the conclusion of his argument, counsel for the plaintiff, I think, recognised that he could not fairly compare the verdict given (as in this case) to the associate with a privy verdict which has long since ceased to be a matter of practical importance. But he did rely, and, indeed, was entitled to do so, on the language of COKE and BLACKSTONE where emphasis was laid on the words "in open court". He said that "open court" necessarily involved the presence of the judge, that one could not conceive those words being used of a court-room in which, indeed, the officer of the court was sitting, but there was no judge, and that it would follow from that that any verdict so given must be a nullity.

I agree that that argument is a formidable one. If one takes the words "in open court" at their accepted value, the verdict in this case was not given in open court, but the matter does not rest there. One has to remember that these things develop on historical lines, as, indeed, the relief of juries developed on historical lines, and since the eighteenth century the practice of the courts, as the authorities show, has been to regard the giving of the verdict to the associate in the absence of the judge as a recognisable practice.

I agree wholeheartedly with what has fallen from my Lords with regard to the undesirability of the practice of allowing the verdict to be taken in the absence of the judge, a practice which was, although disapproved of by SCRUTTON, J., later SCRUTTON, L.J., in *Fanshaw v. Knowles* (1) and *Banbury v. Bank of Montreal* (3), recognised by him, I think, as an existing practice. The two cases in the last century which have been referred to, in which by consent the verdict of a jury was taken by an officer of the court in the absence of the judge, show that in the eyes of the court those verdicts could not be regarded as mere nullities, because, if they were nullities, consent could not cure their invalidity.

The researches of counsel drew our attention to another case, *Baker v. Oakes* (7). That case was heard in the Court of Appeal, and the subject-matter of the appeal was a question of costs which has no relevance, but the judge of appeal, SIR RICHARD AMPHLETT, did recognise the existence of this practice in supposing a case in which a judge had left the court, or, perhaps, the circuit town, before a verdict was returned, and he supposed also that an officer had been delegated by the judge to take the verdict. That was in 1877. Passing by the two cases in the Court of Appeal to which I have already referred, I come to *Ellis v.*

Deheer (6), in which ATKIN, L.J., referring to this matter said ([1922] 2 K.B. 120):

“In accordance with the ordinary practice the verdict is, or ought to be, delivered in open court . . .”

That, again, I think, was the language of a learned lord justice who recognised that there had been cases where, in the strict sense of the word, the verdict had not been delivered in open court, and I think the development of the law, as shown by the decided cases, compels this court to say that the rigidity of the rule has been relaxed to this extent—namely, that the associate may, if the circumstances warrant it, receive the verdict of the jury in the absence of the judge, although, of course, no judicial act can be taken on that verdict.

I agree, therefore, that the appeal fails on this ground, and also on the separate ground of misdirection. On that matter I have nothing to add.

Appeal dismissed.

Solicitors: *T. D. Jones & Co.* (for the plaintiff); *T. MacDonald Baker*, Solicitor, *Metropolitan Police* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

R. v. WINES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Parker, JJ.), March 31, 1953.]

Criminal Law—Falsification of accounts—Intent to defraud—Accounts falsified with intent only to avoid dismissal—Falsification of Accounts Act, 1875 (c. 24), s. 1.

The appellant was convicted of larceny of wireless sets and falsifying accounts. He admitted making false entries with regard to the wireless sets in the accounts of the co-operative society for which he worked, but contended that he had done this, not to conceal the theft of the wireless sets as contended by the prosecution, but to make the gross profit of his department appear higher than it was so that he would not lose his employment. The recorder directed the jury that, whichever of these versions was true, it amounted to an intent to defraud.

HELD: since the appellant intended by the falsification to induce his employers to keep him in their employment and to pay him wages, he was inducing a course of action by his deceit, and intending to defraud his employers, and, therefore, the recorder's direction to the jury was correct.

Dicta of BUCKLEY, J., in *Re London & Globe Finance Corp., Ltd.* ([1903] 1 Ch. 732), applied.

Case referred to:

(1) *Re London & Globe Finance Corp., Ltd.*, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 15 Digest 940, 10,354.

APPEAL against conviction.

The appellant, Henry Leonard Asquith Wines, a manager of the radio department of a co-operative society, was convicted on Jan. 6, 1953, at Oxford City Sessions of larceny of wireless sets and other goods, conspiracy to steal, and falsification of accounts, and was sentenced to four years' imprisonment on each count, to run concurrently.

F. L. Clark for the appellant.

Micklethwait for the Crown.

LORD GODDARD, C.J., stated the facts and continued: The only difficulty that has arisen is this. The appellant was convicted on certain counts of falsifying accounts. The suggestion for the prosecution, and by far the

most probable reason, was that he falsified the accounts to cover up the thefts, but he went into the witness box and swore that the reason why he falsified the accounts was to make it appear that the gross profit of his department was higher than it was—to make it appear that the gross profit of his department was twenty-four per cent. and not merely sixteen per cent. The reason why he did it, he said, was because he feared that if he only showed sixteen per cent. he would be dismissed and lose his employment and, therefore, lose his wages. A

The only point that we are concerned with is whether the direction which the learned recorder gave to the jury was right. The jury did not say which version they accepted, whether the version of the prosecution or the version of the defence, and the learned recorder, in effect, directed the jury that it did not matter which version was true, as whichever version was accepted, there was evidence of an intent to defraud. He said this: B

“If, therefore, you are satisfied, as Wines himself admitted, first, that he is a servant, which has been proved, secondly, that he made a false entry in the document, which is admitted, and, thirdly, that the object of it was either, as the prosecution ask you to infer, to conceal the depredations which had been made in the stock, or, as Wines himself says, in order to keep a job which he would have lost if he had not made these false entries, if that was the intention, then that is an intent to defraud and the charge is made out.” C

So the learned recorder tells the jury: “Whichever version you take, that amounts to an intent to defraud”, and counsel for the appellant has put to us in a very clear argument that that was a misdirection. If it was a misdirection, we should have to quash the convictions on the counts for falsification, although I say at once that that would not make any difference to the sentence, because the learned recorder passed a sentence on each count to run concurrently. So it is an academic point, but one of some importance, whether this was a correct direction on a point of law. D

Having had the advantage of a full argument, the court has come to the conclusion that the recorder's direction in these circumstances can be upheld and is correct. The definition which has been so often given as the difference between an intent to deceive and an intent to defraud is to be found in BUCKLEY, J.'s judgment in *Re London & Globe Finance Corp'n., Ltd.* (1), where he said this ([1903] 1 Ch. 732): E

“In both ss. 83 and 84 of the Larceny Act of 1861, and s. 166 of the Companies Act, 1862, the offence is that of making or publishing a false statement or account, or a false or fraudulent entry with intent to deceive or defraud.” F

In the Companies Act it does not matter whether it is to deceive or defraud, but in dealing with accounts it does matter because it is not criminal if the intent is merely to deceive; it must be an intent to defraud. The learned judge went on: G

“To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.” H

That is the locus classicus on the subject. It has been cited with approval over and over again, and, therefore, one has to consider in all these cases whether the deceit which has been practised has merely induced, or was intended merely to induce, a state of mind, or has induced a course of action.

One thing that is clear here is that the appellant has himself said what he intended to achieve by this falsification, which was to remain in the service of the society; in other words, to avoid being dismissed by them, as he feared they would dismiss him if he showed a proper return. If he had been dismissed because he did not show a satisfactory return, he would have lost his wages, and, therefore, the society, by his falsification, assuming that his object to be what he said it was, would be induced to retain him in their service and to pay him his wages, and he was thereby getting wages from the society by means of falsifying these accounts.

For these reasons we think that the learned recorder was justified, in view of what the appellant himself said, in directing the jury that, whether they thought the object of the falsification was to conceal the thefts—and I should think there was very little doubt that really that was what was in his mind—or whether they thought it was merely to induce the society to keep him in their employ and pay him his wages, that, in these circumstances, did amount to an intent to defraud, and, therefore, the direction was right. For these reasons, the appeal is dismissed. With regard to sentence, we cannot possibly alter it.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *H. J. A. Astley, Oxford* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

HOLT AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), October 20, 21, 22, 23, November 3, 4, 5, 6, 10, 11, 25, 1953.]

Estate Duty—Company—Shares—Valuation—Restriction on alienation—Basis of valuation for estate duty purposes—Finance Act, 1894 (c. 30), s. 7 (5).

The principal value for estate duty purposes of 43,698 ordinary shares of £1 each (out of a total issued of 697,680) in a private limited company fell to be ascertained at Mar. 11, 1948. All the shares of the company were owned by members of a family or family trusts and there was a strong desire to retain control in the family. By the articles of association the unfettered transfer of shares to non-members was prohibited so long as a member or person approved by the directors was willing to purchase them at a fair value (to be certified by the company's auditor in case of difference) and the directors could refuse to register a transfer. The company carried on trade with West Africa, where trade was hazardous owing to variations in prices, and had been affected by riots and a boycott of European traders just before the relevant date. In the 1914-18 war the company made large profits and out of the accumulated reserves tided over the heavy losses in the immediately following years and thereafter made modest profits until 1937. In 1937 and 1938, during the ensuing war, and in 1946 and 1947 it made large profits, but had small sums available for reserves or dividends owing to heavy taxation of excess profits (relieved somewhat in 1946). Though earnings immediately before 1948 were sufficient for much larger distributions, it followed its practice of limiting dividend to five per cent. It was conceded that the large profits of 1946 and 1947 reflected the contemporary inflation. The company was over-trading and had a large bank overdraft. Two of its five ships required replacement. In a valuation on "open market value" under the Finance Act, 1894, s. 7 (5),

HELD: (i) since the hypothetical purchaser with a minority holding would have little opportunity to influence the policy of the directors so

long as they retained the support of the general body of shareholders, and would be affected by the articles restricting transfer of the shares and by the absence of a Stock Exchange quotation, he must be conceived as an exceptional kind of investor who would not enter into the transaction hurriedly, but would carefully consider the prudence of the course and would seek the fullest information as to the company's past history and prospects and its trade;

(ii) such a purchaser would consider the inter-war results of the company, the effect of the 1914-18 war on its trade, the heavy losses sustained thereafter, the effects of current inflation on the value of money as affecting the company's financial position, the handicap of taxation on the building up of reserves, and the difficulties imposed on the replacement of assets such as ships by taxation allowances for depreciation based on original cost and not replacement cost;

(iii) the purchaser would also have regard to the possibility of an increase of dividend likely to result from pressure of the family as a result of the fall in value of money, and of an issue of ordinary shares to the public.

AS TO THE VALUATION OF SHARES OF A PRIVATE LIMITED COMPANY WITH A RESTRICTION ON ALIENATION, see HALSBURY, Hailsham Edn., Vol. 13, p. 271, para. 275; and FOR CASES, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.

FOR THE FINANCE ACT, 1894, s. 7 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 362.

Cases referred to:

- (1) *Inland Revenue Comrs. v. Crossman*, *Inland Revenue Comrs. v. Mann*, [1936] 1 All E.R. 762; [1937] A.C. 26; *sub nom. Re Crossman, Re Paulin*, 105 L.J.K.B. 450; 154 L.T. 570; Digest Supp.
- (2) *Inland Revenue Comrs. v. Clay*, *Inland Revenue Comrs. v. Buchanan*, [1914] 3 K.B. 466; 83 L.J.K.B. 1425; 111 L.T. 484; 39 Digest 226, 63.
- (3) *Findlay's Trustees v. Inland Revenue*, (1938), 22 A.T.C. 437;

PETITION by way of appeal against a decision of the Inland Revenue Commissioners as to the value for the purposes of estate duty of ordinary shares in the capital of John Holt & Co. (Liverpool), Ltd., a private company. The Crown had claimed a value of £3 per £1 share, had subsequently determined the value at 34s. per share, and now contended that it should be 25s. per share. The petitioners contended that it should be, at first 11s. 3d. per share and finally 17s. 2d. per share.

MacKenna, Q.C., Graham-Dixon, Q.C., and Rink for the petitioners.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), Cross, Q.C., and J. H. Stamp for the Crown.

Cur. adv. vult.

Nov. 25. **DANCKWERTS, J.**, read the following judgment. This is an appeal under s. 10 (1) of the Finance Act, 1894, against the decision of the Inland Revenue Commissioners as to the value for the purposes of estate duty of ordinary shares in the capital of a private company known as John Holt & Co. (Liverpool), Ltd. The shares had been settled by a voluntary settlement dated Jan. 7, 1947, made by Mr. Robert Longstaff Holt, who died on Mar. 11, 1948, with the result that estate duty became payable under s. 2 (1) (c) of the Finance Act, 1894, on his death on the principal value of the shares, and the petitioners are the trustees of the settlement. The shares were 43,698 ordinary shares of £1 each. The settlement also included 11,643 6½ per cent. preference shares of £1 each, but the value of these for the purposes of estate duty has been agreed at 21s. per share. At the date of the settlement and the date of the death of Mr. Robert Longstaff Holt, the capital of the company was £1,150,000, divided into 150,000 preference shares and one million ordinary shares of £1 each, of which 139,140 preference shares and 697,680 ordinary

shares had been issued, so that the 43,698 ordinary shares included in the settlement formed a minority holding.

The articles of the company contain restrictions on the transfer of shares on more or less familiar lines, the essential features being that unfettered transfer to non-members is prohibited as long as a member or person approved by the directors is willing to purchase the shares at the fair value to be certified (in the case of difference) by the company's auditor in accordance with art. 26 of the company's articles of association. By art. 31 the directors are given a general power to refuse to register a transfer.

Under s. 7 (5) of the Finance Act, 1894, the principal value of any property is to be estimated for the purposes of duty

“ to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.”

But in this case the decision of the commissioners is not final and conclusive on the question, as by s. 10 (1) a right of appeal is given to any person who is aggrieved by the amount of any duty claimed by the commissioners, whether on the ground of the value of any property or otherwise. There was no quotation for any of the company's shares on the Stock Exchange, and they were all held by the Holt family or family trusts.

The principles on which shares in a private company are to be valued for the purpose of estate duty have been settled by the House of Lords in *Inland Revenue Comrs. v. Crossman*, *Inland Revenue Comrs. v. Mann* (1). The House of Lords decided in that case (by a majority of three to two) that the facts that a shareholder by the articles of a company may be compelled to sell his shares at the “ fair value ” ascertained in accordance with the articles, and that by the articles the directors may have power to refuse to register a transfer, must be ignored, but none the less it must be assumed that a purchaser will be bound by the company's articles once he is on the register of members. The result is that I must enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales. It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events. In my task I have had the assistance of a number of experts on each side who differ in their opinions in the manner in which experts normally do, and the frankest of them admitted that certain of his calculations were simply guesswork. It seems to me that their opinions are, indeed, properly described as guesswork, though, of course, it is intelligent guesswork, aided by the experience which they have gained by their work as stockbrokers or accountants. No possible suggestion can be made against the honesty of these witnesses, but their methods of calculation appear to me to be inevitably uncertain and controversial, and, in my view, statements by several of them, that they would be ready to buy the shares at the price reached by them, if they had had the opportunity some five years ago, must be discounted accordingly. None the less I could not have approached my task without their valuable assistance, and my remarks must not be taken to belittle the efforts which have been made by them to provide an answer to a question to which no certain answer is possible.

By the terms of the section I have to imagine the price which the property would fetch if sold in the open market. This does not mean that a sale by auction (which would be improbable in the case of shares in a company) is to be assumed, but simply that a market is to be assumed from which no buyer is excluded: see *Inland Revenue Comrs. v. Clay*, *Inland Revenue Comrs. v. Buchanan* (2), per SWINFEN EADY, L.J. ([1914] 3 K.B. 475). At the same time, the court must assume a prudent buyer who would make full inquiries and have access to accounts and other information which would be likely to be available to him: see *Findlay's Trustees v. Inland Revenue* (3).

With those principles in mind I approach the history of the company and the evidence of the witnesses in this case. The company was incorporated on Mar. 25, 1897, to take over the business of trading in West Africa started in 1867 by John Holt with the assistance of two younger brothers. The company also owned ships, this side of the business having been started in 1869 with a sixty-five ton schooner, and in the period with which I am concerned the company owned five cargo ships which also had accommodation for some passengers. The company was during the material period a private company, and all the shares were held by members of the Holt family or vested in Holt family trusts, and there was a strong desire in the family to retain control of the company and the ordinary shares. The company, however, did become a public company on Sept. 15, 1950 (which, of course, is two and a half years after the death of the deceased), in connection with an issue to the public of 650,000 five per cent. first cumulative redeemable preference shares of £1 each.

The company owned a number of trading stores in West Africa and the business consisted of purchasing and carrying to West Africa of goods for sale there, and purchasing and re-selling the products of West Africa, the goods being carried in both directions in the ships owned by the company. The company's results have fluctuated considerably, apparently because of the variations in price of the commodities in which the company dealt, and the West African trade has been described as a particularly hazardous trade. The company has maintained a settled policy of

"making provision in the good years for the bad ones which must inevitably follow sooner or later."

Since 1921 the practice of the company has been to limit distributions on the ordinary shares to five per cent. less tax, and to build up its reserves by accumulating surplus profits in good years. An exceptional cash capital bonus of one and a quarter per cent. was, however, paid in February, 1948, out of the realisation of an investment. Figures which are available for the thirty-six years from 1912 to the year ending on Sept. 30, 1947, enable the fluctuations in the company's profits to be appreciated. In 1914 there was a loss of £132,993, but in the war years 1915 to 1919 (inclusive) very large profits, rising in 1919 as high as £797,437, were made. In the years 1920 to 1923, however, when the post-war slump occurred, very severe losses were incurred, e.g., £597,768 in 1921. It appears that the company was able to tide over this difficult period by means of the reserves accumulated during the profitable war years, when there was not the same confiscatory taxation that was adopted during the second world war. In the subsequent years between the wars, except for a loss of £134,593 in the unfortunate year 1931, a modest profit, averaging not more than £45,000 a year, was made until 1937 and 1938, which were very successful years, including in one year a profit of £211,000. The war years again brought very large profits, but the policy of making provision by means of reserves for a post-war slump was severely handicapped by the heavy taxation of "excess profits", so that, though the profits reached the high figure of £762,285 in 1943, and the other years were little short of this, comparatively small sums were available for dividends and reserves after provision for such taxation. Some relief from taxation came in 1946 when the profit was £681,745, and in the year ending Sept. 30, 1947, the profits reached the very high figure of £1,011,928. When the deceased died on Mar. 11, 1948, the accounts for this last year were not finally completed, but it is fair to assume that information as to the approximate results of the year's trading would have been ascertained by a prospective purchaser. The figures to which I have referred are partly taken from the table prepared by Mr. H. A. Benson (one of the witnesses for the petitioners) from the company's profit and loss accounts, and partly from the figures given in the 1950 share issue prospectus (on which the witnesses for the Crown based their calculations). There are certain variations in these figures, but these are not large enough to affect the

general picture which I have stated. A dividend of five per cent. on the ordinary shares (which had not been exceeded in the years in question) required only some £22,000, and so the company's earnings during the years immediately prior to 1948 were amply sufficient to allow a much larger distribution to the shareholders, if large sums were not set aside for other purposes, such as reserves, including the cost of new ships. At this date two of the five ships owned by the company were of an age which demanded their replacement. The company had a large overdraft at its bankers, which approached one million pounds in 1947. It was really common ground that the company was over-trading, and that the large figures for profits in the years 1946 and 1947 reflected the contemporary inflation.

After beginning at as high a figure as £3 a share, the value claimed by the Crown is now 25s. per share, though the value formally determined by them was not that figure but 34s. per share. The figures given on behalf of the petitioners started at 11s. 3d. as the fair value stated by the company, and rose to a value of 17s. 2d. per share put forward in the petition and at the hearing. I am entitled, therefore, to assume that the principal value of the shares is one or other of these figures of 25s. and 17s. 2d., or some other value somewhere in between. It appears that a value of 17s. 6d. per share was agreed on the occasion of a death on Apr. 5, 1943, and a value of 20s. per share was agreed on the occasion of other deaths which occurred on Nov. 15, 1945, and June 3, 1946, but a period of one and three-quarter years had elapsed since the later of those dates when Mr. Robert Longstaff Holt died on Mar. 11, 1948.

I now turn to the evidence of the witnesses. The first witness on behalf of the petitioners was Mr. Henry Alexander Benson of the firm of Messrs. Cooper Bros. & Co., a chartered accountant with a knowledge of conditions in Africa as well as experience in this country. He said that the West African trade had had a very bad reputation in the last thirty or forty years, and referred to the riots following a boycott of European traders which occurred in February, 1948, shortly before the death of the deceased. He also referred to the devaluation of the French colonial franc, which occurred in January, 1948, as another depressing factor. He considered that a purchaser of the company's shares would be interested primarily in the profits made by the company and the dividends likely to be paid in the future. In his view the war-time and post-war profits represented an artificial prosperity which in no circumstances would continue indefinitely, and he thought that a purchaser would observe the heavy losses suffered by the company after the first world war and would be apprehensive that such a phase might be repeated. Mr. Benson thought that the position in regard to the assets and liabilities of the company in 1946 and 1947 was very vulnerable, having regard to the large amount of the company's assets represented by stocks and the size of the company's overdraft. He said that a ratio of assets to liabilities of two to one was too low for a company of this character. The company's accounts showed the ratio to be 1.73 to 1 in 1946 and 1.55 to 1 in 1947.

Mr. Benson thought that, having regard to the steady dividend policy of the company, a purchaser would count on a dividend at the rate of five per cent. not being reduced, but on the other hand he would not expect it to be increased. Mr. Benson thought that the absence of any quotation of the shares on the Stock Exchange, and the restrictions on transfer to which the purchaser would be subject when he got on the register, were factors which would make a purchaser require a further one-and-a-half per cent. of income yield in reaching the appropriate price for the shares. Mr. Benson supported his evidence with various tables, containing the figures relating to various companies whose shares had a quotation on the Stock Exchange, and other figures obtained from the Actuaries' Investment Index. Such tables are not without a value as they provide some possible basis of comparison for the purpose of checking the calculations of a witness, but it is easy to attack them on the ground that the varying circumstances of the companies and the difficulty of applying the prices of quoted

shares to the shares of a private company not quoted on the Stock Exchange may render the comparison of little value. On this basis Mr. Benson reached a figure of 15s. 2d. per share, and to this he added the sum of 1s. 6d., making a figure of 16s. 8d. The addition of 1s. 6d. represented Mr. Benson's estimate of the allowance which a purchaser might make in his offer for the possibility sooner or later of the company's shares being offered to the public, with a resulting capital accretion in some way to the shares held by a previous purchaser. Mr. Benson considered that the time for this event would be later rather than sooner, and this was one of the points on which his evidence differed considerably from that of the witnesses for the Crown, who considered that the issue of shares to the public would be sooner rather than later, and attributed a much greater value to this factor. Finally, Mr. Benson added a further 6d. to his estimated price as representing the amount of the net dividend likely to be declared in respect of the year 1947. Thus, the value which he placed on the shares was 17s. 2d. a share.

Mr. Benson expressed the view that the prices of ordinary shares tended to follow the price of Consols, and produced a graph which recorded the rise of Consols to a peak in 1946 (when ordinary shares in the company were valued for estate duty at 20s. a share) and a subsequent fall in the price of Consols which, if followed by the company's shares, would bring the price of these to less than 16s. 8d. by March, 1948. Mr. Benson's view was not accepted by the witnesses for the Crown in this respect.

Mr. John Alphonse Holt is one of the petitioners, and he is a director and, at the present time, the chairman of the company. He had, of course, a complete knowledge of the affairs of the company, and he had lived in West Africa. His description of the company's business was that the company exported from West Africa all the products which West Africa produces so far as possible, and imported into West Africa most of the merchandise which was required by the inhabitants of West Africa. Mr. Holt made it plain that no increase on the dividend of five per cent. on the ordinary shares of the company was contemplated by the board of directors in March, 1948. He regarded the financial position of the company at that time as "very unsafe". The liquid condition of the company's assets had not improved since the accounts for 1946 had been published, and the company's overdraft had substantially increased. The stocks carried by the company had increased by fifty per cent. The company was in the position of having to restore practically the whole of its buildings in West Africa, and to replace before long the two of its five ships which had been built in 1929. But the company had no plans for putting the company's ordinary shares on the market in the foreseeable future.

One question of some importance dealt with by Mr. Holt was how far a prospective purchaser would have been able to obtain information as to the company's position and prospects by inquiry from the directors. Mr. Holt said that all the information which he had given in evidence would not have been given directly to a buyer of a small quantity of shares, but it would have been made available, in confidence, to a reputable firm of accountants, acting on behalf of a buyer and approved by the board of directors, with the result, as I understood the position, that the information so revealed would not be passed on to the buyer but his accountant would be in a position to advise him as to the prudence of the purchase and the price which could reasonably be offered for the shares. Mr. John Holt said that the large profits which the company had been making were frightening because they represented the effect of inflation, and in March, 1948, he thought the sellers' market was virtually disappearing and a recession in trade was expected at any moment. In his view, as the company's reserves were in the form of the company's current trading assets, the company was extremely vulnerable.

I take the evidence of Mr. Frank Samuel next, because his evidence had some features in common with that of Mr. Holt. Mr. Samuel is chairman of the United Africa Co., a very much larger company than John Holt & Co., carrying on trade

A in West Africa, and a subsidiary of Unilever, Ltd. Mr. Samuel has had long experience of West African trading, and this led him to describe the trading risks in West Africa as immensely greater than in any other part of the world. These risks, he explained, were due to the prosperity of these territories being based on agriculture, and in some cases on some particular kind only, such as the culture of cocoa or groundnuts, so that they were affected by the wide fluctuations in the prices of the products and by growing conditions. In his view the necessity of traders in West Africa carrying heavy stocks at times of high prices represented a tremendous danger because it was only a question of time when a break in prices would come. In 1946, 1947 and 1948, Mr. Samuel expected that a break in prices was imminent, and his opinion was generally shared in the West African trade. Another adverse factor in his view was the growing tendency in West B African countries to try to get trade away from European firms. Mr. Samuel thought that the company might appear to be earning more money while in fact having "a much worse time", because of the cost of replacing the company's assets and the level of taxation. He was of opinion that a buyer would not expect increased dividends to be paid by the company because of the company's earnings in 1946 and 1947, if he knew anything about West African trade. He could not see how the company's shares could be attractive to a surtax payer or other C purchaser looking forward to capital accretion.

By comparison with the quoted prices of shares in other companies Mr. Samuel reached a percentage yield of 4.89, to which he added $1\frac{1}{4}$ per cent. for weaknesses in the company's position compared with those companies, making a total required yield of 6.14 per cent. To this he thought it was necessary to add a D further 2.05 per cent. to compensate for the lack of a quotation and difficulties of transfer, thus producing a yield figure of 8.19 per cent. This was equal to a value of 12s. 2d. ex dividend. Mr. Samuel could not see any real possibility of capital appreciation sufficient to bring into account, and added nothing for this factor. It was suggested in cross-examination to Mr. Samuel, and I think it is a fair point, that an ordinary buyer would not have all the information on West E African conditions which led him to take such a depressing view. Consequently, in my view, Mr. Samuel's estimate of the value of the shares, so far as based on the unattractiveness of the company's ordinary shares to him, must be discounted by this consideration.

F Mr. Mark Richard Norman is a partner in Messrs. Edward Stein & Co., merchant bankers, who are also managers of and advisers to investment trusts. He was provided with copies of the company's balance sheets and accounts, and extracts from the chairman's speeches and from the company's articles. He made inquiries from Mr. Benson (who asked him to make a valuation) and also outside enquiries, but he said that if he had really been faced with the problem of buying these shares he would have made longer inquiries. He was asked at what price he would have been willing to purchase 43,698 ordinary shares of the company on Mar. 11, 1948, and his answer was that the highest price G he would have paid was 15s. per share ex dividend. His view was confirmed by all he had heard since March, 1952, when he was asked to make his valuation. Mr. Norman thought that, in March, 1948, it was generally expected that a fall in prices was going to follow the post-war boom, and the reason it did not occur was the outbreak of the Korean war in 1950. In 1948 he would not have expected the dividend to be increased, because he did not think that the profits retained H by the company after taxation were adequate—by a long way. After looking at the yield of other companies and the Actuaries' Investment Index, Mr. Norman thought that on an expected dividend of five per cent. a yield of half as much again— $2\frac{1}{2}$ per cent.—would be looked for. This produced a required yield of $7\frac{1}{2}$ per cent. and a price of 13s. $4\frac{1}{2}$ d. per share. As this was an awkward figure and he would have been anxious to help if the company had come to his firm in 1948 for help, he increased the price to 15s., which is equivalent to $6\frac{3}{4}$ per cent. yield on a five per cent. dividend, and, therefore, he considered 15s. p

share a favourable price. He thought 25s. an absurd price, and would not have paid anything like it.

Mr. Roger Anthony Hornby is a director of Messrs. Cazenove, Akroyds & Greenwood, an unlimited company carrying on business as stockbrokers, which specialises in the underwriting of new issues of capital, and in fact acted as London brokers to the issuing house of Baring Bros. when the issue of preference shares to the public was made by John Holt & Co. in September, 1950. Anticipating that a five per cent. dividend was likely to be paid by the company, Mr. Hornby deducted from a price of 20s., according to the practice of his firm when making valuations, twenty per cent. for the absence of quotation on the Stock Exchange and marketability and for the restrictions on transfer, thus reducing the price to 16s. cum dividend. Mr. Hornby thought that Mar. 11, 1948, following so closely on the boycott and riots in West Africa, could not have been a worse time to try to place the company's shares.

Sir Harold Montagu Barton was the first witness called on behalf of the Crown. He is a very experienced chartered accountant with a long experience of the valuation of shares in public and private companies. Sir Harold Barton agreed that the company was trading in a somewhat dangerous way, but he was not alarmed by the size of the company's overdraft in 1947, nor by the company's liquid assets being very much locked up in debtors and stocks and so forth. He considered that, in this way, the company's assets were profitably invested, and he even said that he regarded an overdraft as a healthy sign. In Sir Harold Barton's opinion the predominant circumstance in arriving at a price for the shares would be the question of dividend yield and prospective dividend yield, and after that the earnings and the relation of the dividends to the earnings. Another factor which Sir Harold Barton took into consideration was the effective management of this old-established business. Sir Harold Barton took the extremely low yield figure of three per cent. and on this basis reached a price of 33s. 4d., to which he added 8d. for the dividend expected for the year 1947, making a price of 34s. Apparently, Sir Harold Barton was impressed by the evidence of the petitioners' witnesses, and, in particular, Mr. Holt's emphasis on the policy of restricting the dividends, to the extent of increasing his yield figure to four per cent. producing a price of 25s. On the other hand, Sir Harold Barton was inclined to discount the danger of a post-war slump, and he said that everyone had learnt lessons from the experience after the first world war. But when I questioned him as to the steps which business men would take to avoid the difficulties experienced after the first world war, he was only able to suggest a more cautious dividend policy, and the keeping of more money in reserve, which seem to be measures tending to reduce the price of the shares as contended by the petitioners. Sir Harold Barton thought Mr. Holt's and Mr. Samuel's expectations of a severe fall in prices unduly pessimistic, and considered that purchasers would not necessarily take a similar view. A great many of Sir Harold Barton's answers seemed to me somewhat vague, and it would appear that he had not examined the position of the company in any great detail. It is not at all clear that Sir Harold Barton considered the effect which the restrictions on transfer of shares contained in the company's articles would have on the purchaser.

Mr. Charles Ian Ritchie Hutton is another experienced chartered accountant. In his view the main factors affecting a prospective purchaser were the rate of dividend which he expected to receive on the shares, the prospects of capital appreciation and the restrictions on transfer. He thought that a purchaser would expect to secure a dividend of not less than five per cent. and would expect to receive a larger dividend, but, in view of the statements made by the board, he might expect to wait a year or so before he had a substantial increase. Mr. Hutton approached the question of capital appreciation on the basis of the strong probability that in the near future the company would have to go to the public for money in one shape or another. He would make some allowance for restrictions on marketability. Mr. Hutton's method was to divide his valuation into

two parts—(i) a fixed element representing a dividend of five per cent. and (ii) a contingent element in which he attempted to give effect to his estimates of contingencies affecting the price of the shares. He reached a price of 18s. for his fixed element on the basis of a yield figure of just under four per cent. from the Actuaries' Investment Index in respect of five per cent. preference shares, and an addition of $1\frac{1}{2}$ per cent. for restrictions on transfer, thus assuming a five per cent. yield. But having regard to the price of 21s. which had been agreed between the parties for the $6\frac{1}{2}$ per cent. preference shares of the company, he reduced his figure from 18s. to 16s. 2d. It appeared that this corresponded in his view with the figure of 15s. 8d. reached by Mr. Benson (before he added 1s. 6d. for the contingencies) and 16s. reached by Mr. Hornby, and consequently, so far, there was very little difference between the respective valuations. But then Mr. Hutton proceeded to assume that the dividend must rise to ten per cent., and in his calculations the additional five per cent. represented a further 16s. 2d. This (contingent) 16s. 2d. Mr. Hutton discounted by twenty-five per cent. to compensate for delay and uncertainty, and allowing against these contingencies (on the credit side) the prospects of a further issue of shares by the company. It appeared that this deduction of twenty-five per cent. could not have any mathematical or scientific basis, and was purely guesswork. This reduced the second or contingent 16s. 2d. to 12s. 1d., and made Mr. Hutton's valuation 28s. 3d. He said that, in March, 1948, he would have advised a purchaser to buy at that price, and, if offered the shares at 25s., he would have marshalled the resources of his family and friends in order to purchase. Mr. Hutton discounted the effects of the boycott and riots in West Africa in February, 1948, and the apprehensions for the future expressed by Mr. Holt and Mr. Samuel, and Mr. Hutton actually said that "there are no bad risks in the Commonwealth these days", which I find a very surprising statement.

Mr. Thomas Austin Hamilton Baynes, another chartered accountant, had made a special study of the valuation of shares in private companies, and had read papers on the subject at meetings in many parts of England. He was a frank and attractive witness. The first thing that Mr. Baynes looked at was the five per cent. dividend, and he looked at the profits for a period of ten years up to and including 1947, because that happened to include two pre-war years and two post-war years. He found that the average profits for this period were £524,744. This figure he discounted by twenty-five per cent. because, as I understood, the very high profits of 1947 were not likely to be maintained, and this gave him a figure of £393,558 which he regarded as approximately twice the pre-war profit. He admitted that the deduction of one quarter from the average of ten years was made for no particular reason, but he was trying to get at some kind of guesswork figure for the future profits. It seems to me, moreover, that the years to which Mr. Baynes confined his average might well produce a misleading result, because the years selected were the war years of exceptionally high profits and the years of post-war inflation, and the two pre-war years, 1937 and 1938, were years of unusually high profits not at all typical of the years between the two wars. Mr. Baynes thought that the dividend paid by the company was quite unrealistic, having regard to the profits earned, but he thought it very unlikely that the company would remain a private company for long. He reached the conclusion that an investor would require an $8\frac{1}{2}$ per cent. yield. He thought that the company would be likely to distribute a third of its profits with a view to a forthcoming issue of shares to the public. This represented a sum of £131,000 which was subject to the preference dividends of some £9,000, leaving a figure of £122,000 and a possible dividend on the ordinary shares of $17\frac{1}{2}$ per cent. This gave Mr. Baynes, on an $8\frac{1}{2}$ per cent. yield, a price of £2 1s. per share. He thought the type of investor who would be attracted was the surtax payer, looking for a capital profit. Apparently, he thought such an investor would be prepared to pay 30s. 9d. in the expectation of a rise to £2 1s. and a capital accretion of 10s. 3d. or about $33\frac{1}{2}$ per cent. on his investment. So he took a price of 30s., which

included the prospective dividend for the year 1947. It is clear that, if the figure taken by Mr. Baynes for the average profits of £393,558 was unreasonable for any reason, all the calculations by which he reached his selling price of 30s. per share would be affected. It appears also that he had not paid any attention to the way in which heavy war-time taxation had affected the ability of the company to place money to reserve to meet future capital expenditure and the possibility of a post-war slump. Mr. Baynes made no allowance for the lack of a quotation on the Stock Exchange and restrictions on transfer, because, he said, he had approached the problem of valuation in such a way that these considerations did not really affect the position.

Mr. Henry Samuel Loeb is the senior partner in the firm of Messrs. Montagu, Loeb, Stanley & Co., stockbrokers, and he has been a member of the Stock Exchange since 1904. Mr. Loeb was very much affected by the personalities of those connected with the management of a company. He said that, if he were satisfied with the integrity and ability of the men who ran the company, he would go no further. He appeared to have a touching confidence in the likelihood of business ability being reproduced in successive generations of Hols as in the case of the Brookes in the case of Brooke, Bond & Co., the tea producers and dealers. When he looked at the company's balance sheets, he looked particularly at the assets in relation to capital and the reserves, and, one other thing, cover for the dividend which was being paid. He did not anticipate particularly increased dividends in the case of John Holt & Co. It appeared that he thought that a conservative policy of limitation of dividends was likely to benefit the shareholders in some form or another. He was not troubled with abstruse calculations. The question he asked himself was: "Is this a firm in which I would like to be a sleeping partner?". Having answered that in the affirmative, he reached a price of 28s. to 29s. per share, as far as I can see, by some process of intuition. Then it occurred to him that the Crown, by whom he was instructed, would want something more than this, and so he looked for some other company to form a guide and took Brooke, Bond & Co. He admitted that many people might think that there was no real basis for comparison in the companies, but it was "the nearest thing in which he held shares". He came to the conclusion that Brooke, Bond & Co. represented a better investment, and so lowered his figure for the shares of John Holt & Co. to 25s. per share. He said that he himself would have been prepared to purchase the shares at 25s. or a bit more in case of competition, and if Mr. Benson had offered him the shares at 17s. 2d. he would probably have fainted. Matters like the boycott and riots in West Africa in Mr. Loeb's view would not affect the price, and non-marketability or restrictions on transfer did not worry him at all. Dividend yield was a matter of indifference to him. He dismissed Mr. Samuel's anxieties as to the future with the remark: "Personally I never think there is a risk of falling prices."

That really completes the evidence, for I need not deal with the evidence of Mr. Frederick William Gower, an accountant of the Board of Inland Revenue, who was merely called to deal with some disputed matters of detail in regard to the figures appearing in certain tables.

As I have already indicated, the problem to be decided is purely hypothetical, because, in a company in which the family are determined to retain control, it is obvious that a member or person selected by the directors would be found to enforce a transfer at "the fair value" under art. 25 of the company's articles of association. I am bound to assume, however, that this provision in the articles was not being enforced, and that the shares were thrown open for purchase by anyone who was willing to buy them. Now, it is plain that the shares did not give a purchaser the opportunity to control the company, or to influence the policy of the directors to any great extent, as the shares available only represent 43,698 shares out of 697,680 ordinary shares which had been issued. Any purchaser, therefore, would be dependent on the policy of the directors, so long

A as they should have the support of the general body of the shareholders. I think the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude his disposing of his shares freely whenever he should wish (because, when registered as a shareholder, he will be subject to the provisions of the articles restricting transfer), would be different from any common kind of purchaser of shares on the Stock Exchange, and would be rather the exceptional kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects of the company. I think that such a purchaser would consider the inter-war results of the company, the effect of the 1914 war on the company's trading and the heavy losses sustained in the years which followed that war. In my view, therefore, the evidence of the witnesses for the Crown is open to criticism in so far as it ignores or minimises unduly (as it seems to me) the history of that period in the company's trading. The possibility of losses due to some severe fall in prices emphasises the importance of reserves, and I do not see how anyone considering the financial situation of the company could properly ignore the effects of inflation on the value of money, the way in which the building up of adequate reserves to meet the difficulties likely to be caused by a slump in prices had been handicapped by the enormous sums required to be taken from profits for taxation in the years of the second world war, and the way in which the provision for the replacement of capital assets, such as ships, had been made more difficult by allowances for depreciation being made on the basis of original cost and not the expense of replacement. In my view, these matters, as well as the fluctuating nature of West African trading, would be likely to have a greater effect on the mind of the hypothetical purchaser than was admitted by the witnesses for the Crown. I rule out of consideration the knowledge provided by the passage of time since Mar. 11, 1948, that the company's dividend on ordinary shares has not been increased from five per cent. and that the company has been able to avoid a public issue of ordinary shares by launching an exceedingly successful issue of new preference shares in September, 1950. But I think that the witnesses for the Crown have over-valued the prospects on Mar. 11, 1948, of an increase of dividend and the issue of ordinary shares in the future.

F On the other hand, owing to the fall in the value of money, five per cent. on the ordinary shares did represent a much smaller return in fact to the members of the family than that dividend represented in pre-war years, and there might have been pressure by the family in 1948 or later to increase the dividend (having regard to the ample earnings of the company). Moreover, some possible hypothetical purchaser might well have thought that the company would be forced to raise further capital by an issue of ordinary shares to the public instead of adopting the method of an issue of preference shares, or debentures, or unsecured notes. Any such anticipation could have no more certainty than a guess. But I think that the petitioners' witnesses have under-valued this element in the price which the hypothetical purchaser might pay in this hypothetical open market.

H Having carefully considered the evidence which has been given, including such assistance as may be gained from the various tables which have been put in and the various comparisons with the prices of shares of other companies quoted on the Stock Exchange (so far as any useful deductions can be made from these), and making the most intelligent guess that I can, I have come to the conclusion that these shares of John Holt & Co., if sold on the hypothetical open market which the authorities and the section in the Act require me to assume, would fetch a price of 19s. a share. Accordingly, I determine the principal value of the 43,698 ordinary shares in the company to which this appeal relates to be 19s. multiplied

by the number of shares, and the resulting figure is, I think, £41,513 2s. The amount of the estate duty payable on this sum can, no doubt, easily be determined.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Alsop, Stevens & Co.*, Liverpool (for the petitioners); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, Esq. Barrister-at-Law.*]

A

PRACTICE DIRECTION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R.), November 30, 1953.]

B

Court of Appeal—Notice of appeal—Contents—Certificate of service—Notice by appellant.

SIR RAYMOND EVERSLED, M.R., read the following statement, which was made contemporaneously in the other Divisions of the Court of Appeal:—

Before we begin today's list I wish to draw attention to two small matters of difficulty which have arisen in the Court of Appeal.

C

The first is (and it appears only likely to be met in practice where appeals are entered in district registries) that an appeal may on occasion get set down and appear in the list before notice of it has been served on the respondent. The second is where a respondent appears in person and may not know when the appeal is coming on—indeed, he may be misled by the common form of notice of appeal ("Take Notice that this court will be moved at the expiration of . . . days from the service upon you of this notice . . ."). To get over these difficulties it is suggested that the notice of appeal should contain a statement and a certificate the effect of which I will state in a minute.

D

I would emphasise that there is no form of notice of appeal fixed by statute or the rules, and I should, therefore, make it clear that, if a notice of appeal does not contain the suggested statement or certificate, it will not thereby be invalid. We think, however, that, if the suggestions are adopted, they will save the mischance that I have mentioned and, therefore, save trouble and costs.

E

The suggestions are these:

On setting down an appeal to the Court of Appeal one copy of the notice of appeal should be indorsed with a certificate of the solicitors for the appellant (or the appellant himself if in person) stating the date or dates on which notice of appeal was served on the party or parties named as respondent(s). The officer receiving the notice of appeal should satisfy himself that it was served in due time on the respondent(s) and must refuse to set the appeal down if it appears that the notice was served out of time. The copy of the notice of appeal containing the certificate as to service shall be in the custody of the officer in attendance on the Court of Appeal when the appeal comes on to be heard.

F

Notices of appeal should contain after the signature by the solicitor for the appellant a statement as follows:

G

"No notice as to the date on which this appeal will be in the list for hearing will be given: it is the duty of solicitors to keep themselves informed as to the state of the lists. A respondent intending to appear in person should inform the Appeal Clerk, Room 136, Royal Courts of Justice, W.C.2., of that fact and give his address; if he does so he will be notified by telegram to the address he has given of the date when the appeal is expected to be heard."

H

DYSON v. DYSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 23, 24, 1953.]

Divorce—Maintenance of wife—Charge of cruelty and of adultery against wife—Failure of charges—Offer by husband to resume cohabitation—Refusal of wife—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

On Jan. 15, 1951, the husband left the matrimonial home and on Jan. 20, 1951, he wrote to the wife asking her to leave those premises. He filed a petition dated June 13, 1951, for dissolution of the marriage on the ground of the wife's adultery and cruelty, and on Dec. 13, 1951, the petition was dismissed. The husband appealed against the dismissal of the charge of adultery, and on June 16, 1952, the appeal was dismissed. On June 20, 1952, the husband wrote to the wife: "You will no doubt have heard by now that my appeal has been dismissed. The court decided that my suspicions were wrong. As that is the case, let us drop the matter now, once and for all, and I assure you it will never be raised again by me. The house is still here and we really must arrange a meeting and see if we can get together again". The wife refused to meet the husband or to discuss a reconciliation. On a summons by the wife for maintenance under the Matrimonial Causes Act, 1950, s. 23 (1),

HELD: there being no suggestion that the husband was guilty of a matrimonial offence, the wife had to prove that he had been guilty of such grave and weighty conduct as to make married life impossible; the husband's charges of cruelty having been heard and disposed of, the wife could not for ever set up the fact that he had made those charges as providing her with just cause for refusing to live with him; the husband's offer in his letter of June 20, 1952, to meet the wife with a view to a reconciliation was genuine in the sense that he was prepared to take her back; the wife's refusal to meet the husband was not justified; and, therefore, he had not wilfully neglected to provide reasonable maintenance.

Price v. Price ([1951] 2 All E.R. 580n.), applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 84, 85, Nos. 631-636.

Cases referred to:

- (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L.. [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest, Replacement, 307, 2551.
- (2) *Oldroyd v. Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 27 Digest, Replacement, 289, 2349.
- (3) *Price v. Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 27 Digest, Replacement, 85, 636.

SUMMONS by the wife under the Matrimonial Causes Act, 1950, s. 23 (1).

The parties were married on Apr. 3, 1948, and there was one child of the marriage born on Dec. 29, 1948. On Jan. 15, 1951, the husband left the matrimonial home and on Jan. 19, 1951, the wife took the child and went to her parents' house. On Jan. 20, 1951, the husband's solicitors wrote to the wife that

"in view of your conduct we must ask you to vacate the [matrimonial home]."

On Jan. 29, 1951, the wife's solicitors replied, denying that she was guilty of any conduct which would justify the husband in asking her to leave, and stating that she was ready and willing to continue living with him. On Jan. 30, 1951, the

husband's solicitors wrote, repeating the husband's request that the wife leave the house. On June 13, 1951, the husband filed a petition for the dissolution of the marriage on the grounds of the wife's adultery with the co-respondent and cruelty, and, as particulars of cruelty, he alleged, *inter alia*, that from February, 1949, to January, 1951, the wife caused the matrimonial home to become so filthy that the health of the husband and the child of the marriage was impaired; that the husband became subject to nausea and vomiting as a consequence of the circumstances in which the wife required him to eat and live and that his health deteriorated; and that from September, 1950, to January, 1951, the stench in the house became so strong that the husband frequently vomited as a consequence thereof and as a consequence of having to eat in such conditions and that his general physical condition further deteriorated. The husband gave further and better particulars of these allegations. By her answer the wife denied the allegations of adultery and cruelty. On Dec. 5, 1951, the suit came before COLLINGWOOD, J., at Leeds Autumn Assizes, and on Dec. 13, 1951, the judge dismissed the petition. The husband appealed against the dismissal of the charge of adultery, and on June 16, 1952, the Court of Appeal dismissed the appeal. On June 20, 1952, the husband wrote to the wife:

"Dear Doreen, Please find cheque for £20 for the care of you and baby Margaret. You will no doubt have heard by now that my appeal has been dismissed. The court decided that my suspicions were wrong. As that is the case, let us drop the matter now, once and for all, and I assure you it will never be raised again by me. The house is still here and we really must arrange a meeting and see if we can get together again. After all, there is Margaret to consider, she is only four years old. Please write me, Yours, Kenneth."

On June 24, 1952, the wife's solicitors replied, directing their letter to the husband's solicitors:

"We would refer you to your letter to us of Jan. 30, 1951, and we can only express the greatest surprise that after the allegations of cruelty and adultery which [the husband] has seen fit to make against [the wife] he should consider that [the wife] can now agree to a meeting with him."

On the same day the wife's solicitors also wrote to the husband's solicitors asking them to give a date on which the wife could collect some of her furniture, to which the husband's solicitors replied on June 26, 1953:

"We are reluctant to do so as this is liable to obstruct any possibility of a reconciliation, and in the same way we also feel that it would be a pity to divest the matrimonial home of various fittings and effects if there is any possibility of [the wife] returning."

On July 9, 1952, the husband's solicitors wrote a further letter:

"[The husband] informs us that his letter of June 20 was quite genuine and he is anxious to meet [the wife] with a view to discussing their affairs and if possible to effect a reconciliation. This suggestion still stands and there is no doubt that it would be a good idea if the parties could meet and discuss their differences. If, however, [the wife] refuses to change her attitude as stated in your letter of June 24 there is nothing more which [the husband] can do about it."

On July 24, 1952, the wife's solicitors replied:

"She is unwilling to meet her husband and there can be no question of a reconciliation."

On Oct. 29, 1952, the wife issued a summons under the Matrimonial Causes Act, 1950, s. 23 (1), alleging that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and the infant child of the marriage.

Faulks for the wife.

Temple, Q.C., and *Law* for the husband.

BARNARD, J.: This is a summons by the wife, in which she complains that her husband has wilfully neglected to provide reasonable maintenance for her and the only child of the marriage, and she asks for an order for maintenance. It is a commonplace that maintenance does not merely mean pounds, shillings and pence. If a husband is willing to provide a home for his wife, he cannot then be found guilty of wilful neglect to provide her with reasonable maintenance. [His LORDSHIP stated the facts and continued:] It is the charge of cruelty which the husband made against the wife that has put him in a grave and difficult position. The suit was heard by COLLINGWOOD, J., who, on Dec. 13, 1951, gave a judgment in which he dismissed the petition and said certain things about the charge of cruelty which, I think, are important and to which I have to give weight.

The charge of cruelty was a grave reflection on the wife as a housewife. The husband accused her of keeping the house in such a filthy and dirty condition that often on his return home he would vomit because of the disgusting smells that came from different parts of the house, and—what is far more serious—he made grave reflections on her as a mother and alleged that she so neglected the child that the child's health was in danger. Even if COLLINGWOOD, J., had accepted the husband's evidence, it seems to me doubtful whether that conduct could come within the realm of cruelty. The husband was complaining about the character of the woman he married. It may be that he married a lazy woman who would not take the trouble to keep the house clean and in order, and it may be, as regards the charges dealing with the child, that she was an ignorant mother and did things from ignorance and from laziness which left the child in a dirty condition. But it is clear from his judgment that COLLINGWOOD, J., did not believe the husband. Dealing with the way the wife looked after the child he said:

"There is not a scrap of truth in this long list of complaints."

Then, as regards the charges in general, COLLINGWOOD, J., said:

"It is not only grossly exaggerated, it is grossly and deliberately distorted . . . I am satisfied that that story of having to live in these appalling conditions, day after day, week after week, is in the main a distortion."

The charge of adultery was a different matter. I do not think anybody could say that the husband had no grounds for suspicion. There was clear evidence, accepted by COLLINGWOOD, J., that the wife and the co-respondent were on more than one occasion seen kissing and caressing. The judge, having referred to that, went on to say:

"That such conduct is utterly reprehensible nobody will seek to deny, but such conduct, in my opinion, is not necessarily accompanied by adultery."

I think that, so far as that charge is concerned, the judge was saying that the burden of proof was on the husband, and that he had failed to prove the charge beyond all reasonable doubt. The husband was not content with that decision, and he appealed to the Court of Appeal on the charge of adultery. On June 16, 1952, the Court of Appeal dismissed the appeal. In so many words, they said that it was a pure question of fact on which the judge had made up his mind, and, in the circumstances, it was hopeless to come to them by way of appeal. [His LORDSHIP referred to the correspondence and continued:] I have to consider two points: (i) Had the wife just cause for refusing to live with her husband?; and (ii) Was the offer made by the husband on June 20, in all the circumstances of the case, genuine?

I find little difficulty in dealing with the question of just cause. I have been referred to *Russell v. Russell* (1), which deals not only with what amounts to cruelty, but also with what affords just cause in resisting a petition for restitution, or, in the same way, would amount to a good defence to a charge of desertion. I have also been referred to the decision of GORELL BARNES, J., in *Oldroyd v. Oldroyd* (2), and I think that it is clear that the wife must satisfy me either that the husband has been guilty of a matrimonial offence, or that he has been guilty of such grave and weighty conduct as to make married life impossible. As there is no suggestion that the husband has been guilty of a matrimonial offence, the wife has to satisfy me that his conduct was so grave and weighty as to make married life impossible. I have been referred to *Price v. Price* (3), where one spouse made, but failed to prove, charges against the other and, as far as I know, made no apology for having made them, and that was not considered just cause. Although I have no wish to belittle the charges of cruelty which the husband in the present case did make at one time against the wife, they were heard in court and disposed of, and, as the husband himself said in the witness box: "That's an end of it". In my view, the wife cannot for ever set up the fact that he made these charges as providing her with just cause hereafter for refusing to live with him.

The other question—whether or not this letter is genuine—is not so easy. It is difficult to believe that a husband who has described his wife in the way in which he described her when he made these charges of cruelty against her is ready to have her back. *Price v. Price* (3) makes it clear that an offer, to be genuine, need not carry the implication that the person who makes it is desirous of having the other party back, provided that he or she is honest in saying that he or she will receive the other spouse back. SOMERVELL, L.J., said ([1951] P. 416):

"It is plain from the evidence that the judge was determined to probe the wife's evidence very carefully before he was satisfied that this offer was a genuine one. As he has done that, and as he has decided that it was a genuine offer, that to my mind is an end of this case . . ."

Then DENNING, L.J., dealing with what it is necessary to prove in order to establish a genuine offer, said (*ibid.*, 417):

"This wife deserted her husband and then went to the Divorce Court and charged him with cruelty. She lost her case, and immediately, through her solicitors, offered to go back to her husband. She made the offer genuinely in this sense, that she was prepared to return to her husband if he would have her; but she did not have any genuine desire to re-establish the marriage."

HODSON, L.J., dealing with this point, said (*ibid.*, 421):

"I do not think it possible for the courts to investigate matters of emotion . . ."

In that case the wife, who had made the offer, said in the witness box that she hated her husband, but none the less her offer was considered to be genuine because, whether or not she hated him, she was prepared to make the best of it, and go back to him.

It is in the light of that decision that I have to consider whether or not this offer was genuine. I saw the husband in the witness box and, of course, counsel for the wife, fairly and properly, made the most of what COLLINGWOOD, J., had said about him in the divorce case, and not for one moment am I seeking to go behind anything that COLLINGWOOD, J., said. But I do not think that it follows that, because a husband coloured his case to succeed with his petition for divorce, whenever he appears in court again he is of necessity telling lies. More likely, having realised that his petition failed, he has learned a most

salutary lesson, and I say at once that I thought the husband seemed an honest witness. I watched him carefully. I heard him cross-examined and he said:

"If my wife will come back to me I shall be quite ready to provide for her."

True, he went further, and again I think he was genuine, and said:

"I genuinely want her back. I think if we can get together we could make a go of it. Surely we can make something out of it?"

The wife will not even meet him. She will not allow the matter to be discussed, and she made it perfectly plain in her own evidence that: "As soon as I got his letter suggesting a meeting, I made up my mind never to go back", and that is still her mind—never, in any circumstances, to go back. I can sympathise with her to a great extent, after what he said about her as a wife and a mother, but in law she cannot take up that attitude for ever. More than a year has passed since these unfortunate proceedings between the parties, and I feel convinced that when the husband wrote, without any legal advice or assistance, this letter to his wife, he meant what he said. He wanted her to meet him to see whether they could not discuss the whole thing and clear the air, with a possibility of their coming together again.

This would have been a different case if the wife had been prepared to meet him and had given me evidence as to what had taken place at an interview, but she completely shut the door at a stage where I do not think she is entitled to shut it for ever. It was also suggested that the husband's offer could not be genuine because, months later, when it was apparent that she was not even going to meet him, there was some further trouble over a sum of money which the husband said he gave to the wife to furnish the house. That, of course, was when the two solicitors had taken up the cudgels on behalf of their respective clients. There did not then appear to be any possibility of a reconciliation or of a meeting.

I do not think that this is an idle offer by the husband. As he told me, the matrimonial home is still there; the living accommodation is temporarily used by clerks, but within a few hours they could be turned out and he could be ready to receive his wife back. The wife suggested that she could not live in that district again (not that I think the district matters, because she has firmly made up her mind never to live with her husband again), but the husband has said he is quite prepared to find a home anywhere else in the neighbourhood if she does not like going back to the same premises. I am satisfied on the evidence, in spite of the somewhat grim surrounding circumstances, that the husband did make a genuine offer on June 20, 1952, for his wife to meet him with a view to a reconciliation, and, the wife having definitely refused to meet him from that day onwards, I think that this summons must fail and be dismissed.

Summons dismissed.

Solicitors: *A. F. & R. W. Tweedie*, agents for *Cook, Fowler & Outhet*, Scarborough (for the wife); *Ludlow, Head & Walter*, agents for *Willey Hargrave & Co.*, Leeds (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

NICHOLS AND ANOTHER v. WALTERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
November 24, 25, 1953.]

Mortgage—Possession of mortgaged property—Premises subject to Rent Restrictions Acts—Default in payment of mortgage interest for more than twenty-one days—Subsequent payment—Loss of protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 7.

By a legal charge dated Sept. 28, 1951, the owner of the fee simple in possession of premises comprising business and living accommodation which she occupied herself mortgaged them to secure repayment of £2,200. In June, 1952, the mortgagees called in the principal, and, thereafter, for a period exceeding three weeks, the mortgagor refrained from paying interest which fell due, and also failed to pay a fire insurance premium due under the legal charge. By a summons issued on Dec. 17, 1952, the mortgagees claimed possession. On Feb. 3, 1953, the master, on the mortgagor's undertaking to clear the arrears of interest and premium at once, stood the matter over with liberty to restore if default were made. On Feb. 7, 1953, the arrears were paid, but later the matter was adjourned to the judge and an order for possession was made.

HELD: assuming that the Rent Restrictions Acts applied to the legal charge, the notice calling in the mortgage in June, 1952, was unlawful by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7, but, having fallen into arrear in the payment of interest for more than twenty-one days, the mortgagor lost the protection of s. 7 and she did not regain it by paying off the arrears, and, therefore, the order for possession was rightly made.

Evans v. Horner ([1925] Ch. 177), approved.

Quaere whether s. 7 of the Act of 1920 applies as between mortgagee and mortgagor where the mortgaged premises are in the hands of the freehold owner.

AS TO RESTRICTIONS ON ENFORCING MORTGAGE, see HALSBURY, Hailsham Edn., Vol. 23, p. 423, para. 625; and FOR CASES, see DIGEST, Vol. 35, pp. 697, 698, Nos. 4402-4410.

Case referred to:

- (1) *Evans v. Horner*, [1925] Ch. 177; 94 L.J.Ch. 220; 132 L.T. 730; 35 Digest 698, 4407.

APPEAL by the mortgagor from an order of DANCKWERTS, J., dated July 21, 1953.

By an originating summons issued under R.S.C., Ord. 55, r. 5A, the mortgagees of premises comprising a restaurant and living accommodation claimed possession from the mortgagor who owned the fee simple of, and occupied, the premises. In June, 1952, when the mortgagees called in the principal due under the mortgage, no interest was in arrear, nor was the mortgagor in breach of any covenant, but, after receipt of the mortgagees' notice, the mortgagor ceased to pay interest, which became overdue for more than twenty-one days, and failed to pay a premium for fire insurance for which she was liable under the mortgage. The summons was issued on Dec. 17, 1952, and was heard by the master on Feb. 3, 1953. The master stood the matter over, noting that:

"The defendant undertakes to clear the arrears of interest and the premiums at once. Stand over with liberty to restore if default made."

On Feb. 7, 1953, the mortgagor made payment in accordance with the undertaking, but on Feb. 10, 1953, the summons was restored, and, finally, DANCKWERTS, J., made an order for possession.

The mortgagor appeared in person.

C. B. Guthrie for the mortgagees.

SIR RAYMOND EVERSHED, M.R.: In my judgment, there is no ground on which we can disturb the order made by DANCKWERTS, J. The plaintiffs sued as mortgagees under a legal charge dated Sept. 28, 1951, whereby the defendant mortgaged her premises, of which she was the fee simple owner in possession, for £2,200 repayable as provided in the charge, with interest at $5\frac{1}{2}$ per cent. reducible to $4\frac{1}{2}$ per cent. on punctual payment. The mortgagees in June, 1952, nine months after the deed, called in the principal moneys, and, though the mortgagor has very rightly said that she is here, not for sympathy, but for what she claims to be her rights, I can well understand that the calling in disturbed her. The result was that she forebore to pay the interest due in September, 1952.

The first part of the mortgagor's argument is that she is protected as against the mortgagees by the Rent Restrictions Acts, and, in particular, by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7. That section is in the following terms:

"It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as—(a) interest at the rate permitted under this Act is paid and is not more than twenty-one days in arrear; and (b) the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed; and (c) the mortgagor keeps the property in a proper state of repair . . . to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security . . ."

A mortgage to which the Act applies is defined in s. 12 (4) of the same Act which is in these terms:

"Subject to the provisions of the Act, this Act shall apply to every mortgage where the mortgaged property consists of or comprises one or more dwelling-houses to which this Act applies, or any interest therein . . ."

with certain exceptions which it is not necessary for me to read. Section 12 (2) provides:

"This Act shall apply to a house or a part of a house let as a separate dwelling, where . . .",

and then follow the financial limits imposed by the Act, on which nothing now turns. Finally, the mortgagor draws attention to s. 12 (6), which provides:

"Where this Act has become applicable to any dwelling-house or any mortgage thereon, it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

I confess that I find these provisions somewhat obscure, and I have seen elsewhere (MEGARRY'S THE RENT ACTS, 7th ed., p. 17) that the adjective "enigmatic" has been applied to sub-s. (6).

At the date of the mortgage of September, 1951, and ever since, these premises in Westbourne Grove have not been let to anyone either in whole or in part. The mortgagor carries on a business on the ground floor, lives in part of the upper floor, and has not, in fact, let the other part. It is said by the mortgagees that s. 7 is inapplicable as between mortgagee and mortgagor where the mortgaged premises are in the hands of their freehold owner. I think that question is open to doubt, and I prefer to express no opinion about it.

I will assume that the mortgagor is correct when she states that the mortgage was one to which the Act applies. On that footing the notice calling in the mortgage in June, 1952, was unlawful, i.e., invalid and bad, but as I have already said, unfortunately for her, the mortgagor did not pay the interest due in September and allowed it to get considerably more than twenty-one days in arrear. She also did not pay an insurance premium which she was bound to pay. The summons, asking, not for the payment of the principal,

but to enforce the security by an order for possession, was issued on Dec. 17, 1952, and it came before the master on Feb. 3, 1953. I have before me the note made by the master which, so far as relevant, is:

"The defendant undertakes to clear the arrears of interest and the premiums at once. Stand over with liberty to restore if default made."

According to the mortgagor (and I accept her evidence in the absence of any refutation or challenge), she paid the arrears on Feb. 7, 1953. Counsel for the mortgagees said that was not paying "at once", but I should have thought for practical purposes it was. However, the summons was restored on Feb. 10, 1953. The mortgagor says it ought not to have been restored, because the arrears had then been paid, and, therefore, there was no right of action left in the mortgagees, but, as I think, the mortgagor was not entitled, because she had paid the arrears, thereupon to get the summons dismissed. In fact, the court never lost seisin of the matter. It was considered carefully by the master in February and was three times before the judge, and we are now in November.

Subject to one point, therefore, it seems to me that, as a matter of law—whether or not it may be hard on the mortgagor is not relevant—the mortgagees were entitled to ask for an order enforcing their security, and that is what they obtained. The only question is whether, having paid off the arrears of interest in February, 1953, the mortgagor can still claim the benefit of s. 7. I think the answer to that point is provided by *Evans v. Horner* (1), decided by RUSSELL, J., in 1925. The learned judge concluded as follows ([1925] Ch. 178):

"Section 7 (a) means that so long as interest is paid not later than twenty-one days after it is due, the mortgagee cannot call in his mortgage or take any steps for exercising any right of foreclosure . . ."

The learned judge had earlier said (*ibid.*):

"In my opinion the section only suspends the rights of the mortgagee during one continuous period, which lasts so long as conditions (a), (b) and (c) are complied with, and that when once those conditions are broken a subsequent compliance with them does not revive the protection given by the section."

That decision has never been questioned in this country for the quarter of a century which has passed since it was delivered, and I should, in any case, be slow to differ on a matter of this kind from that very learned judge.

In the circumstances, therefore, I think the answer inevitably is that the mortgagor, having allowed the interest to get more than twenty-one days in arrears (whatever may have been the reason), ceased to be able to invoke s. 7. When that stage is reached I think everything else follows, and I think, as I said at the beginning, that this appeal must fail.

I said during the argument that I felt some sympathy for the mortgagor, and, indeed, I do, but I think, also, that, even if she was able now to postpone an order for possession, it would not in the end make any difference. Ultimately, I have no doubt, from what the mortgagor told me, an order would have to be made. I should not wish, from anything I have said, to be treated as criticising the mortgagees or to suggest that they have not behaved properly in this matter.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Farrar, Porter & Co.* (for the mortgagees).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

STARKIE v. STARKIE (No. 2).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), November 16, 17, 1953.]

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Consensual separation—No agreement as to maintenance—Neglect to maintain child—Liability of husband.

On July 20, 1953, the wife left the matrimonial home, taking with her the child of the marriage, then aged about eighteen months. On July 24, 1953, the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her and had wilfully neglected to provide reasonable maintenance for her and the child. The justices found that "the wife left home . . . on a consensual basis . . . and that the husband had not constructively deserted the wife", that "there was no agreement, express or implied, that the husband should pay maintenance for the support of the wife and/or the child", and that "there was no evidence from either side that after the parting on July 20, 1953, the husband paid the wife any maintenance either in respect of herself or the child." The justices held that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and the child and ordered him to pay the wife £2 10s. per week, being £1 for her benefit and £1 10s. for the benefit of the child. On appeal by the husband,

HELD: since the justices had found that the separation was consensual and that there was no agreement, express or implied, to maintain the wife, the husband could not be guilty of wilful neglect to provide reasonable maintenance for her; the failure of the wife's complaint in regard to her own maintenance did not exonerate the husband from his liability to maintain the child; in the absence of any explanation by the husband of his failure to maintain the child, the wife was entitled to an order in her favour in respect thereof; but the justices had awarded the maximum sum, £1 10s., in respect of maintenance for the child, and, therefore, the proper sum to be awarded in respect of the wife should be nominal, namely, 1s. a week.

Baker v. Baker (1949) (66 (pt. 1) T.L.R. 81), followed.

Kinnane v. Kinnane (ante, p. 1144), applied.

AS TO WILFUL NEGLECT TO MAINTAIN, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 701-703, Nos. 6703-6721.

Cases referred to:

- (1) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest, Replacement, 85, 635.
- (2) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 27 Digest, Replacement, 706, 6750.
- (3) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest, Replacement, 82, 630.
- (4) *Chapman v. Chapman*, unreported.
- (5) *Stringer v. Stringer*, [1952] 1 All E.R. 373; [1952] P. 171; 116 J.P. 102; 3rd Digest Supp.
- (6) *Kinnane v. Kinnane*, ante, p. 1144.
- (7) *Jones (A.) v. Jones (D. L.)*, (1929), 142 L.T. 167; 94 J.P. 30; 27 Digest, Replacement, 705, 6734.
- (8) *Sullivan v. Sullivan*, [1947] P. 50; 111 J.P. 27; 27 Digest, Replacement, 734, 7023.

APPEAL by the husband against an order of the justices for the Cockermonth petty sessional division of Cumberland, dated Aug. 10, 1953.

On July 24, 1953, the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her on July 20, 1953, and that he had wilfully neglected to provide reasonable maintenance for her and the infant child of the marriage from the same date. On Aug. 10, 1953, the justices dismissed the charge of desertion, but found proved the charge of wilful neglect to maintain, and made an order in favour of the wife for the payment of £2 10s. per week, being £1 for the benefit of herself and £1 10s. for the benefit of the child of whom she was awarded custody. The husband desired to appeal, and on the husband's request the clerk to the justices sent the following statement of the justice's reasons for their decision:

"I hereby certify that the reason given by the [justices] for their decision in this matter on Aug. 10, 1953, was that the [husband] had neglected to maintain the complainant and child."

On Oct. 30, 1953, the Divisional Court (LORD MERRIMAN, P., and COLLINGWOOD, J.), set out, ante, p. 1255, certain questions to which the court required an answer before deciding the appeal. The answers of the justices to the questions were as follows:

"(i) Q.—In respect of [a previous] parting (from about Aug. 31, 1952, to July 11, 1953) did the justices accept the evidence of the husband in cross-examination by the wife's solicitor that he agreed to pay maintenance, and, if so, at what rate per week if the wife was (a) working or (b) not working, respectively. A.—The justices accepted the evidence of the husband in cross-examination by the wife's solicitor that he agreed to pay maintenance, but did not accept his evidence that any particular rate per week was agreed, because there was no evidence to support this statement and the justices did not believe it in view of the fact that payments were in fact irregular, and the husband apparently went off to sea without a care as to his responsibilities.

"(ii) Q.—Did the justices accept the evidence of both the husband and the wife that the husband paid maintenance at the rate of £4 10s. per week between the resumption of cohabitation on July 11, 1953, and July 20, 1953, the date of the present parting? A.—The justices accepted the evidence of both the husband and wife that a payment of £4 10s. was made, but they considered that this was an isolated payment, as supported by the wife's evidence, and not a regular weekly payment.

"(iii) Q.—On what grounds was the wife's complaint of desertion in respect of the present separation dismissed? A.—The justices considered that the wife left home rather on a consensual basis than because of the words and conduct of her husband and that there was for that reason no constructive desertion.

"(a) Q.—What did the justices find was the nature of this parting, and on what evidence did they base their finding? A.—The justices considered that the wife's evidence showed that that parting was on a friendly basis. The husband also stated that they agreed to separate. The justices accepted this evidence and therefore found that the husband had not constructively deserted the wife.

"(b) Q.—If the justices found that the parting was consensual, did they find that there was any agreement (i) express, or (ii) implied, that the husband should pay maintenance for the support of the wife and/or the child? Note (which applies to the whole question): A full statement of the grounds for this answer is required. A.—The justices found that there was no agreement, express or implied, that the husband should pay maintenance for the support of the wife and/or the child. They considered that there was no evidence before them which could support a finding that there was such an agreement.

“(c) Q.—If so, how much ? A.—See (b).

“(iv) Q.—After the parting on July 20, 1953, did the husband pay the wife any maintenance in respect of herself and/or the child, and, if so, how much respectively ? A.—The justices considered that there was no evidence from either side that after the parting on July 20, 1953, the husband paid the wife any maintenance either in respect of herself or the child.

“(v) Q.—On what ground was the wife’s complaint of July 24, 1953, that on and after July 20, 1953, the husband had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child held to be proved ? Note (which applies to the whole question): A full statement of the grounds for this answer is required. A.—The justices considered (i) That on July 20, 1953, any such payments as had been made by the husband did not constitute reasonable maintenance. This they considered was supported by the fact that the wife had been compelled to apply to the National Assistance Board. (ii) That after July 20, 1953, there was no evidence that any payment at all had been made. For these reasons the justices considered that on and after July 20, 1953, the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and her infant child.”

Sneade for the husband.

D. R. Ellison for the wife.

LORD MERRIMAN, P., stated the facts and continued: This court has, more than once recently, emphasised that when the wife is the complainant under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949 (and I realise that there are circumstances in which the husband may be the complainant), the order is made in her favour—it is her order, and that in these cases which deal with wilful neglect to provide reasonable maintenance, to support the findings of the justices the wife must establish wilful neglect to provide reasonable maintenance (i) for her and (ii) for the child, who must be her child, must be an infant child, and a child whom the husband is legally liable to maintain. But still, in respect of the child as in respect of the wife, it must be possible for her to establish that the husband has been guilty of wilful neglect to provide reasonable maintenance. In my opinion, it is still the law, although the contrary has been argued, that in either case wilful neglect imports an element of misconduct. For the contrary view, *Tulip v. Tulip* (1), a decision of the Court of Appeal, was cited. But that case strongly affirmed decisions of this court, particularly *Morton v. Morton* (2), in which the element of misconduct in the phrase “wilful neglect to provide reasonable maintenance” was emphasised.

Starting with the proposition that the wife is the complainant in respect of wilful neglect to provide maintenance, not only for herself but also for her infant child, it is, I think, important to bear in mind that, however badly the husband has behaved in respect of the infant child, there may be a complete and absolute bar to the wife obtaining an order, for under the Summary Jurisdiction (Married Women) Act, 1895, s. 6. no order can be made if she has committed adultery which has not been

“ . . . condoned, or connived at, or by his wilful neglect or misconduct conducted to ”

by the husband. As it is not suggested that this wife has disentitled herself by any other matrimonial misconduct, such as desertion, it would be academic to discuss the question whether a wife, who had disentitled herself from any maintenance for herself because she had deserted her husband, might also, in certain circumstances, have disentitled herself from complaining of wilful neglect to provide reasonable maintenance for the infant child whom she had carried away with her in the process of deserting her husband. That matter can be

discussed when it arises. Any failure on this wife's part to prove her own claim for maintenance does not depend on any misconduct on her part, whether adultery or otherwise. For the same reason, I do not think it necessary to pursue the interesting topic which has been debated, whether by any contractual act on her part she can make it difficult to assert that the husband has been guilty of neglect to maintain not only her, but also the child. I can imagine circumstances in which the self-same contract might conceivably be available as evidence in favour of the husband—not conclusive evidence: *Tulip v. Tulip* (1)—that he had no more been guilty of wilful neglect to maintain the child than of the wife. But, again, I do not think it necessary to pursue that topic. The wife's difficulty is that as regards her own maintenance she has been held, on evidence which, I think, abundantly justifies the finding, to have consented to this particular separation, and without any stipulation, express or implied, that the husband shall maintain her while they are thus living separate and apart. With regard to that, the law, as established at present, is conveniently contained in a short passage (66 T.L.R. (pt. 1) 82) from a judgment of this court in *Baker v. Baker* (3) quoted in the Court of Appeal in *Chapman v. Chapman* (4) and followed in *Stringer v. Stringer* (5), which reads as follows:

"There is no law involved in this case; it is merely an application of the principle that, if a wife is living separate and apart from her husband, it is not enough for her to give evidence that her husband had money and that she needed maintenance. The question is: What was the nature of the parting? If the wife can prove desertion, she is, of course, entitled to a maintenance order on that ground. If the separation was consensual, then, if she can prove—and Mr. Crispin accepted that the onus was on the wife—that this was on the basis, express or implied, that the husband undertook to be responsible for her maintenance, she is entitled either to the agreed amount (if there was an agreed amount), or to a reasonable amount under the section, although she is living apart from her husband. But unless she can show, where the separation was consensual, that the husband had accepted a liability, express or implied, to maintain her, she has no case at all."

That is precisely what has been found in this case. The separation was consensual, and there was no agreement, express or implied, to maintain the wife. In my opinion, therefore, the finding of wilful neglect to provide reasonable maintenance for the wife cannot stand.

That is not, however, the end of the case. We pointed out in *Kinnane v. Kinnane* (6) that the wife would be entitled, if she established a complaint of wilful neglect to provide reasonable maintenance for her infant child whom the husband was legally liable to maintain, to any order permissible under the Act of 1895, s. 5, and the Married Women (Maintenance) Act, 1920, s. 1 (1), and containing, of course, a provision giving her the custody of the child. We also pointed out that the establishment of that complaint might entitle her to an order for maintenance, not limited to any sum which was awarded in respect of the child of which she was given the custody. But, at the same time, we pointed out that if she failed to establish wilful neglect to maintain herself, the discretion of the justices as to the amount to be awarded must be exercised in recognition of the fact that she had failed to establish that matter. Remembering that we are talking about a wife being barred, not by some statutory disability, but merely by her own consensual act in agreeing to a separation without an obligation on the part of the husband to maintain her, the question in this case is: Does the failure of her complaint necessarily carry with it, in those circumstances, exoneration of the husband from responsibility in respect of the child? Having regard to some of the arguments which were addressed to us, I think it is important to distinguish, with reference to the husband's responsibility, two things: (i) the condition precedent that he is legally

liable to maintain the child, and (ii) the offence that he has wilfully neglected to provide reasonable maintenance for the child. It may be, speaking generally, that there is little practical difference, but they are not the same thing. Unquestionably, in this case, there is no doubt about the husband's legal liability to maintain the child. There has been a dispute about the paternity of the child, but that, to put it at its lowest, certainly has not been resolved in the husband's favour, and there is nothing to show that his legal liability to maintain his infant child does not subsist. I point out, however, that if his legal liability to maintain the child, as contrasted with wilful neglect to provide maintenance for the wife, necessarily imports wilful neglect if he does not do so, s. 4 of the Act of 1895 need only have referred to the husband's failure to maintain any given child, and made no reference to wilful neglect. The justices have found that from the moment of this parting on July 20, 1953, the husband paid nothing in respect of this child. I cannot see that he has given any excuse or explanation except the suggestion that the child was not his, which has not been determined in his favour. In my opinion, therefore, the fact that the wife cannot make out a case of wilful neglect to provide reasonable maintenance for herself does not bar her from proving that there has been wilful neglect to provide reasonable maintenance for the child, and I think that the justices were entitled to find that complaint proved, and that that is the right conclusion in this case.

There remains the question whether or not the whole order can stand. That is to say, on the basis that the wife has proved one out of her three complaints, can she have an order of £1 for herself as well as the £1 10s. in respect of the child of whom she is given custody? The order for £1 was challenged, but although, as we have said in *Kinnane v. Kinnane* (6), it is possible for the justices to make an order for the maintenance of the wife on the basis that she has proved the complaint of wilful neglect to maintain the child, I do not think that, on the question of quantum, this order can stand, because the justices have awarded the maximum sum which is now possible under the Married Women (Maintenance) Act, 1949, s. 1 (1), in respect of the maintenance for the child. I think that it is wrong, therefore, that, in addition to that sum, £1 should be ordered in favour of the wife, who has failed in the two complaints in which she is principally concerned. In my opinion, the proper way to deal with the situation is to allow the order for the wife's maintenance to stand for the nominal sum of, say, 1s. a week, which will recognise the facts that she is the complainant, that she is entitled to an order, and that if at any time variation is necessary she will not be barred by the fact that no foundation for variation is laid.

COLLINGWOOD, J.: I agree. In answer to question (iv)

"The justices considered that there was no evidence from either side that after the parting on July 20, 1953, the husband paid the wife any maintenance either in respect of herself or the child."

We were invited to go behind that finding on the strength of an answer given by the wife, according to the note, but in view of the way in which these answers have been elicited, and not overlooking the fact that in the court below the husband gave no evidence on the matter, in my opinion, it is impossible to do so at this stage. By their answer to question (iii)

"The justices considered that the wife left home rather on a consensual basis than because of the words and conduct of her husband and that there was for that reason no constructive desertion",

and they amplify that in their answer to question (iii) (a) by saying

"The justices considered that the wife's evidence showed that the parting was on a friendly basis. The husband also stated that they agreed to separate. The justices accepted this evidence and therefore found that the husband had not constructively deserted the wife."

That being so, and there being evidence to support that finding, clearly the wife was not entitled to maintenance from her husband save in the event of there being an agreement, express or implied, that the husband would maintain her. That is clear from *Baker v. Baker* (3). In answer to question (iii) (b),

"The justices found that there was no agreement, express or implied, that the husband should pay maintenance for the support of the wife and/or the child. They considered that there was no evidence before them which could support a finding that there was such an agreement."

Again, there was evidence to support that finding, and, in my opinion, that would have been the end of the wife's case of wilful neglect to provide reasonable maintenance for her, had there been no question of the maintenance of a child. I put it in that form because it is important to remember what was said by LORD MERRIMAN, P., in *Kinnane v. Kinnane* (6) (ante, p. 1146):

"... I reject the argument that an order cannot be made in favour of the wife for the maintenance of the wife unless it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that, if the only finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that is the law. It may be that the amount which a court thinks reasonable as an award in favour of a wife may depend on whether the neglect has been of the wife or of the children or both, but, in my opinion, the right to make an order is established when the justices are satisfied that any one of the complaints set out in the Act of 1895, s. 4, is proved."

There is an infant child whom, there is no question, the husband is legally liable to maintain. Furthermore, no payments have been made by the husband in respect of that child. I agree that, to prove wilful neglect to maintain, it is not sufficient merely to show that the liability to maintain has not actually been carried out. It is clear from *Jones v. Jones* (7) and a number of cases up to *Morton v. Morton* (2) that wilful neglect imports some element of matrimonial misconduct. The justices have found that the husband has wilfully neglected to maintain the child, and, indeed, the wife. No payment has been made by the husband, and no attempt has been made by him to justify that. It is true there was some reference to a doubt as to paternity, but that was raised, according to him, by the wife herself, whether or not as a taunt to him is not clear, but he never put that forward, as I read the evidence, as in any way exonerating him from liability to maintain the child, and, therefore, in my opinion, there was material on which the justices could find that he had been guilty of wilful neglect in that regard.

The only question that remains, therefore, is the question of quantum. The order was made for £2 10s. The statutory maximum for the order in respect of the child's maintenance is now 30s., and, therefore, I agree that this order should be reduced in the way in which LORD MERRIMAN, P., has suggested.

LORD MERRIMAN, P.: We pointed out [ante, p. 1256] that we would give the justices an opportunity to be heard about costs in view of the waste of public money, both parties being legally aided, owing to the default of the justices. But they have written to say that they did not intend to defy the court, and that they did not realise, owing to a misconception of the rules, that they had to give detailed reasons for their decision. I merely point out that although, perhaps, justices and their clerks are not to be expected to read month by month the law reports, a pointed reference to *Sullivan v. Sullivan* (8) about the duty of justices and their clerks is contained in, inter alia, *STONE'S JUSTICES' MANUAL*, 85th ed., p. 1122, n. However, we do not think it necessary to say any more, although it is owing to the difficulties created by their default that

recourse to a second hearing before us has been occasioned. We do not think it necessary to make any other order as to costs than that both sides shall tax under their certificates.

Appeal allowed.

Solicitors: *Beachcroft & Co.*, agents for *Curwen & Co.*, Workington (for the husband); *Speechly, Mumford & Craig*, agents for *Paisley, Falcon & Highet*, Workington (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re HOUSE PROPERTY AND INVESTMENT CO., LTD.

[CHANCERY DIVISION (Roxburgh, J.), November 9, 10, 11, 12, 13, 1953.]

Company—Winding-up—Voluntary winding-up—Assignment of lease for value—Permitted assignment—Future performance of covenants—Landlord's right to have sufficient assets of company set aside to meet future rent and provide for performance of other covenants.

Where a solvent company, having resolved to be wound-up voluntarily, has assigned for value a lease which is beneficial to the assignee, the assignment being a permitted one, there is no absolute right to have a fund set aside out of the assets of the company to answer its liabilities under its covenants in the lease. The landlord's remedy in such a case is to prove in the winding-up.

James Smith & Sons (Norwood), Ltd. v. Goodman ([1936] Ch. 216), applied. *Elphinstone (Lord) v. Monkland Iron & Coal Co.* (1886) (11 App. Cas. 332), distinguished.

FOR THE COMPANIES ACT, 1948, ss. 302, 316, 317, see HALSBURY'S STATUTES, Second Edn., Vol. 3, pp. 690, 697, 698.

Cases referred to:

- (1) *James Smith & Sons (Norwood), Ltd. v. Goodman*, [1936] Ch. 216; 105 L.J.Ch. 70; 154 L.T. 113; Digest Supp.
- (2) *Elphinstone (Lord) v. Monkland Iron & Coal Co.*, (1886), 11 App. Cas. 332; 10 Digest 1000, 6948.
- (3) *Gooch v. London Banking Assn.*, (1885), 32 Ch.D. 41; 10 Digest 1000, 6947.
- (4) *Hardy v. Fothergill*, (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 4 Digest 250, 2385.
- (5) *Re Panther Lead Co.*, [1896] 1 Ch. 978; 65 L.J.Ch. 499; 10 Digest 935, 6414.
- (6) *Re Midland Coal, Coke & Iron Co., Craig's Claim*, [1895] 1 Ch. 267; 64 L.J.Ch. 279; 71 L.T. 705; 10 Digest 1057, 7391.
- (7) *Ex p. Waters, Re Hoyle*, (1873), 8 Ch. App. 562; 28 L.T. 757; 4 Digest 259, 2453.
- (8) *Metropolis Estates Co., Ltd. v. Wilde*, [1940] 3 All E.R. 522; [1940] 2 K.B. 536; 109 L.J.K.B. 982; 163 L.T. 192; 2nd Digest Supp.
- (9) *Re New Oriental Bank Corpn. (No. 2)*, [1895] 1 Ch. 753; 64 L.J.Ch. 439; sub nom. *Re New Oriental Bank Corpn., Ltd. Ex p. Hong Kong Land Investment & Agency Co., Ltd.*, 72 L.T. 419; 10 Digest 935, 6413.
- (10) *Re London & Colonial Co., Horsey's Claim*, (1868), L.R. 5 Eq. 561; 37 L.J.Ch. 393; 18 L.T. 103; 10 Digest 935, 6411.
- (11) *Re Telegraph Construction Co.*, (1870), L.R. 10 Eq. 384; 22 L.T. 649; sub nom. *Telegraph Construction & Maintenance Co., Ltd. & Reduced, Ex p. Enderby's Trustees*, 39 L.J.Ch. 723; 9 Digest 164, 967.
- (12) *Oppenheimer v. British & Foreign Exchange & Investment Bank*, (1877), 6 Ch.D. 744; 46 L.J.Ch. 882; 37 L.T. 629; 10 Digest 1000, 6946.

ADJOURNED SUMMONS in the voluntary winding-up of a company.

The applicant, Reginald Moses Phillips, was the freeholder of property, known as the Royal Arcade, No. 28, Old Bond Street and 12, Albemarle Street, London, W.1, which comprised fifteen shops, with offices, basement storage place and toilet accommodation for each shop, and first floor showrooms at each end of the arcade. The applicant's title to the property was at all material times an absolute title under the Land Registration Act, 1925.

By a lease (referred to hereinafter as "the lease"), dated Mar. 29, 1933, and made between the applicant, of the first part, certain mortgagees, of the second part, and London Freehold and Leasehold Property Co., Ltd., hereinafter called "the property company", of the third part, in consideration of a premium of £15,000 the applicant, with the consent of the mortgagees, demised the property to the property company for the term of ninety years from Mar. 25, 1933, subject to and with the benefit of the existing leases therein specified, at a yearly rent of £3,500 for the first year, £4,000 for the second year, £4,500 for the third year, and £5,000 for the remainder of the term. The lease contained covenants by the lessee, inter alia, to pay the rent and rates, to repair, to insure, and to leave for registration with the applicant's solicitor every assignment of the demised premises or of the lease within twenty-one days after the execution or date of such assignment. There was a proviso for re-entry in the event of a breach of covenant. After the lease was granted the mortgage was paid off and the property was discharged therefrom.

The property company was a subsidiary of the House Property and Investment Co., Ltd. On Mar. 2, 1936, the property company resolved, by special resolution, that it be wound-up voluntarily, and a liquidator was appointed for the purpose of the winding-up. By an instrument of transfer of lease, dated Mar. 16, 1936, the property comprised in the lease was transferred by the property company and its liquidator to the parent company (referred to hereinafter as "the investment company") for the residue of the term granted by the lease. On July 1, 1937, the applicant, as landlord, made certain claims in the winding-up of the property company in respect of its liability as lessee under the lease, one of the claims being to have a sum set aside which, when invested in consols, would with half-yearly rests be sufficient to produce the rent falling due during the residue of the term of the lease. By cl. 1 of a deed (referred to hereinafter as "the supplemental deed"), dated Feb. 17, 1938, and made between the applicant, of the first part, the property company and its liquidator, of the second part, and the investment company, of the third part, in consideration of the sum of £105 paid by the investment company to the applicant to cover his costs in the matter and of the covenants by the investment company thereafter contained, the applicant withdrew the claim made by him in the winding-up of the property company and released the property company and its liquidator from the covenants and agreements on the part of the property company contained in the lease and all liability thereunder, provided that the release was not to affect the said covenants and agreements so far as they were real covenants and agreements binding on the premises demised by the lease and the persons from time to time possessed thereof, but was only to affect the personal liability of the property company and its liquidator thereunder. Clause 1 also provided that the release was not to prejudice or affect the applicant's right to re-enter on the demised premises for non-payment of the rent reserved by the lease, or for the breach of any of the covenants, agreements, or conditions contained in the lease, except so far as the said covenants and agreements were thereafter modified. By cl. 2, the investment company covenanted with the applicant that, as from Dec. 25, 1937, and during the residue of the term granted by the lease, that company would pay the rent reserved by the lease and perform and observe all the covenants and agreements contained in the lease and on the part of the lessee to be performed and observed, but, as regards the said covenants and agreements, as the same were modified by cl. 4 thereof. The modifications in cl. 4 were not material for the purpose

of the application. By cl. 5 it was provided that the lease should be read in conjunction with the supplemental deed and (as modified by cl. 4) should, as from Dec. 25, 1937, and throughout the residue of the term thereby granted, operate and have effect as between and be binding on the applicant and the investment company, as though the same had originally been entered into between them instead of between the applicant and the property company. The supplemental deed was duly noted on the register at the Land Registry.

A In June, 1951, the investment company delivered to the Registrar of Companies a declaration of solvency under the Companies Act, 1948, s. 283. The declaration showed that its surplus assets, after satisfying all liabilities, were estimated at £2,207,857. On July 19, 1951, the investment company resolved by special resolution that it should be wound-up voluntarily and, by ordinary resolution, that the respondent, Norman Percival Seaton, and the former respondent, the late Henry Morris Parry, be appointed liquidators for the purposes of the winding-up. In the winding-up the investment company sold and assigned its leasehold interest in the demised property to the respondent, David Bluston, the sale being completed on May 7, 1952. The price paid for the assignment was £46,000. The total rents received from the sub-lessees amounted, at the time, to £9,481 10s. On May 13, 1952, notice of the assignment was given to the applicant's solicitors. Since the assignment the respondent, Bluston, had tendered the rent to the applicant's solicitors, but it was not accepted. On receiving a notice from the liquidator to submit a proof, the applicant issued the originating summons whereby he asked, *inter alia*: (i) whether, as the lessor of the demised property under the lease, he was entitled to have sufficient assets of the investment company set aside to meet all future and other rent under the lease and supplemental deed and to provide for the performance of the covenants on the part of the company under the lease and supplemental deed; and (ii) whether the proper amount to be so set aside was £200,000, or any and what other sum. By paras. (v) and (vi) of the summons, he asked for the following relief, in the event of the answer to question (i) being in the negative: (v) that the time for proving in the winding-up of the company in respect of its liabilities under the lease and supplemental deed be extended; (vi) that the liquidator might be directed not to proceed with any distribution in the winding-up of the company pursuant to the Companies (Winding-Up) Rules, 1949, r. 106, pending adjudication on and disposal of the applicant's proof without retaining in hand the sum aforesaid, or some other sum approved by the court, earmarked only for the satisfaction of the applicant's proof. By para. (vii) he asked, in the same event, whether, on the receipt by the Registrar of Companies of the account and either of the returns referred to in the Companies Act, 1948, s. 290 (4), or, alternatively, on the dissolution of the company, the applicant would be entitled to re-enter on the demised property either under the power of re-entry contained in the lease or otherwise (subject nevertheless to any relief against such forfeiture which might be granted to any person by any competent court).

G *Millard Tucker, Q.C., R. J. T. Gibson and R. R. D. Phillips* for the applicant.
Bell, Q.C., and Raymond Walton for the liquidator.
Goff, Q.C., and L. J. M. Smith for the assignee.

H ROXBURGH, J., stated the facts, and continued: The difficult questions that I have to determine at present are solely questions of law. The short point is that, if the House Property and Investment Co., Ltd., which I shall refer to as "the company", is allowed to dissolve, the applicant will lose something of value. That is indisputable. The declaration of solvency, which was filed by the company in June, 1951, showed that its surplus assets, after satisfying all liabilities, were estimated at £2,207,857. In its liquidation the company sold and assigned its leasehold interest in the Royal Arcade to the respondent, David Bluston (whom I shall refer to as "the assignee"). I regard that as a feature of cardinal importance. This is not a case of a lease which was onerous to the

lessee. It was not a lease which any liquidator would want to disclaim, such as are some of the leases in cases which were cited to me. Nor is this a case where the liquidator remains in beneficial occupation, as happened in some of the cases. Nor is it a case where the original lessee remains in possession and is the only person liable on the covenants in the lease. On the contrary, it is a case where the company has assigned the lease for a very substantial consideration. Though no one doubts that the applicant has the benefit of the covenants of the company in liquidation, equally there is no doubt that he cannot get the rent twice over.

[HIS LORDSHIP read the questions asked by the summons, and continued:] The first question is: Has the applicant a right in law or equity to have a fund set aside? If he has, that is an end of the case except as to the amount of the fund. If he has not, then the next question is whether I have jurisdiction to set aside such a fund. If I have not, that would be an end of the point. The third question is: Supposing that the applicant has no absolute right in law or equity to have the fund set aside, but that the court has jurisdiction to set it aside, ought the court to set it aside? If the answer to that question is that it ought to set it aside, then the court would have to proceed to the assessment of what is the actual sum to be set aside, and how it is to be set aside. I want to dispose of some minor matters before I come to the main question. If a fund is to be set aside, I have indicated all the points that arise. If a fund is not to be set aside, the summons asks that the time for proving be extended, and that sufficient sums should be kept in hand until the proof has been finally adjudicated on. As regards those two claims for relief, the liquidator has at no stage raised any opposition, and, therefore, if my decision should be that a fund ought not to be set aside, it follows as a matter of course that questions (v) and (vi) of the summons will be answered in the way in which the applicant seeks to have them answered. Question (vii), however, stands on quite a different footing. There is one difficulty which will make it impossible for me to proceed at this stage, if my answer to the first three questions which I have stated is in the negative. The applicant is not bound to prove. I do not know whether he will prove or not, but his course of action in that regard might have some bearing on the solution of question (vii). I take the view that the assignee is entitled to know what the applicant proposes to do about that before he is called on to defend his position against a claim to re-enter which might compel him to ask for relief. Therefore, it is clear that I cannot proceed today with the questions which arise if my answer to question (i) is in the negative. That is the question which I have to consider, and it is a difficult question and one that has been debated for many years.

James Smith & Sons (Norwood), Ltd. v. Goodman (1), a decision of the Court of Appeal, is the only recent case which has any bearing on my problem. That case is, in some respects, similar to the present one, but it took a course which could not be described as usual, and it has been argued, with great force, that, by reason of the course it took, I ought not to treat it as having the authority which I should have been bound to give it, if it had taken another course. It is also said—and I will return to that question later—that it is unsatisfactory for another reason, namely, that it is at variance with *Lord Elphinstone v. Monkland Iron & Coal Co.* (2), a decision of the House of Lords, and it is possible, though by no means certain, that that decision of the House of Lords was not cited to the Court of Appeal. The facts in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1) were as follows. In September, 1925, certain premises were demised under two leases to a company, and each of the leases contained a personal covenant on the part of the company, as tenants, to pay the rent during the currency of the lease. In January, 1933, notice was given by the company to determine the leases, with the result that they would come to an end at Michaelmas, 1938. In January, 1933, the premises were assigned to another tenant. So far, the only distinction between the facts of that case and those of the present case seem to be that the assignment, in the present case, took place after the

commencement of the liquidation, and, in the earlier case, before the liquidation. I cannot see that that can be a material distinction in law. After that the facts differ from those of the present case. In April, 1933, the company went into voluntary liquidation, and the liquidator distributed the assets without making provision for future rent due under the leases. In an action by the lessors against the liquidator for a declaration that, in distributing the assets without making provision for the liabilities of the company under the two leases, he had acted wrongfully and negligently and in breach of his duty as liquidator, and for damages, the Court of Appeal affirmed the decision of BENNETT, J., that the liability was one which ought to have been admitted to proof by the liquidator under s. 261 of the Companies Act, 1929, and that he had committed a breach of his statutory duty under s. 247 of the Act to pay or provide for the liabilities of the company in not taking steps to have the value of the contingent liability ascertained, and that he was liable in damages to the plaintiffs.

The reference to "contingent liability" leads me to make one observation about a point which counsel for the applicant has stressed, and, if I may say so, rightly stressed. It may be doubted whether the words "contingent liability" which occur in some of the cases are quite an accurate description of the position. In fact, they are not, though it is a convenient phrase. The position, as I understand it, is this. The landlord can recover the rent after an assignment either from the lessee or the assignee, from the lessee because of privity of contract and from the assignee by reason of privity of estate. When I say "assignee", I mean "permitted assignee", and that is not unimportant, as will appear, I think, when I come to deal with the *Elphinstone* case (2). What the position would be if the lease were assigned without consent, I need not explore, because it did not happen in this case, but it is, undoubtedly, true that the position might be different, because, supposing the landlord was objecting to the assignment, then he could not safely accept rent from the assignee without giving up his right to object to the assignment. At least, I should not think that he could, but I have not fully considered the point. Therefore, it does not seem to me to follow that what I am saying about permitted assignments is necessarily true about non-permitted assignments, and I am talking about permitted assignments. There is no doubt in my mind that the landlord is bound to accept the rent from a permitted assignee if he tenders it. He cannot refuse to accept the rent and say that he likes the original lessee's money better. In other words, the tender of the rent discharges the original lessee from that amount of rent. If the assignee does not tender the rent, then it is common knowledge that the landlord can elect whether he will proceed against the original lessee or the assignee or both, but he cannot get the rent more than once. I agree with counsel for the applicant that to call that a "contingent liability" is, perhaps, not accurate, but I must confess that I do not know of any short formula which adequately describes that liability, but a liability it certainly is.

In *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), counsel for the liquidator contended that the lessors had no right to insist on anything being done in regard to their claim before a distribution. That was the point which the liquidator had to establish in order to succeed. The Court of Appeal heard him fully. It is not clear how far they heard the respondents, the lessors. There is a passage in the interlocutory observation by LORD HANWORTH, M.R., which would suggest that they did not hear them at all. I cannot say how far the court had heard the respondents when LORD HANWORTH, M.R., made his interposition, which is in no sense a binding judgment on any court—a fact which has been much pressed on me by counsel for the applicant—but I must read it in order to explain what happened and how the case proceeded. LORD HANWORTH, M.R., said ([1936] Ch. 227):

"We are prepared to hold in your favour that the judgment of BENNETT, J., ought to be affirmed, that the liability was one which was provable in the

course of the liquidation, and which ought to have been admitted to proof by the liquidator, and the liquidator ought to have taken steps to have the value of the contingent liability ascertained, and that therefore there is ground for affirming the judgment of BENNETT, J., who has affirmed the liability against the liquidator and ordered an inquiry as to what is the quantum of that liability. If you want to go further and to say that it is plain, quite apart from what may be revealed in the inquiry, that the amount of the rent ought to have been set aside, we should have to hear you, because we are not prepared to say that the decision in *Gooch v. London Banking Assn.* (3) would apply in all cases and that the liquidator was wrong in not setting aside sufficient assets to provide for the further rent and other liabilities. That would be a possible course; but it is not one which can be affirmed as the necessary right on the part of the landlord. It is a possible protection which could have been granted him, but it should not be taken as an absolute right."

As far as I can see, the liability in that case did not differ one iota from the liability in the present case. In answer to that interposition, junior counsel for the respondents said (*ibid.*):

"I do not think we need carry the matter any further, because MAUGHAM, L.J., put the point that the court in assessing the damages cannot shut its eyes to what has happened in the present case."

That is a point on which that case is markedly distinct from the present one, for in the present case the assignee tendered the rent and it was not accepted, while in that case the assignee did not tender the rent and, as far as I can make out, was not likely to do so. That is the point of the observation by junior counsel.

As I have said, I do not regard the interlocutory observation of LORD HANWORTH, M.R., as in any way binding on anyone, but LORD HANWORTH deals with the matter in his judgment and, in my view, it is not possible to say that it is obiter, and I will give my reason. It was essential for the Court of Appeal to decide that the liquidator had a duty to do something, otherwise the appeal had to be allowed. Therefore, they did decide that he should, at least, have admitted the claim to proof. If that is so, then the setting aside of sufficient assets to provide for the future rent cannot possibly be the only remedy in all circumstances, because that would, *ex hypothesi*, exclude the admission of proof. Therefore, I cannot treat it as obiter, though it is true to say that, as the question of the right to have a fund set aside was not further argued in the circumstances which I have indicated, the case is not nearly so conclusive of the matter as it would have been if the decision had been made after the hearing of full argument on both points.

In his judgment LORD HANWORTH, M.R., said (*ibid.*, 228):

"In my opinion this claim by the landlords against their tenants was clearly a liability in respect of which they could have brought in a proof."

That he says quite clearly. He says it was a contingent liability. I have already made an observation about that phrase, but he goes on (*ibid.*):

"It was a contingent liability, for the assignees might have satisfied the liability for the rent, but it was a right which they had against the company who were their tenants under the demises and who were liable to them under the contract to pay the rent."

That is exactly the present case. LORD HANWORTH, M.R., continued (*ibid.*, 229):

"That being so, if the liquidator had done his duty, he would have seen that a claim was brought in. Now what was the claim? It is suggested that it was one which it was impossible to ascertain, and that under those circumstances it was so contingent that it would not be possible to put a money value upon it. To my mind the dicta in *Hardy v. Fothergill* (4) are

directly contrary to any such suggestion. I need not refer to the various passages which were mentioned in the course of the argument, but LORD SELBORNE, I think, makes it quite plain that there are cases where such contingent debts are capable of valuation. He says (13 App. Cas. 360): 'There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc.; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy. But the present is not a case of that kind. A contract to indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term is, to all intents and purposes, "an obligation or possibility of an obligation to pay money or money's worth" on the breach of any such covenant: it is "an engagement to pay, or capable of resulting in payment of, money or money's worth", if the contingency against which the indemnity is provided should occur. Unless excluded . . . on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this particular liability is not capable of being fairly valued, it is, and must be included in those words.'

D LORD HANWORTH, M.R., then continued (*ibid.*, 230)—and I regard this of great importance:

"It is true, as [counsel for the liquidator] said, the court were there considering words contained in a passage in a statute which does not find its place in the statute that we are considering at the present moment, but it is abundantly plain that LORD SELBORNE in the words which I have rather cursorily referred to intended to indicate that a contingent liability to pay rent was a contingent liability which was capable of being fairly valued. LORD MACNAGHTEN deals with the matter in more precise terms. He says (13 App. Cas. 369): 'It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it, the court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned, and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case.' It appears therefore that there was here a liability under the demise which could have been estimated and was a proper subject for estimation, and since *Hardy v. Fothergill* (4) one must look at such contingent liabilities as provable in a liquidation or in a bankruptcy. ROMER, J., in *Re Panther Lead Co.* (5), said ([1896] 1 Ch. 985): 'Since the decision in *Hardy v. Fothergill* (4) the old cases as to proof by a lessor to a company in liquidation have to be re-considered, as was pointed out by LINDLEY, L.J., in *Re Midland Coal, Coke & Iron Co., Craig's Claim* (6); and certainly it will be the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined'—he makes observations that coincide with what I have said as to *Hardy*

v. *Fothergill* (4)—‘it will be the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present where the lessor is desirous of proving at once for his loss.’ Of course, in some of the cases, as in *Gooch v. London Banking Asscn.* (3), the liability which was said to rest upon the liquidator was that he ought to have set aside sufficient assets to provide for future rent and other liabilities under the lease. That may be so in proper cases, but it does not appear that that course is one which would be followed in all cases, and the liquidator would have the opportunity of going to the court if he was in difficulty as to what ought to be done.”

ROMER, L.J., agreed. MAUGHAM, L.J., said ([1936] Ch. 234):

“There is, in my opinion, no doubt whatever that [the liquidator] was guilty of negligence in not making some provision for the liability of the company under the two leases in question. We have heard a long argument as to what the nature of the provision should have been. For my part I am satisfied that since the decision in *Hardy v. Fothergill* (4) it has been impossible to doubt but that a company in liquidation, and a fortiori a perfectly solvent company in liquidation, is bound to submit to the assessment under the Companies Act of its contingent liability to a landlord in such a case as the present, that is to say, in a case in which the company being the original lessee is no longer interested in the leases. The leases having been assigned to third parties, the question is whether the landlords are entitled, under s. 261 of the Act of 1929, to prove for the debt as one payable on a contingency or to prove as for a claim against the company, ‘present or future, certain or contingent, ascertained or sounding only in damages’, arising by reason of the fact that the company has covenanted to pay the rent to the landlords during the continuance of the leases. I have said that in such a case as the present in my opinion there is no longer any doubt about the right of proof; but I am not forgetting that where the company is itself the tenant at the time of the liquidation considerable difficulty may arise . . . The liquidator may desire to surrender and the lessor may be unwilling to let him do so, or the liquidator may be unwilling to surrender though the lessor may be willing to accept the surrender on terms as to proof or otherwise. Those circumstances do not exist here, and as a matter of fact since the Act of 1929 will less often arise—for under s. 267 of the Act of 1929, there is, what there was not previously to the Act, a right of disclaimer when a company is in liquidation. In my opinion, in the case which we have here, where the company is no longer interested in the leases, there is no very serious difficulty in estimating the amount for which the lessors are entitled to prove; and all the Lords who sat in the important case of *Hardy v. Fothergill* (4) expressed, as I think, opinions which would at any rate cover this comparatively simple case. I will mention that LORD SELBORNE referred to a dictum of MELLISH, L.J., in *Ex p. Waters, Re Hoyle* (7) . . .”

I do not think I need read further from that passage, because it is only dealing with the right to prove, about which MAUGHAM, L.J., said: “. . . in my opinion there is no longer any doubt about the right of proof.” But towards the end of his judgment MAUGHAM, L.J., said (*ibid.*, 235):

“Accordingly in my opinion we have not here to consider whether the course taken in *Gooch’s* case (3) and, I may add, in other cases, of declining to allow the final winding-up of the company and the distribution of all its assets, without making provision for the landlord’s claim under his lease, was the right one. I am content to agree with the view expressed by my brethren that here was a claim which could properly be proved under s. 261 of the [Act of 1929].”

This is a decision binding on me (though I am happy to be bound by it) that a landlord can prove in the liquidation of the original lessee company in respect of the original lessee's original covenants in a lease which has been assigned. In the particular circumstances of the particular case, he proves for the value of the original lessee's covenants the benefit of which he will lose by the original lessee's dissolution; not, of course, for the rent, because, if the assignee duly pays the rent, which he will do if the lease is beneficial, if only to avoid forfeiture, no rent could ever be recovered from the original lessee, and, of course, precisely the same applies to the other covenants. If the premises are duly kept in repair, as they undoubtedly will be by the assignee if the lease is beneficial, if only to avoid forfeiture, then no sum in cash would ever become payable by the original lessee. I certainly do not accept the position that a landlord can refuse rent from, or the performance of the other covenants by the assignee, and at the same time assert a claim against the original lessee. I am not saying this in order to preclude argument as to what may flow from an interim refusal to accept some rent in the present case, but I am dealing with it as a matter of principle to see what the obligation of the original lessee was. It seems to me quite clear that, so far as the particular sum which has been tendered is concerned, the landlord cannot now sue the company in liquidation, and this would apply, in my judgment, to each and every payment of rent, or each and every other covenant, if the assignee had tendered the rent or had been willing to perform the covenants, but had been prevented from so doing by the landlord. In other words, it is not true, in my judgment, that the landlord has a right to elect whether he will accept the rent from one or the other. If it is tendered by the assignee and if he does not accept it, in my judgment he loses all rights in respect of that particular payment of rent. I rather thought that counsel for the applicant was suggesting that the landlord had a complete option in all circumstances in the matter. That view I certainly cannot indorse.

It was agreed between the parties in this case that the sum for which a proof could be lodged is the difference, at the date of valuation, between the market value of this particular lease with the benefit of the original lessee's covenants, and the value of the same lease without the benefit of the original lessee's covenants. But the applicant wants to know whether he is relegated to proof. He says, through his counsel, that he has an absolute right to have a fund set aside. If it is an absolute right, it prevails in all circumstances, that is, whenever a company which is an original lessee has assigned a lease for value and thereafter wants to be dissolved. The applicant will, I am sure, not take it amiss if I say, while entirely acquitting him of any intention to abuse anything or anybody in this case, that that would set a precedent, which, in my judgment, would open the way to intolerable abuses.

Counsel for the liquidator, on the other hand, goes altogether the other way, and I am not prepared to decide in his favour on the grounds which he mainly advanced. I will deal at once with his ingenious point. He first read s. 302 of the Companies Act, 1948, which begins:

“Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding-up . . .”

He pointed out that there is a slight change in phraseology as compared with certain earlier statutes [see s. 186 (1) of the Act of 1908], but I doubt whether the change is entitled to the weight which he sought to place on it. Section 302 runs on:

“ . . . be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.”

It is noticed that the phrase there is “distributed”. Counsel then referred to

s. 365, which provides that the Lord Chancellor may make general rules. Section 365 (2)—and this is the important part of the section—is:

“All rules made under this section shall be judicially noticed and shall have effect as if enacted by this Act.”

Therefore, the rules appear to be given statutory force. It was not contended, and, I think, it probably could not be contended, that any rule of the character which I am about to read is *ultra vires*. A

The Companies (Winding-Up) Rules, 1949 (S.I., 1949, No. 330), r. 106 (1) is as follows:

“Subject to the provisions of the Act, and unless otherwise ordered by the court, the liquidator in any winding-up may from time to time fix a certain day . . . on or before which the creditors of the company are to prove their debts or claims, and to establish any title they may have to priority under s. 319 of the Act, or to be excluded from the benefit of any distribution made before such debts are proved, or as the case may be from objecting to such distribution.” B

It is to be noted that the words used are “or to be excluded”, and not “or be excluded”, and I think that may be the crisis. Counsel for the applicant submitted that the words of that rule do not apply to a claim of the nature which he is putting forward, and that “prove,” in the context, does not mean prove in the ordinary sense. I am disinclined to accept that submission, as will appear from a later part of this judgment. He also submits that the word “distribution” means distribution amongst creditors and does not include a distribution among shareholders. I am disinclined to accept that view, but what he further submits, and what I think is conclusive on this point, is that r. 106 (1) opens with the words: “Subject to the provisions of the Act, and unless otherwise ordered by the court . . .” I take the view, and it is a considered view, that those opening words apply to the whole of r. 106 (1). As I have pointed out, the words are not: “or be excluded”. They are: “or to be excluded”. That is to say, they refer to something that is to be in the notice in which the creditors are called on to prove. The liquidator has to give notice of a date on or before which the creditors are to prove or to be excluded, and I feel no doubt that the whole of that machinery is subject to the opening words: “Subject to the provisions of the Act, and unless otherwise ordered by the court”. I have no doubt that, in such a case as this, the court would invariably make such an order preventing the applicant from being excluded until an interesting point of law which he has raised had been determined by the highest tribunal to which anybody desired to resort, and, therefore, my conclusion is that the rule neither helps nor hinders the applicant. C
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I am well aware of the danger of attaching undue importance to the interlocutory observations of a judge, but they are sometimes helpful, not only in the course of the argument, but for future generations, even though sometimes—and I shall come back to that point—they may not be wholly accurate. It is, however, clear that they are not judgments binding on any future court. In his interlocutory observations in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), LORD HANWORTH, M.R., said ([1936] Ch. 227) that setting aside a fund would be a possible course, and I am certainly not prepared to say that that observation, though interlocutory, is wrong. I think, however, that an occasion for its exercise will seldom, if ever, arise in future. G
H

There have been other changes of relevance in the history of this interesting matter besides the decision in *Hardy v. Fothergill* (4). In *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), MAUGHAM, L.J., pointed ([1936] Ch. 234) to the right of disclaimer, which was new in 1929, long after most of the cases on which counsel for the applicant in the present case relied. Then there is the interesting decision of the Court of Appeal in *Metropolis Estates Co., Ltd. v.*

Wilde (8), to which counsel for the applicant referred, and, though I venture to suggest that he has misconstrued it, it is, I think, an important point in the history of this subject. The position, as I understand it now—and I realise that part of what I am now saying will be only obiter dictum—is really simple. If the liquidator requires beneficial occupation in the sense in which that term is defined by VAUGHAN WILLIAMS, J. ([1895] 1 Ch. 757) in *Re New Oriental Bank Corpn.* (No. 2) (9), i.e., either for his own occupation or so that he can obtain a rent from the premises from a sub-tenant, then he has to pay the rent. There is no question then of any proof or of the setting aside of any fund, and ex hypothesi he cannot close the liquidation while that state of affairs continues. He must somehow get rid of his beneficial occupation before he can close the liquidation. Under the present law what he would do is so obvious that I cannot see how any other position is likely to arise. If the lease is onerous, he will endeavour, probably with success, to disclaim it. If the lease is beneficial, i.e., if there is a value in it, he will, certainly with success, sell it. If my judgment stands in this case, there does not seem likely ever to be in this connection a future occasion for setting aside, but I do not wish to hold that there may not be such a case. I cannot think of one, but one cannot think of everything. The conclusion that I am about to come to is, therefore, that there is no absolute right but that it is a possible course, and, if it is a possible course, I shall have to consider whether it is a proper course in this case.

First, I desire to deal with *Re New Oriental Bank Corpn.* (No. 2) (9) and *Metropolis Estates Co., Ltd. v. Wilde* (8), which are, in my judgment, most important, though I feel that counsel for the applicant, in his argument, misconstrued them. In *Re New Oriental Bank Corpn.* (No. 2) (9), which was decided in 1895, the corporation, the original lessee, took possession of certain premises and paid the rent until May, 1892, but on June 23, 1892, it passed an extraordinary resolution in favour of voluntary winding-up, and on July 5, 1892, an order was made continuing the voluntary winding-up under supervision. The corporation was insolvent. The liquidator remained in possession of the premises and paid the rent until October, 1893, when he gave up possession and handed the keys of the premises to the lessors' agents, but, inasmuch as no agreement could be arrived at as to the terms on which the corporation should be free from further liability under the lease, possession was only accepted without prejudice to the rights of the lessors in respect of the future liabilities of the corporation under the lease. It is to be noted that that was a case in which there was no assignment. Indeed, I think it is true to say, with one possible exception, that in all the cases except *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), there was no assignment in the sense which is material in the present case. *Re New Oriental Bank Corpn.* (No. 2) (9) is a case in which, presumably, a disclaimer would have been made under the present law, but that was not possible in 1895. The crisis of the judgment, in my opinion, is in these words of VAUGHAN WILLIAMS, J. ([1895] 1 Ch. 757):

“In my judgment, if a company which is in liquidation remains in beneficial occupation of a lease—that is to say, if it occupies the demised premises, or takes the rent, and thus obtains the benefit of the lease . . .”

—that, if I may say so, is the signification in which I use the phrase “beneficial occupation” in this judgment—

“the court ought to do its very best to make the company pay the rent in full, and not merely a dividend.”

To that principle no exception can, in my judgment, possibly be taken, and that, in my judgment, is the principle which was applied in the *Metropolis Estates* case (8), to which I am going to refer next. Unfortunately, an inaccurate expression was used by VAUGHAN WILLIAMS, J., in an interlocutory observation, as his judgment, in which he said exactly what he did mean, shows. In the course of argument he said (*ibid.*, 756): “If a lease is subsisting when the lessee is

adjudicated a bankrupt, how can the lessor prove immediately?" Of course, he did not mean it quite like that, because, if he had meant that, he could not have gone on to say (*ibid.*): "He cannot have both the rent and possession". In his interlocutory observation he overlooked the fact that a lease would still be subsisting if it had been assigned for value. Of course, no one can say that it is not still subsisting, but it is certain from the context that the judge had no intention whatever of uttering a dictum by way of interlocutory observation about a position which did not arise in that case, namely, the position where there had been an assignment for value. Unfortunately, that is perpetuated in the judgment of the Court of Appeal in *Metropolis Estates Co., Ltd. v. Wilde* (8), because LUXMOORE, L.J., who delivered the judgment of the court, took his citation from the interlocutory observation and not from the body of the judgment.

In *Metropolis Estates Co., Ltd. v. Wilde* (8) the facts were as follows. On Dec. 9, 1935, the defendant, Wilde, took a lease of a flat for a term of seven years, from Dec. 25, 1935, at a yearly rent of £200, payable quarterly in advance. On Jan. 10, 1936, he was adjudicated bankrupt, and the official receiver was appointed the trustee in the bankruptcy. The defendant did not disclose to the official receiver his interest under the lease of 1935 and, therefore, no steps were taken to disclaim that interest. On June 30, 1937, he obtained his discharge from bankruptcy. On Oct. 27, 1939, the lessors instituted an action in the King's Bench Division against the defendant, claiming £50 in respect of one quarter's rent due in advance on Sept. 29, 1939, under the lease. On Feb. 2, 1940, the official receiver, without obtaining the leave of the court, purported to disclaim the defendant's interest under the lease. The Court of Appeal affirmed the decision of the Common Serjeant that the defendant's liability to the lessors remained unaffected, because they could not prove in bankruptcy for future rents, and, that being so, his discharge from bankruptcy had no effect with regard to future rents under the lease. The Court of Appeal also held that there had been no valid disclaimer of the lease, because the trustee in bankruptcy had not complied with the provisions of the Bankruptcy Act, 1914, s. 54 (3), in regard to getting the leave of the court. That is important because, again, the matter could not have arisen but for the invalidity of the purported disclaimer. If the trustee had validly disclaimed, then, of course, the case could never have been brought. In that case—unlike a company case—the legal estate of the bankrupt vested in the trustee, the bankrupt remained in beneficial occupation, and neither the trustee nor the bankrupt could be heard to say that there had been an assignment of the premises for value. Therefore, I can find nothing surprising in the decision itself, but it seems to me clear from the judgment as a whole that the court intended to apply the principle enunciated in the judgment in the *New Oriental Bank* case (9) and not the principle enunciated in certain words in the interlocutory observation of VAUGHAN WILLIAMS, J., though the court did not use the phrase "beneficial occupation", but used the phrase, "existing lease". LUXMOORE, L.J., said ([1940] 3 All E.R. 526):

"The fallacy in this argument is that the premise on which it is based—namely, that the lessors were entitled to prove in Wilde's bankruptcy for all future rent under the lease—is without foundation, for, where a lessor is seeking to prove against a bankrupt lessee's estate in respect of an existing lease, he can only prove for the arrears of rent due and the breaches of covenant which have taken place up to the time of proof: *Re New Oriental Bank Corpn. (No. 2)* (9)."

In my judgment, the court had picked up the phrase "existing lease" from the interlocutory observation of VAUGHAN WILLIAMS, J. ([1895] 1 Ch. 756), in *Re New Oriental Bank Corpn. (No. 2)* (9), but they were intending to apply the doctrine enunciated in the judgment in that case, which, of course, has no application to a case where there has been an assignment of the lease for value. I stress

A the word "value", because I am not considering what would be the position if there was an assignment to a man of straw. No one has ventured to suggest that the assignee in the present case is a man of straw. What I have said may or may not apply to an assignment to a man of straw, but that is not the case which I am considering. I am quite certain in my own mind that the Court of Appeal in the *Metropolis Estates* case (8) never intended to express any opinion whatever about the quite different problem with which I am confronted. It is, undoubtedly, true that a practice grew up of setting aside a fund in certain analogous cases, though, strangely enough, no case has been cited to me which bears any real resemblance on its facts to the present case, the nearest being *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), in the Court of Appeal in 1936.

B This practice was clearly explained by LINDLEY, L.J., in the judgment of the court in *Re Midland Coal, Coke & Iron Co., Craig's Claim* (6), and I cannot do better than read what he said on the point, as it is a summary of the position as it then existed and it ends with an important warning. The facts were as follows. Craig, the lessee of certain mines, assigned his leases to a company which covenanted to indemnify him against liability thereunder. The company went into liquidation, and a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870, was adopted and approved by the court for forming a new company which should take over the assets and liabilities of the old company, and should pay or satisfy the unsecured creditors of the old company within three months of the approval of the scheme by the court. After the new company was incorporated, the lessee applied in the liquidation to have a sum provided to meet his contingent liability for rents, royalties, and breaches of covenant. LINDLEY, L.J., delivering the judgment of the Court of Appeal, said ([1895] 1 Ch. 275):

"First, as regards Mr. Craig's rights against the old company, apart from the scheme."

E After reading s. 158 of the Companies Act, 1862, which corresponds, for the present purposes, with s. 316 of the Act of 1948, he said (*ibid.*):

F "Notwithstanding the very comprehensive language of this section, GIFFARD, L.J., when Vice-Chancellor, decided in *Horsey's Claim* (10) that, as it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant, he was not entitled to prove against a limited company being wound-up and to receive a dividend on his proof, and this view prevailed until a comparatively recent date."

I may say that that view is no longer possible, because the Court of Appeal in 1936, in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), decided finally, so far as I am concerned, against that view. *Re London & Colonial Co., Horsey's Claim* (10), so far as it is based on this ground, is no longer law in this court. LINDLEY, L.J., went on to say (*ibid.*):

"But after the decision of the House of Lords in the case of *Hardy v. Fothergill* (4), which must be considered in connection with s. 10 of the Judicature Act, 1875 [see now s. 317 of the Companies Act, 1948], it is difficult, if not impossible, to say that Mr. Craig could not have had his claim valued and have proved for its value against the old company. Mr. Craig, however, does not really want to do this. What he wants is to enter a claim with a view to have assets of the old company set apart for his indemnity before they are divided amongst the shareholders; or, if he is not in time for that, he asks that the old company may not be formally dissolved so long as he is exposed to liability under his covenants. He bases his claim in this respect on certain decisions in which a lessor of a limited company being wound up or applying for leave to reduce its capital has been held entitled to enter a claim for the amount of rent and royalties which may become due to him in future, and to

an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment. The cases in which orders to this effect have been made are: *Re Telegraph Construction Co.* (11), *Oppenheimer v. British & Foreign Exchange & Investment Bank* (12), *Gooch v. London Banking Asscn.* (3), and *Lord Elphinstone v. Monkland Iron & Coal Co.* (2). The last of these cases was in the House of Lords, and the House made an order in favour of the lessor of a limited company which was being wound up voluntarily, and declared that the lessee company was bound to fulfil its future obligations under its lease, and that the liquidators were bound to make due provision for fulfilling such obligations and to set aside assets of the company in their hands for that purpose. It is true that this was a Scottish case, and a case between lessor and lessee; but we see no reason to suppose that there is any difference between English and Scottish law in this respect."

I must confess that that sentence has caused me some embarrassment, because I am going to suggest that there are important differences. I can hardly think that this passage could be regarded as anything more than an obiter dictum at that point. The *Elphinstone* case (2) is, indeed, the sheet anchor of counsel for the applicant, and I propose later to make a minute analysis of it. LINDLEY, L.J., went on to say (*ibid.*, 276)—and with this, if I may say so, I am wholeheartedly in sympathy:

"The effect, however, of the decision in *Hardy v. Fothergill* (4) on the right of a lessor to have the assets of a limited company which is being wound up impounded has not yet been judicially determined. The English decisions in favour of his right to enter a claim and have assets impounded to meet it have all proceeded upon the view that the lessor could not prove for any ascertainable sum and be paid a dividend upon it, and on some future occasion those decisions will have to be reconsidered."

Pausing there, so far as my researches have gone that statement, which is, of course, obiter, is wholly accurate. It follows that if the cases were all based on a premise which the Court of Appeal, as a matter of decision, held to be wrong—and the premise has been, as a matter of decision, held to be wrong—then a judge of first instance is not impertinent if he looks anew even at things which have been said in the House of Lords, because, if the whole basis of one court's decision is declared by another court, in a decision which is binding on me, to be false, it is not unreasonable to think that the conclusions derived from the false premise may well be open to legitimate question.

I want to make another point at this stage. In what sense are decisions of the House of Lords binding? They are absolutely binding on every court, including, I think, themselves, in regard to the matter on which the decision is given, or any matter which is not distinguishable. Normally, however, they have a much wider importance. It often becomes material to consider whether a decision of the House of Lords should be applied in a case which can be distinguished, but is analogous. Normally, in such a case a judge hesitates long before disregarding a proposition stated in a speech in the House of Lords. But I think that that normal rule ceases to operate when the basis on which all the earlier law was founded has been destroyed, first, indirectly in *Hardy v. Fothergill* (4), and, later, positively by the decision of the Court of Appeal in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), and when there have been such important changes in the whole situation, such as, for instance, the right of disclaimer, which had no application whatever to facts in the days when these broad pronouncements were being enunciated. I think I have spoken with respect to the highest tribunal in these matters, but I must go into this question, because there is, undoubtedly, difficulty in the decision of the House of Lords in *Lord Elphinstone v. Monkland Iron & Coal Co.* (2), and it is, undoubtedly, true that, if nothing had happened since, I should have felt, though it is easily distinguishable, that

I ought to apply it on the footing that this was an analogous case. But unless it is indistinguishable, I do not think, in view of what has happened since, that I ought to apply it in an analogous case. I have stressed that, because the position is precisely stated in *Craig's Claim* (6) by LINDLEY, L.J.

Another preliminary question is: What is the duty of a judge when he is confronted with a series of decisions which are difficult to reconcile? In my judgment, it depends. If there is a decision which cannot be distinguished from the case before him, even if it is a decision of a judge of first instance, a fortiori, of course, if it is a decision of the Court of Appeal or the House of Lords, he ought to apply it, expressing, may be, his doubts whether it is still good law, but leaving a superior tribunal to overrule it. Suppose there had been a case, either before or after *Hardy v. Fothergill* (4), in which a fund had been set aside in favour of a landlord out of the assets of an original covenantor when the lease had been sold for a large sum of money, and in which the jeopardy of the landlord, though not to be treated as of peppercorn value, ought certainly to be capable of being estimated for proof. I must be careful to say nothing to jeopardise the valuation which may come hereafter, but no one could say that in the present case there is any real jeopardy. If there were any reported case of that kind, decided, either at first instance, or by the Court of Appeal or House of Lords, I should have considered it my duty to follow it and to give such encouragement as I could to the liquidator to go to the Court of Appeal. But that is not the position. No case has been brought to my attention which is really indistinguishable from the present case. There are analogous cases in abundance, and, that being so, I think that it is my duty to endeavour to apply the principles which can best be extracted from the reported decisions as a whole, having in mind what has been said repeatedly about the bearing of *Hardy v. Fothergill* (4) on the problem, and may I add once more, the bearing of the right of disclaimer.

I would like to refer to two of these earlier cases. I agree that they are only two of quite a number. The first one to consider is *Oppenheimer v. British & Foreign Exchange & Investment Bank* (12). That case shows the danger of dealing with this type of case by analogy. In that case a banking company, which was registered under the Companies Act, 1862, obtained demises of premises from the plaintiff and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding-up of the company, though it was not insolvent. The headnote reads:

"A question having arisen as to plaintiff's claim for the future rent, he brought an action for an injunction to restrain the distribution of the assets until the liability of the company had been provided for:—Held, that the lessor was entitled to have a sum set apart which, when invested in consols, would, with half yearly rests, be sufficient to produce the amount of the rent."

There it is quite plain that there was no assignment of any kind. In support of his conclusion SIR CHARLES HALL, V.-C., said (6 Ch.D. 746):

"The question which has arisen is a very important one no doubt, but I am more embarrassed by the expressions which are to be found in the judgments of the cases which have been referred to than by any great difficulty in this case."

That is certainly true here. After reading s. 158 of the Companies Act, 1862, which is similar to s. 316 of the Act of 1948, he said (*ibid.*, 747):

"It seems to me that rent is a sum which does bear a certain value, therefore the latter branch of the section is applicable only where the claim is incapable of bearing a certain value. Rent is not payable as a debt or a claim subject to a contingency; and because there is another remedy for payment, viz., by distress, its value is not made less certain. It appears to me, therefore, that the plaintiff is entitled to claim for the full amount, and to have a

sum provided to meet it, less only such a sum as, when the whole has been set apart and invested, and is yielding income, will be necessary to make up the full amount."

SIR CHARLES HALL, V.-C., was talking about the position between a lessor and an original lessee who had not assigned the lease, and, whether or not his observations on that topic, which are the foundation of his judgment, would be accepted today, they are, plainly, quite inappropriate to a case where there has been an assignment for value. Thus, there is an analogous case in which the ratio decidendi is wholly inappropriate to the present case. I think that is an illustration of the danger of proceeding by analogy in this case.

The second case is *Gooch v. London Banking Assocn.* (3), to which the head-note is:

"An injunction was granted, on motion by the lessor, to restrain a company in voluntary liquidation from distributing assets among its shareholders without setting aside sufficient assets to provide for future rent and other liabilities under a lease."

This case, which was shortly before *Hardy v. Fothergill* (4), went to appeal, but the appeal was compromised before judgment. I rather think, though counsel for the liquidator doubted it, that, if it had not been compromised, the Court of Appeal would have affirmed the decision of the court below. Here I invoke the submission of counsel for the applicant. Though there are some interlocutory observations of considerable strength during the argument in the Court of Appeal, these are not binding, because there was no judgment, and, having regard to what LORD HANWORTH, M.R., and MAUGHAM, L.J., said in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), I do not think it at all likely that the Court of Appeal would make similar interlocutory interjections in the circumstances of today. So there, again, the case, though it is analogous, has this important difference that it is not one in which there had been an assignment for value. That difference, I think, is most important, having regard to the choice which now seems to me to be envisaged by the general policy of the Companies Act. It seems to me plain that it is intended, and deliberately intended, by Parliament that the liquidator should do one of the three things to which I have already referred. The cases to which I have been referred seem to me to be mainly concerned with the position of the liquidator when he is either in beneficial occupation or unable to assign the lease, there being in those days no right of disclaimer, and the lease being in its nature onerous.

Now I come to what is, undoubtedly, the sheet anchor of counsel for the applicant. Am I bound by *Lord Elphinstone v. Monkland Iron & Coal Co.* (2)? If it decides the point before me—in other words, if I cannot distinguish that case from the present case—I conceive myself to be bound by it. If, on the other hand, I can distinguish it, as I think I can, ought I to follow some of the things that were said in the course of the speeches? I must look into this case with some care. LORD WATSON said (11 App. Cas. 336):

"According to the law of Scotland the assignation of his lease by a tenant, who has power to assign, has the effect of making the assignee sole tenant from the time he attains possession of the subject of the lease, and of discharging the cedent [the assignor] from future liability to the landlord. When the tenant has no power to assign, the unqualified acceptance of the assignee by the landlord, whether express or implied, has the same effect."

I emphasise the word "sole" in the phrase "sole tenant", as that is important. I have read that passage at the opening of my analysis of this case because we are here considering that branch of the law of Scotland which corresponds to the English branch of law relating to assignments without the consent of the landlord. That is quite clear, and it is also quite clear that the two laws are different, which is important. The *Elphinstone* case (2) related to an agricultural lease of

November, 1870, of which the respondents were the assignees and the appellant was the landlord, and to a minute of agreement, dated 1877 and containing thirteen articles of contract, which related to the deposit of mineral refuse on the appellant's land, and to which the respondents were original parties. The case in the court below also related to four other deeds, but the case in the House of Lords related only to the two which I have specifically mentioned. LORD WATSON said (*ibid.*, 334):

A "The affairs of the respondent company became embarrassed; and, at an extraordinary meeting held on May 30, 1881, it was resolved that the company should be wound-up voluntarily, and the respondents, William Mackinnon and Nathaniel Spens, were appointed liquidators. On Aug. 9, 1881, the liquidators sold, by public roup [i.e., auction] the whole property and assets of the company, heritable and movable, including the company's right and interest in the leases and agreements . . . to a gentleman, who subsequently declared that he made the purchase on behalf of a new company, then in course of formation, which was incorporated and registered in September, 1881, as the Monkland Iron Company, Limited. In December, 1881, the respondents executed two formal assignments [i.e., assignments] transferring and making over their whole rights and interests, as tenants or otherwise, and their whole obligations and liabilities, under the six deeds of lease and agreement already specified, to the new company."

The importance of this case is that there was a purported assignment. I put in the word "purported" for reasons which will appear later. LORD WATSON went on to say (*ibid.*):

D "On July 1, 1881, the appellant lodged a claim in the liquidation, in which he insisted upon the liability of the respondent company to fulfil all the obligations and liabilities already incurred, or to become prestable to him under these six deeds. The liquidators gave no deliverance upon the claim, but proceeded to pay the creditors of the company; and after settling all claims of debt (other than the appellant's) a considerable sum remained in their hands at the time when this action was raised [i.e., begun] on Oct. 29, 1883. Between September, 1881, and October, 1883, there was a good deal of correspondence between the appellant's agents on the one hand, and the respondents and the new company on the other, as to the terms upon which the appellant should recognise the new company as having right by assignation to the leases and agreements in question."

F I stress that. The point was that the landlord was saying that the assignees were not entitled as against him to be treated as the tenants, and the old company was saying that they were. That, I should have thought, was a question which was, by its very nature, peculiar to Scots law. LORD WATSON continued (*ibid.*):

G "These negotiations terminated with an assertion on the part of the respondents and the new company that the respondents had absolute power to assign, and that the appellant had not the option to give or withhold recognition of the new company as tenants in lieu and stead of the respondent company; and the present action was brought in consequence of an intimation made by the liquidators on Oct. 4, 1883, to the effect that, if no proceedings were taken to interpel them before the 31st of that month, they would distribute the surplus assets among the shareholders of the company. The leading conclusions of the appellant's summons are for declarator that the respondent company are still liable to fulfil the whole obligations and liabilities attaching to them under the contracts assigned to the new company . . ."

H—in other words that there had been no assignment which was binding on the landlord—

" . . . and that the liquidators are bound to set aside the whole or so

much of the surplus assets as may be required to meet such obligations and liabilities as they become due and prestable. These conclusions are founded upon the allegation that the respondents had no power to assign so as to make the new company the appellant's debtors in these obligations and liabilities without his consent."

That was the issue that was joined and the question was whether the original lessees were liable and the assignees not liable, or whether the assignees were liable and the original lessees not liable. In other words, it was a question which, as far as I know, could not possibly arise in England unless—and I must say this—it arose in some case in England in which there had been an assignment without a licence when a licence was required. I do not wish to pursue that question because the law is not the same in England and Scotland, and what would happen in such a case is quite irrelevant to the present case. There was no argument on the question whether, if the old company was solely liable, a fund would have to be set aside. I hardly think that there could have been any argument as the law stood in 1886. If the assignment was valid, *ex hypothesi* the old company would cease to be liable altogether. LORD WATSON made that quite plain, and, therefore, it is simply one more in the line of cases where there was no assignment for value, and it differs from those to which I have referred only in that it was a decision of the House of Lords. I regard the case as no authority whatever on what the position would have been if the decision had been that both the old company and the new company were liable.

The case proceeded on the two deeds which I have specifically mentioned. LORD WATSON said (11 App. Cas. 335);

"The lord ordinary (LEE), on Mar. 22, 1884, gave the appellant decree in terms of the declaratory conclusions. The case was then carried by reclaiming note to the Second Division of the court, who, on Oct. 30, 1884, allowed the parties a proof before answer of their respective averments. The learned judges, at the same time, decided that four of the contracts specified in the summons, viz., the mineral lease of March, 1836, the minute of April, 1853, the mill lands tack of December, 1855, and the agreement of November, 1862, were in terms assignable, and had been lawfully assigned by the respondents. Against that decision, which was given effect to in the subsequent interlocutor of May 27, 1885, no appeal has been taken. The proof allowed was led on Dec. 2, 1884, before one of the judges of the Division."

I, therefore, take it that, the assignments in those four cases being held to be binding on the landlord, the old company ceased to be liable, and there was no question, I assume, of setting anything aside. LORD WATSON then went on to say (*ibid.*):

"The case, which was then confined to the agricultural lease of November, 1870, and the minute of August and November, 1877, was again heard along with the proof; and by interlocutor of May 27, 1885, their Lordships recalled the interlocutor of the lord ordinary and dismissed the action. LORD YOUNG, in whose opinion the other judges concurred, was inclined to think that the appellant had accepted the new company as assignees of the contracts embodied in the lease of 1870 and agreement of 1877, and that he could not therefore take action against the respondents."

That is certainly right if the appellant had accepted the new company as assignees. Then comes what is really the important passage:

"But, inasmuch as he was of opinion that no present debt or liability to the appellant under either of these contracts had been averred or proved, his Lordship preferred to abstain from deciding the point, and to leave the appellant to prefer his claims in the liquidation. His Lordship also expressed

the opinion that the circumstances of the case did not justify the appellant in resorting to an extraordinary remedy for his security."

I am not quite sure what is meant by "extraordinary remedy for his security". I expect it means that he, the appellant, ought to try to prove and see what happened, and that to try to get the company interpellated was an extraordinary remedy. The important point is that, if he was able to prove, or to do anything, it could only be because the original lessee, i.e., the respondent company was solely liable. There was no question of the respondent company and the assignee both being liable. That was not possible under the law of Scotland. Therefore, if the appellant had lodged a proof, it would have been on the footing that the assignment was invalid as against him or not binding on him, and, if it was not binding on him, then he could not look to the assignee for anything. To do that would have gravely prejudiced his position, because it would have involved recognising the very assignment which he was disputing. Therefore, he could only look to the respondent company so long as he was contending that the assignment was not binding on him, and, therefore, his proof would have been on the footing that the original lessee or the intermediate lessee—because there is a difference between the two contracts—was solely liable.

It was that phrase in LORD YOUNG's judgment that the circumstances of the case "did not justify the appellant in resorting to an extraordinary remedy for his security" which evoked the important passage in LORD WATSON's speech on which counsel for the applicant relied. LORD WATSON said (*ibid.*, 336):

"I cannot assent to the propriety of the course taken by the learned judges in dismissing the action, and leaving the appellant to renew his claims in the liquidation. The appellant had preferred a claim in the liquidation more than two years before the action was instituted. He had, during the interval, made repeated endeavours to get the liquidators to dispose of the claim, which they declined to do, and ultimately recommended him to take judicial proceedings. It was, in my opinion, inexpedient to send back the appellant, with his claim, to the liquidators, four years after it had been submitted to them. If they had again declined to entertain it, or if they had adjudicated upon it, in accordance with the pleas they now maintain, the appellant would have been under the necessity of raising a fresh action, with conclusions substantially the same with those he now insists in, for the purpose of enforcing what he conceives to be his legal rights. When a limited company is in course of being wound-up voluntarily, I do not think a creditor, who is asserting future or even contingent claims against the company, can justly be said to resort to an extraordinary remedy when he seeks to have the liquidators judicially interpellated from dividing the surplus assets among the shareholders without making any provision to meet his claims when they shall arise."

In my view, LORD WATSON is there referring to the phrase used by LORD YOUNG in the context in which it was used and in the circumstances in which it was used, and I do not understand him to say that it is an absolute right of every future or contingent creditor to have a fund set aside without any regard to the circumstances. I do not think he said that. But, if he had said it, it would be obiter, and, in my judgment, for the reasons that I have given already, it is an obiter dictum which I should not be willing to adopt.

The only thing that was decided in that case was that, where there was no assignee liable, a fund should be set aside. When I say "assignee", I am not treating the intermediate lessee as an assignee. I think the same applies to what LORD HERSCHELL, L.C., said (*ibid.*, 344):

"I cannot think that the learned judges in the court below were right in dismissing the action. If any liability to the appellant existed on the part of the respondent company . . ."

—and I would interpolate a sentence: “it was the the sole liability of the respondent company”—

“he was entitled to have provision made for it by the liquidators before the assets of the company were distributed among the shareholders.”

I think that the interpolation which I have made is consistent with the sense and reasoning of the case, and I think that is all that LORD HERSCHELL, L.C., meant. But if he meant anything more, then, again, it is plainly obiter dictum, and I cannot possibly agree, with all respect to the suggestion made obiter in the judgment of the Court of Appeal in *Craig's Claim* (6), that it is not possible to differentiate the *Elphinstone* case (2) from other cases. To my mind, the difference in the law—the circumstance that either the original lessee or the assignee is liable, but both are not liable—is a fundamental difference which may lead to different conclusions. I have no knowledge of what view would be taken in Scots law now of the *Elphinstone* case (2), because the introduction of the disclaimer and *Hardy v. Fothergill* (4) are binding in Scotland as well as in England, as the company law applies with minor modifications to both countries. I think that for the reasons which I have given I ought not to regard the *Elphinstone* case (2) as having any decisive effect in the law of England on the point which I have to determine.

Therefore, I find no absolute rule, that, when there has been an assignment for value, a landlord is entitled as of right to have a fund set aside out of the assets of a company, which is an original lessee and which proposes to be dissolved, to answer its liability under covenants in a lease, and I go further. I think that in present circumstances, particularly in the present state of the authorities and owing to the introduction of the right of disclaimer, it is very unlikely that any setting aside would be made in any future case, though I do not rule out that possibility. Ought I, then, to make any such provision in the present case? It will not be forgotten that the rent under the lease is £5,000. The rack rent is over £9,000. The lease was so far from being onerous that the liquidator realised £46,000 on its sale. Looking at this case in isolation, it would be wrong to belittle the applicant's contention that, where the property is large and valuable and the rent high (though it is only a little more than half the rack rent), it might be a case in which something ought to be done for him in the way of setting a fund aside. I want to make it clear that I am dealing, not with any question of what he ought to be able to prove, but whether or not a fund ought to be set aside. The fund would in no conceivable circumstance, in my view, be or approximate to £200,000, but I am not going to go further than that. That amount seems to me to be, if I may say so, wholly unreasonable in the circumstances of this case. But I do not suggest that some provision by way of setting aside a fund would be unreasonable in this particular case, if I were to deal with the matter in isolation, but I cannot. In exercising my discretion, if I have one, I have to consider what the general effect of any such procedure might be, because I emphasise that, so far as I am aware, this has never been done before where there has been an assignment for value. It is a remarkable feature that, even when the liability stood as it did before 1877, so far as I know this had never been done in the case of an assignment for value. To start such a practice, when an assignor's liability has reached the position laid down in the Court of Appeal in 1936 in *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), would be to take a step which requires great circumspection in relation to its bearing on other cases.

If this practice began, where would it stop? Suppose that the rack rent was twenty times the ground rent, or suppose, for example, that it was a true ground rent. (In the present case, it may not be a true ground rent. It may be that the value of the site devoid from buildings is not £5,000 per annum. If it is not, it is not what I call a true ground rent, it is more than a ground rent. Equally plainly, it is not a true rack rent, that is to say, a full rent for the land and the

buildings.) Take the man who has a true ground rent and whose ground rent may be covered several times over? Is he to have a fund, and, if not, why not? If the landlord is entitled to a fund where the lease has seventy years still to run, what about the case where the lease has ninety-nine years to run? Or where it has 999 years to run? Where would it stop? There is no different principle, though, of course, there is a difference in degree. If once this doctrine were incorporated in our law, it would lend itself, not in this case, but in cases which would arise, to terrible abuse. It would put a person who was entitled to some quite nominal rent for a very long period of years in a position to exact preposterous sums of money from a company which wanted to go into liquidation. I want to make it plain, as I said before, that I am not dealing with the present case. I am considering what the result might be in other cases if I accede to this application, and I am bound to refer to these matters because I have to consider other cases if I am going to lay down a new practice. It is, as far as I know, a new practice that counsel for the applicant is asking me to lay down. I think that, if the full implications of what he asks me to do are realised, anybody must resilé from it.

Secondly, I would like to refer again to s. 302 of the Act of 1948 for a different purpose. The section provides:

“ Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding-up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.”

It is the right of a company to wind itself up even though it is not insolvent. It is a statutory right: [see s. 278 (1) of the Act of 1948]. It is part of the policy of the law of England, and it is one manifestation of that wide branch of the law which abhors perpetuity. That, to me, is a feature of the greatest importance. Of course, a liquidator is not to distribute the property among the members before he has dealt with the liabilities. That is plain enough. But I am certain that, though it does not say so in express terms, the policy of the Act, as expressed in s. 302, carries the implication that he has to deal with the liabilities finally within a reasonable time, and thereafter to distribute amongst the members within a reasonable time. I imply those words in s. 302 from the general policy of the Act. Parliament cannot have contemplated liquidations lasting for 999 years. Where is the line to be drawn? Of course, what is reasonable must vary according to the circumstances of the company. In some cases the time required to complete the winding-up may be very long and still be reasonable, but, in my view, the policy of the Act would abhor an arrangement under which a winding-up could not be completed for seventy years because the liquidator had to administer, for the benefit of a landlord, a fund created out of the assets of the company, which was the original lessee, when the lease had been assigned for value and was beneficial to the assignee, and the landlord, presumably, would be delighted to accept a surrender at any moment and the chance of any claim against the original lessee ever becoming a live claim for actual money was almost as remote as it could be. The rack rent might, instead of being nearly twice as much, be twenty times as much.

It was submitted by counsel for the applicant that my fears are not warranted, that the liquidator could sell the reversionary interest in the fund. I have no doubt that he could sell it for something, but for what could he sell it? People do not usually like buying a property which is dependent on a contingency which will not be finally determined for seventy years, even though the contingency is remote. In other words, it is what conveyancers used to call a serious blot on the title. I do not believe that the reversionary interest in such a fund could be sold except at a sacrificial price. It is, however, a pure question of fact, and I may be wrong in my belief. No evidence was given that it could be sold at a

reasonable price, and in the absence of evidence I shall not presume that it could. Therefore, from that point of view, it would put the company in a position of having to sacrifice a large sum of money to purchase the right to go into liquidation which the Act of Parliament confers on it. And there is another matter. The company has a statutory right to put itself out of a position to fulfil its future obligations. That position is now plainly visualised by s. 316 and s. 317 of the Act of 1948. In a sense, of course—and this has been, naturally, much stressed—the company, by dissolving itself, is breaking its contract as lessee, but it is entitled to break it provided that the Act is complied with when it breaks it. In other words, it is entitled to dissolve itself in accordance with the provisions of the Act and, in particular, s. 316 and s. 317. A

What the applicant is saying is: "Well, if you cannot comply with the letter of your bond, you must give me a better bond." What right has he to say that? It is agreed that he is entitled to have compensation, but why should he have a better bond than the bond that he has already? In other words, why should he capitalise the circumstance that the company wants to do what it has a statutory right to do, namely, to go into liquidation? I am going to explain that, because, in this particular case, it is not very obvious that he is capitalising the situation. Indeed, he may not in the particular circumstances of this case be capitalising it at all, for the reason that this was a very prosperous company and had very large assets on its liquidation. What I wish to point out is that I am dealing here with a question of instituting a new practice, and, if this practice applies to this rich company, why should it not also apply to a company which is just above the line of solvency, a company which has no credit, or very little credit, but yet has enough to pay off its creditors in the end and allow a small division among its shareholders? I want very much to stress this. I have been asked to institute a new practice. Consider a company which is just above the border-line of solvency. What is the value of its obligations as an original lessee? I suggest none. In the present case, the rack rent is nearly double the rent of the property which has been assigned. In those circumstances, what would be the value of the covenants of an almost insolvent original lessee? I should have thought none. There is no security for the lessor vis-à-vis the original lessee company, while it is a going concern. Vis-à-vis the assignee, of course, the security, in the business sense, though not in the legal sense, is the property, and a very real security it is in the business sense. But vis-à-vis the original lessee there is no security because ex hypothesi it is a permitted assignment and the estate has passed away from the original lessee. Therefore, the landlord has no security, and the unsecured covenant of an original lessee would, in my opinion, be of no importance whatever in a case of that sort. I know that is not the present case, but I am thinking of the practice that I am being asked to establish. What should I then have to do? Consider how solvent the company ought to be before a fund is established? I think anybody would agree that in that case a fund would never be set up. Where am I to draw the line in the principle between solvent and insolvent companies? Is the court to carry out an elaborate investigation into the value of the company's covenants in order to decide, and then speculate as to what would be a just sum to set aside in the circumstances? It is this sort of reflection which leads me to say that in no circumstances would I set aside £200,000. If I ever started the practice, which I am not going to do, though other courts may, the question how much the fund should be would always have to be a question of the facts of the particular case. I would never set aside a fund which would cover all the rent in a case in which it was unlikely that there would ever be a claim on the fund. But what principle I should adopt in settling how much the fund ought to be I have not the remotest idea. I have not, of course, dealt with any figures, and I am not now dealing with any figures, but it is the difficulties which would arise if I did introduce this practice which are weighing with me. B C D E F G H

A For the reasons which I have given, I decline to order the setting aside of any fund. There is no doubt, and it has been admitted throughout this case, that the applicant can prove in the winding-up if he so desires. That is plain on the authority of *James Smith & Sons (Norwood), Ltd. v. Goodman* (1), and counsel for the liquidator has never questioned it. Whether he has any other remedy against the company, I do not know. The summons does not ask. It asks, first, that he may have a fund set aside. That I refuse. It asks that he may have leave to prove and that the winding-up should not be completed until he has done so. He has had an opportunity of proving, and that has not been resisted. I do not know whether he has any other remedy. Insurance is often a solution of this kind of problem, but both sides agree that in this case it is not a solution because nobody will underwrite such a long-standing affair, though the risk may not be much. That has some bearing on the question to which I referred, viz., what the value of the reversionary interest might be. But, if he has no other remedy against the company, I shall not be shocked. It seems to me plainly the policy of the Act that in such a case the applicant should prove. It is quite plain that he can prove, but whether he can do anything else or not the future only can tell.

Order accordingly.

C Solicitors: *Rider, Heaton, Meredith & Mills* (for the applicant); *Slaughter & May* (for the liquidator); *Julius White & Bywaters* (for the assignee).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

D *Re* HILLIER. HILLIER AND ANOTHER *v.* ATTORNEY-GENERAL AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), November 6, 10, 1953.]

E *Charity—Benefit to community—Public and charitable purpose—Appeal for funds for erection and maintenance of voluntary hospital in certain area—Failure of object of appeal—General charitable intention—Trusts affecting funds.*

F In 1938 a council known as the S. Bucks. and E. Berks. Voluntary Hospital Council was formed, its immediate purpose being to raise funds for (1) the extension of the accommodation of the existing King Edward VII hospital at Windsor and (2) the erection and maintenance of a new voluntary hospital at Slough. In the same year the Slough Hospital Committee was formed with the special object of furthering the purpose of erecting this new hospital, and under a trust deed dated Oct. 28, 1938, three trustees known as the Slough hospital trustees were appointed to be trustees of the committee's property. In 1939 the council published an appeal in the form of a brochure containing articles advocating the voluntary hospital movement, emphasising the need for the extension of hospital services in the area, explaining the work of the council, and stressing the need for financial assistance. It further referred to the need for and intention to build a voluntary hospital at Slough and the way in which the council hoped to improve existing services at King Edward VII hospital. Prospective donors were told that they could give either to the extension fund of King Edward VII hospital or toward the erection of the Slough hospital, and that they could earmark their subscriptions for either purpose. A pocket to the brochure contained printed forms to be used by intending donors. The first (document 1) read as follows: "I have pleasure in enclosing remittance value (blank) in respect of contribution as below". Then followed three columns, one marked "Capital donation", the second marked "Maintenance donation", and the third marked "Annual subscription", each column setting out the same three alternatives, viz., "Council's discretion; Windsor hospital; or Slough hospital". The second form (document 2) read as follows: "South

Bucks. and East Berks. Voluntary Hospitals Council Deed of Covenant. I (blank) of (blank) do hereby covenant to pay to the secretary for the time being of the . . . council . . . yearly during the period of seven years . . . [certain] sums . . . ” Then the following alternatives were set out, viz., “(a) such hospital . . . in South Bucks. and/or East Berks. as the council may from time to time nominate on my . . . behalf. (b) King Edward VII hospital at Windsor. (c) The Slough hospital at Slough. (d) The (blank) hospital at (blank)”, and a note requested the intending covenantor to delete those alternatives which he did not desire to benefit. The appeal met with general support. Under document 2, £14,000 expressly allocated to the Slough hospital was received, and some £1,500 was received but not expressly allocated. £14,000 expressly allocated to the Slough hospital and £4,000 not expressly allocated was subscribed under document 1. Further funds were raised by means of whist drives, dances, collecting boxes and the like. The court accepted that as a result of the passing of the National Health Service Act, 1946, it had become impracticable to carry out the charitable purpose of building a voluntary hospital at Slough. On the question on what trusts the investments representing the subscriptions were held by the Slough hospital trustees,

HELD: (i) on the true construction of documents 1 and 2 read in the light of the appeal, of which the whole object was to raise funds for a voluntary hospital, it was the clear intention of the donors that their subscriptions should be applied toward the erection and maintenance of what was essentially a voluntary hospital and not a hospital to be maintained by the State, and, since that purpose had become impossible, the object for which the subscriptions had been raised had become wholly impracticable and had failed.

(ii) where a donor, in exercising the option given him by documents 1 and 2, had indicated a desire to benefit the Slough hospital, it was impossible to infer any general charitable intention, and, therefore, in respect of the sums subscribed specifically to the Slough hospital, there was a resulting trust to the donors.

Re Welsh Hospital (Netley) Fund ([1921] 1 Ch. 655) and *Re North Devon & West Somerset Relief Fund Trusts* (ante, p. 1032), distinguished.

(iii) the failure of one among a number of charitable objects did not bring a charitable gift to an end, and, therefore, although the building of the Slough hospital could not be carried out, the gifts in respect of the application of which a discretion had been given by the donor to the council continued to be held on various charitable trusts and could be applied at the discretion of the council among the existing hospitals in the South Buckinghamshire and East Berkshire area.

HELD, further, that moneys collected by means of whist drives, dances, collecting boxes and the like could not have been intended by the donors to be returned when the immediate object of the collection had failed (*Re Welsh Hospital (Netley) Fund* ([1921] 1 Ch. 655), followed), but, quare, whether the funds could be applied cy-près on the footing that there was a general charitable intention, or whether they became bona vacantia.

AS TO CHARITABLE INTENTION, see HALSBURY, Simonds Edn., Vol. 4, p. 267, para. 562; and FOR CASES, see DIGEST, Vol. 8, pp. 291-297, Nos. 686-740.

Cases referred to:

- (1) *Re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1; 78 L.J.Ch. 562; 100 L.T. 423; 8 Digest 291, 690.
- (2) *Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655; 90 L.J.Ch. 276; 124 L.T. 787; 8 Digest 349, 1444.
- (3) *Re British Red Cross Balkan Fund*, [1914] 2 Ch. 419; 84 L.J.Ch. 79; 111 L.T. 1069; 25 Digest 526, 180.

(4) *Re North Devon & West Somerset Relief Fund Trusts*, ante, p. 1032.

(5) *Re Wilson*, [1913] 1 Ch. 314; 82 L.J.Ch. 161; 108 L.T. 321; 8 Digest 313, 948.

A ADJOURNED SUMMONS to determine, inter alia, whether the properties, investments and moneys donated and subscribed and held by the plaintiff, Sir Arthur Noel Mobbs, as surviving trustee under a declaration of trust dated May 25, 1946, setting out the said properties, investments and moneys, were still held on charitable trusts, and, if so, that if proper it should be determined what such trusts were or whether any charitable trust formerly affecting the same had failed, and, if so, whether any donors or subscribers were entitled to repayment of the amounts given or subscribed by them.

B The following statement of the facts is taken from the judgment. In 1938 and 1939 an appeal was launched for subscriptions for the improvement of hospital services in the South Buckinghamshire and East Berkshire area, and, in particular, for the provision of a hospital at Slough. The appeal met with general support, and the subscriptions received by way of donations and deeds of covenant made by donors to make annual payments for a period of seven years amounted, with income tax recovered, to about £14,000, apart from sums that were earmarked, C under a special provision for King Edward VII hospital at Windsor. In 1938 a council was formed, under the title of the South Bucks. and East Berks. Voluntary Hospital Council, of which Sir Arthur Noel Mobbs, one of the plaintiffs, was chairman. The objects of that council were to develop to the greatest possible extent the efficiency of hospital services in South Bucks. and East Berks., and the immediate purpose was to raise funds for two objects, the first being the extension D of the accommodation of Windsor hospital, and the second the building and equipment of a new hospital at Slough. In the same year a committee of the council was formed under the title of the Slough Hospital Committee, with the special object of furthering the purpose of the erection of the new hospital at Slough. On Oct. 28, 1938, Mr. Edward Thomas Bowyer, Mr. William Augustus Hillier and Sir Arthur Noel Mobbs were appointed trustees for the property E of the committee under a trust deed. This body of trustees has been generally referred to as "The Slough Hospital Trustees". Mr. Bowyer had died before, and Mr. Hillier had died since, the issue of the summons, leaving Sir Arthur Noel Mobbs as the sole trustee.

F In 1939 the council issued a brochure which appealed for donations and subscriptions for the purposes mentioned above. This brochure was headed: "Windsor, Slough and Associated Hospitals", and it contained on the fly-leaf an extract from a speech of Lord Horder made at Liverpool in November, 1938, viz.:

G "I believe that the voluntary hospital is as essential to this country's well-being today as ever it was. It still stands as a fortress of teaching, of research, and of efficient treatment; and as a centre where the spirit of medicine can live in freedom, owing no allegiance to political doctrine or State expediency",

and at the foot of the page it read:

"We commend these words to the residents of South Bucks. and East Berks."

H The next page was headed, "The South Bucks. and East Berks. Voluntary Hospitals Council", and the second paragraph read:

"Our voluntary hospital system is the envy of the world. The truly British characteristic of making provision, without force, for those in need of medical care is worthy of preservation. Without adequate finance the work of the honorary surgeons and physicians cannot go on. It is hoped that all will play their part in helping us to attain the objects that are detailed in the following pages. This booklet is intended to explain the

work of the council and to make residents in this district individually conscious of the value of the voluntary hospitals."

On the next page there was set out the membership of the council, and on p. 3 there were the following words:

"With your assistance the hospitals council hope to accomplish the following."

Then followed a paragraph headed: "King Edward VII Hospital, Windsor", and a number of improvements that it was desired to effect to that hospital are set out. Next there was a paragraph headed: "The Slough Hospital", which reads as follows:

"The rapid industrial growth of Slough has thrown a heavy extra burden upon King Edward VII Hospital. The population has doubled in recent years and is still rapidly growing. To relieve the established hospital and to provide this industrial area with a hospital near at hand it has been decided to erect a new building at Slough on a site already purchased. The hospital, which will have sixty beds at its commencement, will be worked in close co-operation with King Edward VII hospital, and will supply a further urgently necessary addition to the hospital services of the whole area. £45,000 is the estimated cost of the new hospital, and it will cost approximately £13,000 per annum to maintain. The smaller hospitals in the area also require your help. £47,000 has already been promised. Please help us with your gift."

On p. 4 there is a quotation from the Right Honourable John Burns when President of the Board of Trade:

"The voluntary hospitals had saved in the course of a single generation a population equal to that of London or Australia."

On p. 7 these words were used:

"You can help the council by: A donation to the extension fund of King Edward VII Hospital, Windsor, or the building of the Slough hospital. An annual subscription towards the maintenance of hospital services in the area . . . You can earmark your help for either of the hospitals, although you may send it to the council."

At p. 8 there was a further commendation of the voluntary hospital system, and, finally, on p. 12 there was an extract from the Sankey report on the future of the voluntary hospitals.

A pocket to the brochure contained forms for the use of those intending to subscribe to the movement which were addressed to the South Bucks. and East Berks. Voluntary Hospitals Council. The first reads:

"I have pleasure in enclosing remittance value (blank) in respect of contribution as below: Capital donation [and three alternatives were set out, viz.] Council's discretion; Windsor hospital; Slough hospital".

There was a column for a maintenance donation with the same three alternatives, and another column for an annual subscription with the same three alternatives. A space was left for the name and address, and then followed a note: "This form should accompany the donation and be sent to" and then followed the address of the South Bucks. and East Berks. Voluntary Hospitals Council. That document is referred to in the judgment as document 1. Another enclosed form dealt with the endowment or maintenance of beds and cots, and again an alternative was given between donating a sum to the Windsor hospital or to the Slough hospital.

Another printed enclosure was a form of seven years' covenant, which was in these terms:

"South Bucks. and East Berks. Voluntary Hospitals Council. Deed of

A covenant. I/We (blank) of (blank) do hereby covenant to pay to the secretary for the time being of the South Bucks. and East Berks. Voluntary Hospitals Council of 18a Mackenzie Street, Slough, Bucks, or other their address for the time being, yearly during the period of seven years from the (blank) day of (blank) 19 (blank) or during my/our life (whichever period shall be the shorter) such a sum as will after deduction of income tax at the standard rate for the time being in force leave in the hands of the said secretary a net yearly sum of (blank) such sums to be paid on the (blank) day of (blank) in every year commencing in the year 19 (blank) and to be paid out of my/our general fund of taxed income and to be deemed to accrue from day to day. All such sums shall be received and applied in such proportions as the council shall direct on my/our behalf for the augmentation of the income of the following."

B Then certain alternatives were set out, against which there was a note that the person entering into the covenant should delete those alternatives which he did not desire to benefit. There were four alternatives, viz.,

C " (a) Such hospital or hospitals in South Bucks. and/or East Berks. as the council may from time to time nominate on my/our behalf. (b) King Edward VII Hospital at Windsor. (c) The Slough hospital at Slough. (d) The (blank) hospital at (blank) ".

The covenant is referred to in the judgment as document 2. During the argument it appeared that these covenants were also used for capital gifts under seven years' covenants, and presumably intending donors altered the words "augmentation of the income" to "augmentation of the capital".

D In addition to those methods of raising money, other methods were employed, such as appeals through the Press, and personal applications for donations and subscriptions. Moneys were also collected by local clubs and committees, and by whist drives, flag days, collecting boxes, dances and similar means.

E In 1939 a site of some ten and a half acres was purchased in Stoke Road, Slough, at a cost of £6,000, and it was conveyed to the Slough hospital trustees, it then being thought that that site would be appropriate for the erection of the intended Slough hospital. In 1940 a new council was formed, called the Bucks. and East Berks. Divisional Hospitals Council, and the funds which had been received by the old council were transferred to, and the activities of the old council were merged in, the divisional council. The divisional council received a large number of subscriptions which had not been expressly allocated by the subscribers to any particular hospital, but which were left to be applied at the discretion of the council, that being one of the modes indicated in both documents 1 and 2. In 1942 those unallocated contributions were transferred to the Slough hospital trustees. In 1946 a trust deed was drawn up whereby the then trustees (that is to say, Mr. Bowyer, Mr. Hillier and Sir Arthur Noel Mobbs) declared themselves trustees of the funds set out in the schedule to the trust deed, the object of the trust deed being to define the property which was then held by the trustees. After the war, it was realised that the property which had been purchased in Slough was too small for the proposed hospital. It was, moreover, urgently required by the Berks. County Council as a site for the erection of a school in Slough. Accordingly, the site was sold, at a profit, for £7,750. Shortly afterwards, in 1948, the trustees purchased another property at a total cost of £30,000 known as Wexham Park, a large house and seventy acres of land in the neighbourhood of Slough outside the town, which was intended as a site for a hospital. The National Health Service Act, 1946, came into force on July 5, 1948, and since that date the house was, in fact, let and became a revenue-producing unit. In 1949 the trustees purchased a tithe farm property for £11,730, which was also let as a revenue-producing asset. The second property, Wexham Park, was let at a full rack rent to provide a nurses' home for the Canadian hospital at Taplow, which was an ordinary hospital operating under the National

Health Service Act, 1946. It had been built by the Canadian army authorities in the war of 1939-45, and was handed over by them for use as an ordinary hospital at the conclusion of hostilities. The smaller property was let by the trustees at a full rack rent and was used as a clinic run by the Slough Estates.

There was before the court a schedule of the sums collected by the various means above mentioned including, inter alia, the following: (a) £14,000 of capital, collected under the seven-years covenants, which had been specifically allocated to the Slough hospital by the covenantors; (b) a little less than £1,500 collected and not allocated. Another schedule showed the amounts subscribed, the sums which had been expressly allocated to the Slough hospital, which amounted to £14,000, appearing in one column, and those sums which had been left to the council's discretion, amounting to £4,000, in another column. The schedule contained not merely gifts made under document 1, but other gifts made by means of whist drives, dances, concerts and the like, and there also appeared an amount produced by collections taken on Good Friday, and sent by the Bishop of Buckingham.

J. L. Arnold for the plaintiffs, the trustees of the funds.

Denys B. Buckley for the Attorney-General, the first defendant.

Peter Foster for the Official Solicitor representing the donors and subscribers.

UPJOHN, J., stated the facts and continued: I am concerned with two questions. The first is, whether it has become impossible or impracticable to carry out the purpose, which is admittedly charitable, of building a hospital at Slough, and, if so, on what trusts are the investments representing the subscriptions now held. Before dealing with those questions in detail, it may be convenient to deal with one matter quite shortly, namely, the amounts that were subscribed either under document 1 or document 2 where the council was given a discretion by the donor as to the application of the gift among hospitals in the South Bucks. and East Berks. area. In my judgment, no difficulty arises on that matter, for assuming, without for the moment deciding, that the project of erecting a hospital at Slough has become impracticable, there remain other hospitals in the area which are capable of benefiting from the donation and are proper objects of the discretion given by the donor to the council, which the council can, therefore, still exercise in relation to them. In other words, when the whole object of the donation is clearly a charitable one, the failure of one object among a number does not bring the charitable gift to an end. The other objects remain capable of being attained. That cannot possibly be affected by the fact that in 1942 the divisional council in fact handed over all the unallocated funds to the Slough hospital trustees, because, assuming that it has become impracticable to build a hospital at Slough, it means merely that that allocation has failed in its purpose, and, therefore, the divisional council must make some other allocation of those funds. Therefore, I need say no more about the funds which are not expressly allocated. They are plainly held on valid charitable trusts, and can be applied at the discretion of the divisional council among the existing hospitals in South Bucks. or East Berks. Nor does any question arise with regard to the sums which were specially directed to be given to the Windsor hospital. Those funds have already been handed over to the appropriate management committee. I am, therefore, concerned, and concerned only, with those sums which were specifically directed to be given to the Slough hospital under document 1 or document 2, or in the other modes that I have mentioned.

The facts as to the practicability of erecting and maintaining a hospital at Slough are to be found in para. 23 of Sir Arthur Noel Mobbs' affidavit. [His LORDSHIP referred to the evidence:] I accept as proved as a fact that it would now be quite impracticable for a voluntary body of persons to undertake the erection and maintenance of a voluntary hospital in the Slough area, but it is equally proved that not only is it possible, but it is contemplated that a new hospital will be erected in the Slough area by the Ministry of Health,

and that work is, of course, as much a charitable work as is the erection of a voluntary hospital, because the provision of a hospital does not cease to be charitable because it is provided by the State. That, however, does not determine the question. The question (which is one of construction of documents 1 and 2) is whether the donors intended their gifts to be applied in the erection of what was essentially to be a voluntary hospital, or in a hospital however erected and maintained. Both documents 1 and 2 speak merely of the Slough hospital, and, taking that alone, I should see nothing to exclude the application of gifts given in those terms to a hospital to be erected by the Ministry of Health. I must, however, look at these documents as a whole, and I must read them in the light of the appeal. I note in particular that both documents 1 and 2 are headed: "The South Bucks. and East Berks. Voluntary Hospitals Council." The covenant in the case of the seven years' covenants is, indeed, with that council, but that is not conclusive of the matter, because the council is only in the position of a trustee. Nevertheless, it is, I think, some indication of the parties' intention. When I read these covenants in the light of the appeal, it seems to me reasonably clear that donors who signed document 1 or document 2 were quite plainly contemplating that their subscription would be used, and used only, for the provision, erection and maintenance of a voluntary hospital. The whole tenor of the appeal was directed to the necessity for voluntary hospitals, and, in particular, for a voluntary hospital at Slough, and, in my judgment, the whole object of the appeal was to gain funds for a voluntary hospital there.

Accordingly, in my judgment, on the true construction of documents 1 and 2 the donors intended that their subscriptions should be applied in the erection and maintenance of what was essentially to be a voluntary hospital, and not a hospital to be maintained by the State, which at the time when these subscriptions were given was not in the contemplation of any party. I, therefore, reach the conclusion that the object or the purpose for which these donations were made has become impracticable.

That gives rise to the second question. The purpose having become impracticable, I have to decide on what trusts these sums and the investments now representing them are held. I will deal in the first place with sums contributed through the medium of documents 1 and 2. The question is whether there is a resulting trust for the donors, the purpose of the donation having failed, or whether a general charitable intention can be inferred so that, although it has become impracticable to build a voluntary hospital at Slough, nevertheless the donors intended that there was to be a general charitable intention in favour of hospitals existing in the area of South Bucks. and East Berks. Apart altogether from authority, I should have thought that the answer was reasonably clear. When a donor is given the option of applying a donation at the discretion of the council among hospitals in the area, or directing that it shall go to the Windsor hospital or to the Slough hospital or, in the case of document 2, to some other hospital in the area, and when, exercising the option given to him by these documents, he is careful enough to exercise it in favour of the Slough hospital, and that purpose fails, I should have thought that, as a matter of principle, and, as I say, apart altogether from authority, it was impossible to infer any general charitable intention to benefit hospitals generally in that area, for he has, by deleting the paragraph giving the council that discretion, negatived any such intention on his part. Therefore, I should have thought that that gift having failed to take effect, there was a resulting trust for the donor.

The case is not unlike that of *Re University of London Medical Sciences Institute Fund* (1), although that case is not in any sense a decision on this matter. In that case the testator bequeathed a legacy of £25,000 to the Institute of Medical Sciences Fund of the University of London. That scheme was abandoned, and the question was whether on the true construction of the will there was a general charitable intention. JOYCE, J., in giving judgment said ([1909] 2 Ch. 4):

"As to the return of subscriptions or donations no serious question was or could be raised. But with reference to the legacy given by Mr. Beit's will it has been suggested on behalf of the Attorney-General that the money had been definitely devoted to a charitable purpose, and ought, therefore, to be applied *cy-près*, the object to which it was originally devoted having failed. I cannot accede to that suggestion. There is not one word in the will upon which to found the theory of the testator having any general charitable intent, or any intention to contribute to any general or other purpose of charity save only the particular scheme of the projected institute."

Speaking for myself, as a matter of construction of these documents I should come to the clear conclusion that there was a resulting trust to the donors, but it is said that there are two authorities binding on me, which compel me to come to a different conclusion. The first of those authorities is *Re Welsh Hospital (Netley) Fund* (2). The headnote is as follows:

"On the outbreak of the war a hospital was erected at Netley, and equipped and run during the war, for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. In 1919 the hospital was closed, the staff disbanded, and the property sold to the War Office, and after winding-up the affairs of the hospital there was a surplus of some £9,000:—Held, on the evidence, that there was not a resulting trust of the surplus for the subscribers to the hospital, but a general charitable intention for sick and wounded Welshmen which enabled the court to apply the fund *cy-près*. *Re British Red Cross Balkan Fund* (3) [1914] 2 Ch. 419 distinguished."

P. O. LAWRENCE, J., in his judgment set out the terms of the appeal, for in that case, as in the next case to which I must refer, the question was one of construction of the appeal, because it was only in relation to the appeal that the intention of the donors could be ascertained. The learned judge said ([1921] 1 Ch. 660):

"The fund was created by contributions from various sources and in varying amounts, partly by donations from private individuals of more or less substantial amounts, and partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales. So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked. They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end. In the result I hold that although all the contributions were in the first instance made for

the particular purpose of building, equipping and maintaining the Welsh hospital at Netley, the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen, and that all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen."

A Before dealing with that case it will, I think, be convenient to refer to the second authority, the very recent case of *Re North Devon & West Somerset Relief Fund Trusts* (4). In that case floods due to torrential rain in north Devon and west Somerset caused loss of life and great damage to property in the area. A relief fund was opened by an appeal in the following terms:

B "We invite not only the people of the west country, but everyone who has known and loved Lynmouth and the quiet villages of north Devon and west Somerset, which have suffered so grievously in this disaster, to contribute to a fund for the relief of all who have suffered . . . Many holiday-makers . . . have suffered grievously. These need help every bit as much as our own people, and for that reason we do ask the whole country to support this fund . . ."

C A large sum was collected, and it was expected that a considerable surplus would remain after all proper claims under the appeal had been met. WYNN-PARRY, J., held, first, that the trusts of the fund were valid charitable trusts; and, secondly, that the appeal disclosed a general charitable intention and that the surplus assets could be applied cy-près. I am concerned in this case only with the second point that was decided by WYNN-PARRY, J. After referring to the well-known judgment of PARKER, J., in *Re Wilson* (5), he said (ante, p. 1036):

E "It is to be observed that in that case the court had to construe a will, the instrument by which a single donor had made the disposition which gave rise to the question. A number of authorities were cited to me, and most of them, I think it is true to say, arose substantially in that way. I have to deal with a very different type of case, a case in which I have to discover the intention of many hundreds—it may be thousands—of donors, and the only document that I have to assist me is not a document brought into existence by any one of those donors, but by those who invited them to become donors."

F He then referred to *Re Welsh Hospital (Netley) Fund* (2), quoted the passage which I have already read, and said (ante, p. 1038):

G "It appears to me, on careful consideration, that it is impossible to draw a distinction of any substance between the facts of that case and the facts of the present case. It appears to me not in the least decisive that there is a reference in the appeal to persons other than local residents who suffered distress by the disaster. The main underlying object of that appeal was to benefit the people of the district in question. The appeal proceeds in this case, as it did in the case of the Welsh hospital, by emphasising what in the Welsh case was called the immediate object, but which might quite easily in either case have been treated, on a strict construction of the appeal, as the only object. In *Re Welsh Hospital (Netley) Fund* (2) P. O. LAWRENCE, J., found no difficulty in drawing the conclusion, for the reasons which he gives, that there was a more extended object than might be said at first sight to appear on the face of the appeal; and when I apply his reasoning to the appeal in question in this case, I feel driven to exactly the same conclusion, namely, that there was a general charitable intent. All the reasons which militated in the mind of P. O. LAWRENCE, J., to the conclusion to which he came are present in this case. I, therefore, find it impossible to distinguish that case from this case. In those circumstances, it appears to me to be unnecessary to travel through the rest of the authorities. I need only say

that I find nothing in the judgment of P. O. LAWRENCE, J., which is in any way inconsistent with the passage from the judgment of PARKER, J., in *Re Wilson* (5) which I have read. It is true that the latter case was not apparently cited to P. O. LAWRENCE, J., but, no doubt, that learned judge was well aware of its existence. Indeed, the judgment of PARKER, J., in *Re Wilson* (5) did no more than state the effect of the authorities as it then existed; nor do I find anything in the later cases which carries the matter further. So far as I am aware, no adverse comment has ever been passed on the decision or judgment of P. O. LAWRENCE, J., in *Re Welsh Hospital (Netley) Fund* (2). I regard it as authority binding on me and as covering this case."

If I thought that the *Netley* case (2) or the *North Devon* case (4) covered this case I would loyally follow them, but, in my judgment, they do not. The problem that I have to consider is very different from that before P. O. LAWRENCE and WYNN-PARRY, JJ. They had to consider the true construction of broadly phrased appeals and they were able to come to the conclusion that on the true construction of the documents that were respectively before them it was right to find that there was a general charitable intention which would take effect when the primary object had been fulfilled. In coming to that conclusion, P. O. LAWRENCE, J., felt that he had some assistance from a consideration of the fact that contributors must have known that in carrying out the object their moneys would become mingled with moneys from other sources which had been given out and out by contributors. That fact assisted the learned judge in coming to the conclusion that, on the true construction of the appeal before him, the real or the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen.

As I have said, I have a very different problem to consider. I have not in documents 1 and 2 appeals by the appeal committee or council, although I must, of course, read documents 1 and 2 in the light of the appeal in response to which those documents were executed. The primary question is what is the intention of each donor? That is to be ascertained from the document which each has signed. For the reasons that I have already given, I can find no general charitable intention in the document. Therefore, I do not derive assistance from the two cases to which I have just referred where altogether different documents were being considered. There is another matter which appears to me to distinguish this case from the cases that I have just mentioned. In this case there has been an initial failure of the charitable trusts because it has now proved to be impracticable to build a voluntary hospital at Slough. The cases before P. O. LAWRENCE and WYNN-PARRY, JJ., were cases where the primary object had been fully carried out. In the one case, *Re Welsh Hospital (Netley) Fund* (2), apparently, a profit was made on the sale of property, and in the other case, *Re North Devon & West Somerset Relief Fund Trusts* (4), the response to the subscriptions was such that the committee which was administering the fund had more money than they could properly dispose of. Those seem to me to be very different from the present case. I can well understand, following the reasoning of P. O. LAWRENCE, J., the position that would arise if a donor were asked at the time of making his gift: "Supposing that the charitable purpose is fully carried out and supposing that unexpectedly there is a surplus when that primary purpose has been achieved, what do you want done with your money? You must remember that it will be mixed with other donations the donors of which we cannot trace." It may be proper, in such circumstances, as a matter of law to impute to the donor an intention that the surplus should be devoted to other charitable purposes, or, at all events, the inevitable mixture of donations may assist in coming to a conclusion on the construction of the appeals that that is what the donor must have intended when dealing with a surplus after the charitable purpose for which he sent his contribution has been wholly achieved. But, supposing that a donor

is asked at the time of making his gift: "What do you want done if this charitable purpose cannot be carried into effect at all?" In my judgment, it becomes quite impossible to assume that the answer, having regard to the terms of documents 1 and 2, must be: "Give the money for some other charitable purpose." It appears to me to be an irrelevant consideration to tell him at the time: "Remember that some of the other contributions that we shall receive will come from donors whom we cannot trace because they will come through collecting boxes, dances, whist drives, and so on." The trustees have in their hands, unapplied to the charitable purpose—for that charitable purpose has never come into effect—all the sums originally subscribed or investments representing the same. Therefore, the conclusion that I reach is that, on the true construction of documents 1 and 2, there is in the events which have happened a resulting trust for the donors.

That leaves two further classes which I must briefly mention. Some contributors may have contributed not on the terms of documents 1 and 2, but by letter. It is, of course, a question depending on each letter or document which came from a donor whether the donor was giving his donation for a specific purpose or whether he indicated a general charitable intention. I do not think that I can deal in greater detail with that class for none of the letters is before me. There remains the class of donations raised through whist drives and the like where it is impossible to trace the donors. With regard to that class I respectfully agree with the observations of P. O. LAWRENCE, J. ([1921] 1 Ch. 660), that it is inconceivable that any person paying for a concert ticket, or placing a coin in a collecting box that was presented to him, should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given, or the collection was made, had been achieved and shown a surplus. That must, I think, be so even where the original object was never achieved for the simple reason that the circumstances in which the money was given negatived the idea that the donor ever intended that he should receive any of that money back. That, however, in my judgment, does not conclude the matter. The donor has no further interest in the money because he has given it out and out, but where there is an initial failure of the charitable purpose it seems to me to be an open matter whether you can infer a general charitable intention or the property is *bona vacantia*. That question has not been argued before me and, indeed, the Crown has not been joined with regard to it. It may be that the Crown will not desire to argue the point, but I do not desire to pre-judge that question in any way. All that I can do is to declare that the original donors of that class no longer have any interest in the money subscribed or contributed by them and the investments now representing the same.

Declarations accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *Treasury Solicitor*; *Official Solicitor*.

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

Re WHICHELOW (*deceased*). BRADSHAW AND OTHERS *v.*
ORPEN AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), November 24, 1953.]

Trust and Trustee—Shares in limited company—Control by beneficiaries—Exercise of voting rights—All beneficiaries not before court—Absence of presumption that females past child-bearing age.

By her will, a testatrix, inter alia, bequeathed on trust for each of her three daughters for life, a block of ordinary shares in a limited company with remainder to the children respectively of those three daughters. At the date of the present proceedings, the three daughters were aged sixty-one, fifty-eight and fifty-two years respectively and their children had all attained the age of twenty-one. Certain resolutions had been proposed for the annual general meeting of the company and the daughters and their children claiming that they were the only persons entitled to a beneficial interest in the shares directed the trustees as to the manner in which they should vote in respect of the resolutions. The trustees refused to accept the direction. On a motion for an order that the trustees be directed to vote in accordance with the directions of the daughters and their children and for an injunction restraining them from voting otherwise,

HELD: it could not be said that all the beneficiaries were before the court or that the trustees had received a direction from all the persons beneficially entitled to the shares, because, until an order was obtained giving leave to presume that the three daughters were past the age of child-bearing, there was, in law, a possibility of their having further children; and, therefore, the relief sought was refused.

Re Thornhill ([1904] W.N. 112), distinguished.

Principle stated by ROMER, L.J., in *Re Butt* ([1952] 1 All E.R. 172), not applied.

AS TO TRUSTEES' DISCRETION AS TO EXERCISE OF POWER, see HALSBURY, Hailsham Edn., Vol. 33, p. 245, para. 433; and FOR CASES, see DIGEST, Vol. 43, pp. 875-881, Nos. 3193-3239.

Cases referred to:

- (1) *Re Butt*, [1952] 1 All E.R. 167; [1952] Ch. 197; 3rd Digest Supp.
- (2) *Re Thornhill*, [1904] W.N. 112; 43 Digest 813, 2565.
- (3) *Re Smith*, [1928] 1 Ch. 915; 97 L.J.Ch. 441; 43 Digest 593, 428.
- (4) *Re Brockbank*, [1948] 1 All E.R. 287; [1948] Ch. 206; [1948] L.J.R. 952; 2nd Digest Supp.
- (5) *Re Higginbottom*, [1892] 3 Ch. 132; 62 L.J.Ch. 74; 67 L.T. 190; 43 Digest 681, 1109.
- (6) *Tempest v. Camoys (Lord)*, (1882), 21 Ch.D. 571; 51 L.J.Ch. 785; 48 L.T. 13; 43 Digest 674, 1040.

MOTION for (1) an order that the defendants, the trustees of the will of Annie Matilda Whichelow dated July 31, 1922, should either (i) appoint and cause one of themselves to attend at the annual general meeting of George Whichelow, Ltd., and should vote thereat (in exercise of the voting rights in respect of the shares of the company comprised in the legacies bequeathed by the testatrix on trust for her three daughters, the first three plaintiffs, and their respective children) in favour of five resolutions of which notice had been given to the secretary of the company, or, alternatively, (ii) appoint the first plaintiff, Gladys Marjorie Bradshaw (or such other person as the first plaintiff wished) to be proxy of the defendants so to vote; and (2) an injunction restraining the defendants from voting either in person or by proxy (in exercise of the voting rights in respect of the said shares) at the said meeting in any manner in which they should have been unanimously directed by the plaintiffs not to vote.

Raymond Jennings, Q.C., and K. J. T. Elphinstone for the plaintiffs, the daughters of the testatrix, and their children.

Elverston for the defendants, the trustees of the will.

UPJOHN, J.: This is a motion by the plaintiffs asking for an order that the defendants, who are shareholders in a company known as George Whichelow, Ltd., do either appoint the first plaintiff a proxy in respect of their shares, or themselves vote in respect of that shareholding in a certain manner at a meeting of the company to be held on Nov. 26, 1953. The defendants hold the shares as trustees of the will of Annie Matilda Whichelow, dated July 31, 1922.

I am informed that the trusts of that will are complicated, but it is agreed (and I assume for the purposes of this motion) that the trusts can be simply stated in these terms, viz., that the testatrix left three blocks of shares on trust for each of her three daughters, the first three plaintiffs, for life with remainder to the children respectively of those daughters. The fourth to the sixth plaintiffs are the children of Mrs. Bradshaw, the first plaintiff; the seventh to the ninth plaintiffs are the children of Mrs. Dale, the second plaintiff; and the tenth and eleventh plaintiffs are the daughters of Mrs. Stott, the third plaintiff. Some 10,093 ordinary shares in the company are held on trust for Mrs. Bradshaw for life with remainder to her children who attain the age of twenty-one years; 8,646 ordinary shares are held on similar trusts for Mrs. Dale and her children; and 8,043 are held on similar trusts for Mrs. Stott and her children. All the plaintiffs have attained the age of twenty-one, and the ages of the first three plaintiffs are respectively sixty-one, fifty-eight and fifty-two. These trust shares, which aggregate 26,782, are part of the ordinary shares of the company. The capital structure of that company is as follows. There are sixty thousand 10s. seven per cent. cumulative preference shares which have been issued and there are sixty-seven thousand ordinary shares of £1 each, but each share, whether preference or ordinary, is entitled to one vote per share at general meetings of the company, so that the total voting power in the company is one hundred and twenty-seven thousand votes. The defendants as trustees of the holding, therefore, hold voting rights of 26,782 votes. That is a substantial, but by no means a controlling, voting power in this company.

A brother of the first three plaintiffs, a Mr. Joseph Whichelow, was managing director of the company until July 17, 1953. He was a joint managing director with Mr. Philip Preston, the latter also being chairman of the company. The other directors were a Mr. George Preston, a Mr. Lyons and Mr. Orpen, the first defendant. On July 17 Mr. Whichelow was dismissed from his position as managing director in circumstances which I need not describe in detail. It is sufficient to say that he was indebted to the company in respect of sums which he had drawn from the company to expend, not on the company's business, but on his own. It is also fair to say that those sums were repaid to the company on July 24 or 25. As a result of that, however, disputes and difficulties arose between the directors of the company and the plaintiffs. It is undesirable that I should mention those matters in detail because they will be discussed fully at the general meeting which will be held on Nov. 26. At that general meeting, certain resolutions will be proposed, and the question is how the voting power of the trust shares should be exercised. The relevant resolutions are set out in a notice convening the meeting which was given on Oct. 30. Notice to propose the first five was given by Mr. Whichelow, that Mr. George Preston be removed from the office of director, that Mr. Orpen be removed from the office of director, that Mr. Philip Preston be removed from the office of director, that the first plaintiff be appointed a director, and a Mr. Stockall also be appointed a director. The next resolution, notice of which was given by Mr. Lyons, is that Mr. Whichelow be removed from the office of director. The plaintiffs and the defendants cannot agree on the manner in which the voting power of the trust

shares should be exercised on those six resolutions. On that state of affairs, all the plaintiffs have sent a notice to the defendant trustees requesting them either to appoint Mrs. Bradshaw a proxy, or directing them how to vote on those six resolutions. The trustees are not prepared, unless they are so ordered by this court, to vote in that manner. They have indicated in the evidence the manner in which they, if unfettered by any order, would exercise their voting power.

The question I have to determine is one of law. The plaintiffs say: "We are all the persons entitled to the beneficial interest in these trust shares. We are, therefore, entitled to direct the trustees how they are to vote at the forthcoming meeting of the company"; and they rely on a passage in the judgment of ROMER, L.J., who delivered the first judgment of the Court of Appeal in *Re Butt* (1). The learned lord justice said ([1952] 1 All E.R. 172):

"I think the true way of looking at the matter is that which was presented to this court by counsel for the defendants—that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares with the advantages and disadvantages (e.g., restrictions imposed by the articles) which would be involved in that position and that they could compel the trustee directors, if necessary, to use their votes as the beneficiaries—or as the court, if the beneficiaries themselves are not in agreement—should think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose."

The plaintiffs further say that they are all the persons entitled to these shares, because although there is the theoretical possibility of further issue being born, that, they say, is plainly impossible in the case of the first two plaintiffs, who are aged sixty-one and fifty-eight respectively, and with regard to the third plaintiff, who is fifty-two, her last-born daughter was born over twenty-one years ago. She is divorced from her husband, and they say, with some force, that the circumstances are indistinguishable from those before the Court of Appeal in *Re Thornhill* (2). In that case, the Court of Appeal, in very similar circumstances, gave leave for money to be paid out of court, on the assumption that the mother was past the age of child-bearing. Further, they say that in *Re Smith* (3), where all the persons entitled as objects of a discretion directed the trustees how to pay the income, the mother was treated as past the age of child-bearing and the court made an order on the footing that they were all the persons absolutely entitled. Therefore, they say they are entitled to give these directions to the trustees, who must carry out those directions.

On the other hand, counsel for the trustees says that the trust is still plainly subsisting—that, indeed, is obvious; there are three life tenants and a number of remaindermen—and the trustees do not desire to surrender their discretion to the court. They are anxious to exercise that discretion themselves, and he submits that, in those circumstances, the court cannot control the bona fide exercise of the trustees' discretion. Pausing there, let me say at once that on the evidence which I have read it seems to me perfectly clear that the trustees are acting in a manner which is entirely bona fide, in circumstances which they find extremely difficult, and I have no doubt that they have given their very best attention to the difficult question of how best to vote in the circumstances which have arisen. Counsel for the trustees relies on a passage in UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 10th ed., p. 427, where the author says:

"Even where it is not absolutely certain that no more beneficiaries can come into existence, but it is morally so (e.g., where the ultimate remainder is in trust for the children of a woman who is past the age of child-bearing), the court will, on summons, give the trustees liberty to act according to the directions of the beneficiaries in esse so long as the contingent rights of living persons are not prejudiced, although it is understood that the court will not in such cases imperatively order the trustees to do so."

Counsel cited *Re Brockbank* (4), *Re Higginbottom* (5) and *Tempest v. Lord Camoys* (6), where SIR GEORGE JESSEL, M.R., lays down the general principle in these terms (21 Ch.D. 578):

“It is very important that the law of the court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly.”

That, he said, is the principle to be applied in this case.

I think *Re Butt* (1) is difficult to reconcile with those cases, and I am not prepared to grant any relief upon interlocutory motion. Furthermore, in my judgment, the right way of looking at the position is that here are trustees, against whom nothing can be said, who are anxious to exercise their discretion. They have not had a direction from all persons beneficially entitled, because it cannot be said in law that the persons concerned are past the age of child-bearing. *Re Thornhill* (2) was, in my judgment, a different case, for there, exercising a well known, but entirely different, jurisdiction, the court gave leave to pay money out of court on the footing that the mother was past the age of child-bearing.

The matter before me must, I think, be dealt with as one of strict law, and in law one cannot say that all the beneficiaries are before the court. For this reason also I must refuse the injunction.

Motion dismissed.

Solicitors: *Stilgoes* (for the plaintiffs); *Bischoff & Co.*, agents for *FitzHugh, Woolley & Burnand*, Brighton (for the defendants).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

PRACTICE DIRECTION.

F Assizes—Settlement of action—After entry for trial and before coming in day's list—Party under disability.

The Practice Direction, dated Apr. 21, 1947, set out in the ANNUAL PRACTICE as a note to R.S.C., Ord. 36, r. 22B, dealing with the settlement of actions before they come into the day's list at assizes applies to cases in which either party is under a disability provided that a master or registrar has approved the settlement.

GODDARD, C.J.

3rd December, 1953.

Ex parte HOW.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Sellers and Barry, JJ.), December 4, 1953.]

Justices—Clerk—Presence in retiring room while justices consider decision—Merits of case not affected—Complaint to Lord Chancellor.

The Divisional Court will not, merely because justices have disregarded the procedure laid down in PRACTICE DIRECTION dated Nov. 16, 1953, (ante, p. 1306) with regard to the presence of their clerk in their retiring room while they consider their decision, quash a conviction, if the disregard did not affect the merits of the case. The proper remedy for such misconduct of justices is a complaint to the Lord Chancellor.

R. v. Barry (Glamorgan) JJ. Ex p. Kashim (ante, p. 1005), distinguished.

AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918.

Case referred to:

(1) *R. v. Barry (Glamorgan) JJ. Ex p. Kashim*, ante, p. 1005; 117 J.P. 546.

APPLICATION for leave to apply for an order of certiorari.

On Sept. 18, 1953, the applicant, Alfred James How, a trolley-bus driver, was convicted by a court of summary jurisdiction, sitting at Dartford, Kent, of driving a motor vehicle on a road without reasonable consideration for other persons using the road, contrary to s. 12 (1) of the Road Traffic Act, 1930, and was fined £2 and ordered to pay £4 4s. 11d. costs. He applied for leave to move for an order of certiorari to bring up and quash the conviction on the ground that justice did not seem to be done. In his affidavit the applicant stated that before the justices he pleaded Not Guilty; that after the evidence had been heard the chairman of the justices said to his clerk "Dismissed", and the clerk thereupon spoke to the chairman words which were inaudible to the applicant; that the justices then retired with their clerk and the shorthand writer; that the clerk remained at all times with the justices during their retirement, which was for a period of at least five minutes, although he was not called to retire with them and no question of law was raised; and that, when listening to the cases which were taken before his own, the applicant formed the opinion that the clerk controlled the chairman's decision.

G. V. Owen for the applicant.

LORD GODDARD, C.J.: It should not be thought that every defendant who has been convicted when the clerk has retired with the justices can obtain from this court a quashing of the conviction. The disregard by justices of the direction given by us in *R. v. Barry (Glamorgan) JJ. Ex p. Kashim* (1)* would not necessarily affect the merits of the conviction, though it would be a ground of complaint to the Lord Chancellor against the justices. We do not think that the justices in the present case departed from the practice which doubtless they followed until the decision in *R. v. Barry (Glamorgan) JJ. Ex p. Kashim* (1), and leave to apply for an order of certiorari will be refused.

SELLERS, J.: I agree.

BARRY, J.: I agree.

Solicitors: *Geoffrey B. Gush & Co.* (for the applicant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

* See also Practice Direction, ante, p. 1306.

OAKES v. NEW SOUTH WALES COMMISSIONER OF
STAMP DUTIES.

[PRIVY COUNCIL (Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone), October 5, 6, 7, 8, 12, 13, December 3, 1953.]

A *Privy Council—New South Wales—Estate duty—Incidence—Trust for benefit of deceased and his children as tenants in common in equal shares—Benefit to deceased—Deceased remunerated for management of trust property—Children's shares applied for maintenance and education—New South Wales Stamp Duties Act, 1920-1940, s. 102 (2) (d).*

B By s. 102 of the New South Wales Stamp Duties Act, 1920-1940: "For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property . . . (2) (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died." In 1924 F., by a deed of trust, declared that he held certain lands therein described, which were held and used by him as grazing property, on trust for himself and his four children as tenants in common in equal shares. A number of powers and discretions were conferred on the trustee, including wide powers of management. In addition to reimbursing himself all expenses incurred in the administration of the trust, the trustee was to be entitled to remuneration for all work done by him in connection with the trust as if he were not a trustee. F. acted as trustee until his death in 1947. During the time he acted as trustee he received varying sums as remuneration under the trust, and, after deducting these sums and other outgoings and expenses, he divided the profits received from the trust properties into five equal shares, crediting one share to himself and one share to each of his children. He applied the amounts credited to each of the children to their maintenance and education until they came of age, after which they were paid to the children. After F.'s death the Commissioner of Stamp Duties assessed the death duty payable in respect of his estate on the basis that the final balance of the estate included the whole value of the trust property. The appellant, the executor of F.'s will, appealed against this assessment, contending that only one-fifth of the value of the trust property should have been included in the final balance.

F
G
H **HELD:** to bring a case within the scope of s. 102 (2) (d) it was not sufficient to take the case as a whole and to find that the settlor had continued to enjoy substantial advantages having some relation to the settled property, but it was necessary to consider the nature and source of each such advantage, and to determine whether or not it was a benefit of such a kind as to come within the scope of the section; the use by F. of the income which accrued to his children for their maintenance and education was not such as to bring the case within the section since it was in their best interests and any advantage which F. obtained thereby was not at their expense, nor did it impair or diminish the value of the gift to them or their enjoyment of it and any such advantage was not a benefit within s. 102 (2) (d); but the taking by F. of remuneration under the trust, even though he was authorised so to do, was a benefit to him within s. 102 (2) (d), since it must have come out of the trust property and must, therefore, have diminished the amount available for division among the tenants in common for their enjoyment, and, under the trust, the whole beneficial

interest in the property passed to F. and his children in equal shares; accordingly, the case came within s. 102 (2) (d), and the appeal must be dismissed.

EDITORIAL NOTE. Section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920-1940, is in similar terms to s. 43 (2) (a) of the Finance Act, 1940, for which, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 470.

Cases referred to:

- (1) *St. Aubyn (L.M.) v. A.-G. (No. 2)*, [1951] 2 All E.R. 473; [1952] A.C. 15; 2nd Digest Supp.
- (2) *A.-G. v. Worrall*, [1895] 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807; 59 J.P. 467; 21 Digest 12, 54.
- (3) *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.*, [1943] 1 All E.R. 525; [1943] A.C. 425; 112 L.J.P.C. 55; 168 L.T. 414; 2nd Digest Supp.
- (4) *Grey (Earl) v. A.-G.*, [1900] A.C. 124; 69 L.J.Q.B. 308; 82 L.T. 62; 21 Digest 12, 51.

APPEAL by an executor from a judgment of the High Court of Australia dated May 8, 1952, affirming by a majority a judgment of the Supreme Court of New South Wales dated Sept. 13, 1951, on a Case Stated dated Mar. 20, 1950, by the Commissioner of Stamp Duties of the State of New South Wales.

The facts appear in the judgment.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *R. O. Wilberforce* for the appellant.

G. Wallace, Q.C. (of the Australian Bar), *Sir Frank Soskice, Q.C.*, and *E. B. Stamp* for the respondent.

Dec. 3. **LORD REID:** This is an appeal from a judgment of the High Court of Australia dated May 8, 1952, affirming by a majority (DIXON, C.J., WILLIAMS and FULLAGAR, JJ.; WEBB and KITTO, JJ., dissenting) a judgment of the Supreme Court of New South Wales of Sept. 13, 1951. The appellant is the executor under the will of the deceased, Leslie William Friend, who died in 1947, and the question at issue arises on a Case Stated under the New South Wales Stamp Duties Act, 1920-1940, and relates to the incidence of death duty on the property held by the deceased as trustee under a trust deed made by him on Sept. 1, 1924.

In 1924 the deceased owned a grazing property in New South Wales known as "Ellerston" and carried on the business of grazier there. At that time he had four children, all of whom were under twenty-one years of age. By deed-poll dated Sept. 1, 1924, he declared that, as from July 1, 1924, he had held, and thenceforth would hold, the property and the rents, issues and profits thereof

"upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same that is to say:"

The first two clauses following thereupon were as follows:

"1.—Upon trust that I or other the trustee or trustees for the time being of these presents (hereinafter called the trustee) shall either retain and use the said lands or at the trustee's absolute discretion at any time or from time to time sell and convert into money the same or any part thereof and invest the proceeds of such sale and conversion upon such securities real or personal and whether authorised by law for the investment of trust funds or not (and with liberty from time to time to vary and transpose the investments) as the trustee shall in his uncontrolled discretion think fit. The said lands and proceeds of sale thereof and the securities upon which the same may from time to time be invested are hereinafter called 'the trust fund.' 2.—That the capital and income of the trust fund shall be held by the trustee upon trust for the said Leslie William Friend and his children

Henry James Friend, Donald Stuart Friend, Terence Maxwell Friend, and Gwynneth Ailsa Friend as tenants in common in equal shares; and if and so often as any such child shall die under the age of twenty-five years and without leaving a child or children him or her surviving then as well as to the original share of the child so dying as to any share or shares which shall have accrued to him or her by virtue of his present limitation upon trust for the others of such children and the said Leslie William Friend as tenants in common in equal shares."

Thereafter the deed of trust sets out a number of powers and discretions conferred on the trustee, including wide powers of management, and, in particular, powers

"4.— . . (h) To appropriate and partition any real or personal property forming part of the trust fund to or towards the share of any person or persons therein under the trusts hereinbefore contained and for that purpose to fix the value of such real or personal property so appropriated as the trustee shall think fit and to charge any share with such sums by way of equality of partition as he may think fit and every such appropriation valuation and partition shall be binding upon all persons interested in the trust fund provided always that as regards any share of the said trust fund not absolutely vested any such appropriation shall be without prejudice to the exercise of any powers hereby expressly or impliedly given to the trustee . . . (j) In addition to reimbursing himself all expenses incurred by the trustee in the administration of the trust the trustee shall be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the said fund in the same manner and as fully in all respects as if he were not a trustee hereof. (k) To purchase notwithstanding that he is a trustee hereof all or any property comprising the trust fund or any part thereof by public auction or by private contract provided in the latter case that the sale shall be conducted by Goldbrough Mort and Co., Ltd. or be made at a price and upon terms and conditions approved by that company or by a valuer or other nominee appointed by the said company . . . (o) To convey appropriate or dedicate any part or parts of the property comprising the trust fund for public or charitable purposes either gratuitously or for such consideration as the trustee may think proper to accept."

In 1928 the deceased, as trustee, sold "Ellerston" and invested the proceeds in another grazing property known as "Glendon" and in certain mortgages, and he continued to manage this trust property until his death. He fixed from time to time amounts to be received by himself as remuneration under cl. 4 (j) quoted above. He received for each of the first six years £3,000 and thereafter smaller sums; for the last three years before his death he only received £100 per annum. After deducting these and other outgoings and expenses, he divided the profits from the trust properties into five equal shares, crediting one share to himself and one share to each of his children. As stated by the commissioner in the Case Stated,

"The amounts credited to each such child were paid or applied by the testator for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age."

Before his death all his children had come of age and all but one had attained the age of twenty-five.

The value of the trust properties at the date of the deceased's death was £71,900 9s. 7d. The Commissioner of Stamp Duties assessed the death duty payable in respect of this estate on the basis that the final balance of the deceased's estate included the whole value of the trust property. The appellant

contended that there should have been included only one-fifth of the value of the trust property and required the commissioner to state a Case for the opinion of the Supreme Court of New South Wales. A Case was duly stated and set out as the question for the determination of the court:

"(1) Should the whole of the property which was at the date of the death of the testator subject to the trusts of the said deed be included in his estate for the purposes of the assessment and payment of death duty?"

The Supreme Court answered "Yes" to this question and on appeal this decision was affirmed by the High Court of Australia.

The question at issue in this appeal depends entirely on the applicability to the facts of this case of the provisions of s. 102 (2) (d) of the Stamp Duties Act, 1920-1940. Those provisions, so far as material to this case, are as follows:

"For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property . . . (2) (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The appellant admits that the value of one-fifth share of the whole trust property was properly included in the final balance of the deceased's estate, but contends that the value of four-fifths of that property, being the value of the shares of the four children, ought to be excluded from the final balance as being property comprised in a gift made by the deceased, of which bona fide possession and enjoyment was immediately assumed by the children and thenceforth retained by them to the entire exclusion of the deceased or of any benefit to him. The respondent contends that there was not entire exclusion from the children's shares of the deceased, or of benefit to him, and the respondent founds on several advantages to the deceased as being benefits within the meaning of the above section. He founds on the application of the children's income from the trust for the maintenance and education of the children as being of advantage to the deceased, in that he was thereby relieved, at least in part, from his obligation to maintain his children. Then he founds on the deceased having had power to take, and having taken, remuneration as trustee in accordance with the provisions of the trust deed. He also founds on the provisions of cl. 4 (h) and (k) as conferring benefits on the deceased. And, finally, he founds on the deceased having resided with his family on the trust property as a further benefit. The Case Stated makes no reference to this residence, but it appears that this matter was raised in argument in the Supreme Court and it was admitted before their Lordships that the deceased had resided on the property in his capacity as trustee and manager. It appears to their Lordships that it may well be that the property could not have been properly managed unless the manager resided there, and that there is nothing to show whether this residence was, in itself, an advantage to the deceased; moreover, it is not clear whether this residence went beyond the rights of the deceased as co-owner of the property. Their Lordships are, therefore, not prepared to regard this residence as being, in itself, a benefit to the deceased in any relevant sense.

In all but one respect s. 102 (2) (d) corresponds with s. 43 (2) (a) of the United Kingdom Finance Act, 1940. The only substantial difference between them is that s. 102 brings in

"any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not";

whereas s. 43 only brings in "any benefit to him by contract or otherwise". But that difference was not founded on in argument and is not material in this case. These sections have given rise to much litigation, and British authorities have frequently been cited in Australian cases and vice versa. In *St. Aubyn (L.M.) v. A.-G. (No. 2) (1)*, the earlier cases, including the Australian cases, were fully considered. In their Lordships' judgment, it is now clear that it is not sufficient, to bring a case within the scope of these sections, to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property: it is necessary to consider the nature and source of each of these advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.

Their Lordships will first consider whether the use of the income which accrued to the settlor's children from the settled estate was such as to bring the case within the section. If property comprised in a gift is to be excluded from the estate of the deceased donor, the statute requires that bona fide possession and enjoyment of the property shall have been assumed and retained by the donee to the entire exclusion of the donor. If property is held in trust for the donee, then the trustee's possession is the donee's possession for this purpose, and it matters not that the trustee is the donor himself. The donor is entirely excluded if he only holds the property in a fiduciary capacity and deals with it in accordance with his fiduciary duty. But the statute requires not only exclusion of the donor but also exclusion of any benefit to him, and it was on that matter that the argument turned. It appears from the case that, after the children came of age, they received payment of their shares of the income: it is not said that that involved any benefit to the deceased. But before they came of age their shares of income were used to pay for their maintenance and education, and it was said that this afforded some relief to the deceased who would otherwise have had to pay out of his own money. Two arguments were submitted. In the first place, it was said that spending the children's money in this way was improper, or at least disadvantageous to them, and that this combination of advantage to the donor with disadvantage to the donee brought the case within the statute. Their Lordships do not find any sufficient basis in fact for this argument. There is nothing in the case from which it can be inferred that the deceased acted at all improperly in this matter. At least after 1925 this money could properly be spent on the children's maintenance under statutory powers if that was in the best interests of the children. In the absence of anything to indicate the contrary it must be taken that the deceased acted properly in so applying his children's income, that this was in the best interest of the children, and, therefore, the children must be held to have had full benefit and enjoyment of their money. The case might have been very different if it had appeared that the deceased had so spent his children's shares of the income from the trust, not entirely in their interest, but wholly or partly for his own benefit in order to relieve himself from the expense of maintaining his children.

Before their Lordships for the first time a further argument of this nature was submitted. It was said that there was no statutory power to spend this money on the children's maintenance until December, 1925, that it appeared from the Case that the deceased had so spent his children's money before that date and that, therefore, at least to this extent, the deceased had acted improperly and it could not be said that the children's money had been applied for their benefit. This argument fails because there is nothing in the Case to show that any of the children's money was spent before December, 1925. No doubt there was ultimately spent income which accrued in respect of the period before that date; but the trust only operated as from July 1, 1924, and thereafter income had to be earned, accounts had to be made up, the children's shares had to be credited to them, and after that some time may have elapsed before the money was spent. Their Lordships are not prepared to assume that the money was spent before the date which is crucial for this argument.

Then it was said that even if the income which accrued to the children was properly spent for their maintenance and they are to be held to have had full benefit and enjoyment of it, yet there was also a benefit to the deceased, because if it had not been available he would have had to spend more of his own money. The findings in the Case are not very specific, but their Lordships will assume that there was some advantage to the deceased. That advantage, however, was not at the expense of the children and did not impair or diminish the value of the gift to them or their enjoyment of it. It is possible for a donee, in the full and unrestrained enjoyment of his gift, to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But, in their Lordships' judgment, any such advantage is not a benefit within the meaning of the section. The point is not strictly covered by authority, but the contrary view would be difficult to reconcile with what was said in the House of Lords in *St. Aubyn's* case (1). The facts in that case were complicated and it may be sufficient for present purposes to state that, as the result of settlements, the formation of a company and certain transactions, the settled property at the relevant date consisted of fifty thousand ordinary shares of the company, and sums of £750,000 payable by instalments, and £100,000 immediately payable, by the company. By virtue of an overriding general power of appointment Lord St. Levan, who had a life interest, vested in himself absolutely the sums payable by the company and surrendered his life interest in the shares so that bona fide possession and enjoyment of them was immediately assumed by the persons next entitled. But it was argued that there was not entire exclusion of Lord St. Levan or of any benefit to him by contract, or otherwise, mainly because of the rights which he retained to receive money from the company. The Crown relied largely on *A.-G. v. Worrall* (2), and it is in the passages dealing with that case that their Lordships find most help on the question now under consideration. LORD RADCLIFFE explained the case thus ([1951] 2 All E.R. 495):

"A father had made a present to his son of a sum of about £24,000 secured on mortgage, and the son had bought in the equity of redemption for a small sum. In return for his father's gift the son had covenanted to pay him an annuity of £735 per annum during his life. In effect, the son was returning to the father the income on the property given during the remainder of the father's life. It seems to me reasonable enough for a court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which encumbered the enjoyment of the very thing that was given. To hold otherwise would have been to stop at the mere form of the transaction."

Then he added (*ibid.*):

"But I think it a very mistaken form of reasoning to deduce from a decision that a benefit, to be within the mischief of the section, need not necessarily be by way of reservation out of the subject-matter of a gift the general proposition that all benefits are within the mischief of the section, whether they are by way of reservation out of the subject-matter of the gift or not."

And LORD SIMONDS said (*ibid.*, 481):

"Whatever the words, which have appeared in a series of Acts, might have meant to your Lordships if the matter were *res integra*, it cannot in face of the decision in *A.-G. v. Worrall* (2) be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or of any benefit to him by contract or otherwise, though the donor himself no longer has any sort of interest in it. But the words, and particularly the word 'exclusion', are singularly inapt to cover a benefit which does not arise by way of reservation out of that

which is given, and I am not disposed to travel further than I am constrained by authority along a line of interpretation which appears to me difficult to justify."

On the view of the facts of the present case which their Lordships have felt bound to adopt, this alleged benefit neither encumbered the enjoyment of the gift, nor arose by way of reservation out of that which was given, and their Lordships can find no good reason for holding that it brings this case within the statute.

For similar reasons their Lordships are not able to accept the ground of the judgment of the Supreme Court of New South Wales to the effect that the linking together of the one-fifth beneficial interests of the donor and the donees resulted in a benefit or advantage to each share and that this advantage to the donor brought the case within the section. Even if this linkage was of advantage to the deceased (of which there is no evidence), that advantage did not in any way impair the enjoyment of the gift by the donees or trench on their rights.

The next advantage to the deceased was of quite a different character. The deceased, under the power which he reserved to himself under cl. (4) (j) of the deed of trust, took considerable sums as remuneration for his services in managing the trust property. Their Lordships will assume that those sums were reasonable and no more than would have been appropriate remuneration for any other manager. But receiving those sums was clearly an advantage or benefit to the deceased, and the question is whether it was a benefit of such a kind as to come within the section. If a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied, it is now well established that such reservation of a beneficial interest does not involve any benefit to the donor within the meaning of the section. In *New South Wales Stamp Duties Comr. v. Perpetual Trustee Co., Ltd.* (3), LORD RUSSELL OF KILLOWEN, having dealt with the earlier cases and in particular *Earl Grey v. A.-G.* (4), said in a passage cited with approval in *St. Aubyn's* case (1) ([1943] 1 All E.R. 533):

"There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11 (1) of the Act of 1889 [the forerunner of s. 43 of the Finance Act, 1940] is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the subsection requires."

It follows that if the right to take remuneration could be regarded as a beneficial interest in the property reserved by the deceased when making the deed of trust, then his remuneration would not be a benefit within the scope of the section. But their Lordships cannot regard a right to take remuneration for managing property as a beneficial interest in the property. A trustee is not permitted to take remuneration for services performed by him unless he is authorised to do so: in this case, the trustee was authorised to do so because the deceased provided in the deed of trust that he, as trustee, or the trustee for the time being, should be entitled to remuneration as if he were not a trustee. If the deceased had resigned office and another trustee had taken his place it could hardly have been contended that this provision gave to the new trustee a beneficial interest in the trust property, and in their Lordships' judgment the deceased did not reserve to himself a beneficial interest in the property by inserting this provision in the deed of trust. Indeed, the terms of the deed of trust make it clear that the whole beneficial interest in the property passed to the deceased and his children in equal shares, so that the subject-matter of the gift to each child was one-fifth of the whole beneficial interest in the property. Clause 2 declared that the capital and interest of the trust fund should

be held on trust for the deceased and his first-named children as tenants in common in equal shares, and neither the right of the trustee to take remuneration, nor any other right, power or discretion conferred on the trustee affected the position of the deceased or his children as tenants in common of the whole beneficial interest in the trust property. Any remuneration taken by the deceased, or any other trustee, must come out of the trust property and must, therefore, diminish the amount available for division among the tenants in common for their enjoyment.

But the appellant argued that the children had had all the possession and enjoyment to which they were entitled under the deed of trust: they could only possess through the trustee and, subject to his rights and powers and, therefore, the exercise of his rights by the trustee, could not trench on or impair that possession. The appellant founded on another passage in the judgment of LORD RUSSELL in the *Perpetual Trustee Co.* case (3), when he referred to the donee being (*ibid.*, 530)

“ . . . put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.”

It was said that in the present case the nature of the gift to the children and the circumstances never permitted the children to have any greater possession or enjoyment than in fact they had. But to understand what LORD RUSSELL meant by these words it is necessary to quote the preceding passage (*ibid.*):

“ In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question, therefore, must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.”

LORD RUSSELL was there explaining in general terms how the section is to be interpreted when the subject-matter of the gift is an equitable interest. He was not dealing with a case like the present where the donor received money which, if he had not taken it, would have gone to the donee under the terms of the gift. In the *Perpetual Trustee Co.* case (3), the settlor derived no actual benefit from the shares or their dividends. He might have exercised voting powers in respect of the shares but did not do so; and he was one of several trustees and they might have used trust money for the maintenance of the son but did not do so. With the exception of some insurance premiums, the whole income was accumulated and the trust fund was paid to the son on his majority. Their Lordships do not read the words on which the appellant founds as modifying, or intended to modify, the later passage in LORD RUSSELL's judgment which has been quoted above and in which he only refers to reservation by the donor of a beneficial interest in the property.

But, even if there is no authority to support it, the appellant's case requires:

further examination. The argument is clearly and forcibly stated in the dissenting judgment of KITTO, J., in the High Court of Australia where he says:

A "If the property comprised in the gift had consisted of four one-fifths of the fee simple of the trust property (whether legal and equitable or only equitable), and the donees, pursuant to a collateral agreement or otherwise, had allowed the deceased to have the benefits which in fact he enjoyed, the case would have fallen clearly enough within s. 102 (2) (d). But it seems to me that, in order to hold that four-fifths of the fee simple was the property comprised in the gift, one would have to construe the deed, not as a whole, but as if it were divided into two sections, effecting two quite distinct transactions, the first transaction being a disposition in equity of aliquot parts of the fee simple, and the second transaction consisting of a set of provisions operating to exact from the donees a power for the donor to derogate from the possession and enjoyment which an undivided share of the equitable fee simple enables the owner of it to have and keep to himself. I cannot construe the deed in that way. It was a deed poll, and the benefits which the deceased derived in accordance with its provisions were benefits which the donees neither permitted him to derive nor had any power to deny him. They were in this position of impotence, not by their own choice, but because the deceased, in exercise of his right to give exactly what interests he liked and withhold exactly what he liked, had chosen to give them interests so hedged about as not to enable them to exclude him from those benefits. It was for him, when framing his deed, to delimit the interests he was parting with; and he did delimit them, not by any one part of the deed considered by itself, but by the entirety of its provisions. The donees had no voice in deciding to what extent their interests should be subject to rights, powers or privileges retained by the deceased. They got interests which were limited ab initio, by the terms of their creation; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived."

E

It is true that the deceased did not exact from his children his power to take benefits, and that the benefits which he took were benefits which they neither permitted him to derive nor had any power to deny him. But, in their Lordships' judgment, the question is not whether the donees permitted the donor to take benefits. It is whether the donor took benefit out of that which was given.

F If a benefit arises by way of reservation out of interests which were given, then, no doubt, the donees' interests are inherently insusceptible of being so possessed and enjoyed as to preclude the donor from taking that benefit, but the section applies because there is not entire exclusion of the donor or of benefit to him from the interests comprised in the gift. The contrast is between reserving a beneficial interest and only giving such interests as remain, on the one hand, and, on the other hand, reserving power to take benefit out of, or at the expense of, interests which are given, and for reasons already stated their Lordships are of opinion that the present case is within the latter class.

G

Two other powers reserved by the deceased were also founded on as benefits—power to appropriate and partition the trust property under cl. 4 (h) and power to purchase it under cl. 4 (k). It may be that the deceased could legitimately have used those powers to his own advantage, but, in fact, he made no use of them at all. So, at most, there were here potential benefits. As their Lordships have already decided that taking remuneration was a benefit within the scope of the section, they find it unnecessary to deal with these other matters.

H

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal. *Appeal dismissed.*

Solicitors: *Stephenson, Harwood & Tatham* (for the appellant): *Light & Fulton* (for the respondent). [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

DUNSTER v. ABBOTT.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), November 12, 13, 1953.]

Licensee—Canvasser—Injury suffered on premises of potential customer—Liability of occupier.

The defendant was the owner and occupier of premises bordered by an unlighted country road. The only means of access to the dwelling-house from the road was a concrete bridge over a ditch and a drive leading to the house. The plaintiff entered the premises after dark with the intention of selling advertising space to the defendant who refused to do business with him. As he left the premises, the plaintiff tripped and fell into the ditch and thereby suffered injuries. He complained that the defendant had turned off a light too soon. In an action for damages for personal injuries,

HELD: on the facts, the bridge over the ditch did not amount to an unusual or a concealed danger by day or night, and there was no breach of duty on the part of the defendant in regard to it; the defendant was not negligent with regard to the light; and, therefore, the plaintiff was not entitled to recover damages.

Per curiam: The plaintiff was a licensee and not an invitee because he was on the defendant's premises on his own business and not on any matter in which he and the defendant had a common interest.

Per DENNING, L.J.: A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee.

AS TO DUTY OF OCCUPIER TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-863; and **FOR CASES,** see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.

Cases referred to:

(1) *Pearson v. Lambeth Borough Council*, [1950] 1 All E.R. 682; [1950] 2 K.B. 353; 114 J.P. 214; 2nd Digest Supp.

(2) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.

APPEAL by the defendant from an order of ORMEROD, J., dated May 12, 1953.

The plaintiff was employed by the Bristol Printing and Publishing Co. as a canvasser to sell advertising space in certain publications. The defendant was the owner and occupier of premises known as "Broadlands" near Canterbury, which comprised a dwelling-house and a builder's yard where the defendant carried on his business as a builder. The only means of access to the premises from the road, which was unlighted during the hours of darkness, was a concrete bridge across a ditch and a drive leading to the dwelling-house, both bridge and drive being bordered on either side by a low concrete wall. There were no railings between the defendant's hedge and that side of the ditch nearest the dwelling-house. On Nov. 29, 1950, the plaintiff, wishing to sell to the defendant advertising space on the covers of certain telephone directories, visited the defendant's house and was asked by the defendant's wife to call later in the day. The plaintiff entered the premises after dark to keep the appointment, his way up the drive being partly illuminated by a light placed at the corner of the garage which adjoined the house. Having seen the defendant, who did not wish to do business with him, the plaintiff left the house. The light at the corner of the garage was still on, but before the plaintiff had reached the roadway and as he was approaching the bridge over the ditch, the defendant switched off the light, and the plaintiff tripped and fell into the ditch, thereby suffering injuries.

In an action by the plaintiff for damages for personal injuries the learned judge came to the conclusion, although he did not regard it as material to his decision, that the plaintiff was an invitee. He regarded the bridge over the ditch as an unusual danger, and held that the defendant was negligent in that he

failed to leave the light on for a length of time sufficient to prevent the plaintiff falling into danger. He awarded the plaintiff £469 damages, and judgment was entered accordingly.

Gardiner, Q.C., and Sabin for the plaintiff.

Berryman, Q.C., and Jukes for the defendant.

- SOMERVELL, L.J.**, stated the facts and continued: There was a debate below and before us whether the plaintiff was an invitee or a licensee. The learned judge, I think, did not consider that that question was very material, but, as the point was argued on both sides, I will say a word or two about it. The learned judge came to the conclusion that the plaintiff was an invitee. Counsel for the plaintiff says with force that one ought not to distinguish between the house and the business premises as they were connected. Although we did not hear counsel for the defendant in reply, I will assume for my present purpose, without deciding it, that that distinction in the circumstances of this case does not avail the defendant. On that basis counsel for the plaintiff submitted that anyone who comes to business premises with the hope that business in which he is interested will result should be regarded as an invitee. I think that is defining the character much too widely. In *Pearson v. Lambeth Borough Council* (1), ASQUITH, L.J., said ([1950] 1 All E.R. 688):

"It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest . . ."

- I do not think when the plaintiff came on the defendant's premises that he and the defendant had a common interest. He no doubt hoped, wrongly as it transpired, that a common interest might result, but they had not at that time a common interest. It is said that there is very little authority on this point, and, in particular, there are no cases dealing with commercial travellers. It may be that, if a case arose concerning commercial travellers, evidence might be given as to the practice and custom in the particular trade which might or might not bring them within the words of ASQUITH, L.J. But I am dealing with this particular case.

Here was a man who was hoping that he might find the defendant to be interested in this advertisement and I think that he was a licensee. If he were a licensee, taking words from a judgment of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2) ([1913] 1 K.B. 411):

- "The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril."

I do not think this case raises what may be a difficult question as to the effect of darkness on unusual dangers because I do not think this was an unusual danger.

- I think that this was an ordinary means of access to a house over a ditch which is an extremely common feature of roads in the country and that there was no unusual or concealed source of danger in respect of which the occupier was under any duty to give warning. Indeed counsel for the plaintiff, having developed his proposition that the plaintiff was an invitee, to my mind, rather withdrew it because he based his main argument on the proposition that, the plaintiff having come with the defendant's knowledge and without objection on to his premises, the defendant was guilty of ordinary negligence in a failure to take reasonable care in relation to his exit from those premises. On that basis I do not think it would matter whether he was an invitee or a licensee.

The learned judge holding that the plaintiff was an invitee and regarding the bridge as a dangerous situation of unusual danger—that, with respect, is where I differ from him—also said:

"He [the defendant] did not in the circumstances take reasonable care,

by leaving the light on for a sufficiently long time, to prevent the plaintiff from falling into danger."

[HIS LORDSHIP considered the evidence of both sides as to the light, concluded that the defendant was not negligent in switching it off when he thought that the plaintiff had reached the road, and continued:] The plaintiff is a man of sixty-one and, apart from the shock, he suffered considerable injury, but it does seem to me that this was an accident which he brought entirely on himself. He said that he never took a torch with him. I should have thought that in these days anyone who went about on a dark unlighted road in a country district without a torch was asking for trouble, or, at any rate, if he found himself in that position, I should have thought he must proceed with very great care. For these reasons I would allow the appeal.

DENNING, L.J.: A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away. Does he change his colour in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.

In the present case the canvasser, the plaintiff, came to the door; the householder, the defendant, asked him in; the plaintiff stated his business; the defendant was not interested; and the plaintiff left. On those facts I am clearly of opinion that the plaintiff was not an invitee, but only a licensee, because he was there on his own business and not on any matter in which the defendant had an interest. We all know that a guest whom a householder invites to dinner is only a licensee, even though the householder has an ulterior business motive in asking him. It would be strange if a householder owed a higher duty to a canvasser who comes unasked than he does to a guest who comes on his express invitation.

In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else. The instance was put by **SOMERVELL, L.J.**, in argument of the driving of a vehicle, but many others can be imagined. In regard to current operations, the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities, and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest. Negligence causing damage gives a cause of action, and it is not proper nowadays in this regard to draw any distinction between negligent acts of commission and negligent omissions. Bearing this in mind, it is tolerably plain that the static condition of these premises was not a danger to anyone who used reasonable care for his own safety. The bridge over the ditch was not an unusual danger, nor was it a concealed danger, either by day or night. No matter whether the plaintiff was an invitee or licensee, the defendant was in no breach of duty in regard to it. The case for the plaintiff depends, therefore, entirely on the action of the defendant in putting out the light. That was a contemporaneous activity, a current operation, on his part in respect of which his duty to the plaintiff was simply to use reasonable care. The judge seems to have thought that the householder was negligent in turning the light off too soon, but I cannot agree with this view. [HIS LORDSHIP considered the evidence as

to the light and held that there was no negligence on the part of the defendant.] I agree that the appeal should be allowed.

ROMER, L.J., considered the question of the light, held that there was no negligence on the part of the defendant, and continued: On the question whether the plaintiff was a licensee or an invitee I agree that he was a licensee on the grounds which my brethren have expressed. He is not within the definition of an invitee which **ASQUITH, L.J.**, laid down in *Pearson v. Lambeth Borough Council* (1) because the business on which the plaintiff called was not a business in which he and the defendant had a common interest. I, accordingly, agree that this appeal must be allowed.

Appeal allowed.

B Solicitors: *Betty Harris* (for the plaintiff); *Hair & Co.* (for the defendant).

[*Reported by MISS PHILIPPA PRICE, Barrister-at-Law.*]

C

WARMAN v. BARCLAYS BANK, LTD. AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), October 30, 1953.]

Legal Aid—Costs—Disallowance—Advice on evidence before delivery of defence—

D *Attendance of country solicitor at consultation in London—Conference to advise plaintiff to agree to settlement—Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1).*

In an action against the executors of a will and the sole beneficiary under the will, the plaintiff, who had been granted a certificate of civil aid under the Legal Aid and Advice Act, 1949, claimed inter alia specific performance of an oral agreement, made between her and the deceased in 1932, whereby they agreed, inter alia, to make, and not to revoke, mutual wills in each other's favour in regard to the disposition of a dwelling-house at Cardiff which they had purchased together and in which they had lived together until the death of the deceased in 1950. The case was a very complicated one, the facts relied on by the plaintiff in support of her claim being based on the relationship between her and the deceased over a long period. The legal aid area committee authorised the plaintiff's solicitors at Cardiff to engage leading counsel, and the instructing solicitor who had detailed information on all the facts went from Cardiff to London to attend a consultation between leading and junior counsel. Without putting in a defence, the beneficiary under the will offered to settle the case by making a payment to the plaintiff. As the plaintiff was unwilling to accept the offer, a conference with junior counsel was arranged so that he could satisfy her that it would be in her interest to accept, which she then did. An order was made in the action for the taxation of the plaintiff's costs as between solicitor and client under sched. III, para. 4 (1), to the Act of 1949. On taxation the taxing master disallowed, inter alia, the following items: (a) a fee of £3 5s. 6d. to junior counsel to advise on evidence; (b) fees for the consultation in London; (c) the fee for the country solicitor's attendance at the consultation and his travelling charges; and (d) the fees in connection with the conference with junior counsel before the settlement was accepted.

H

HELD: until a defence was delivered it was impossible to tell what the issues at the trial would be, and, therefore, it was premature at that stage to ask counsel to advise on evidence, and, as fees had been allowed to junior

counsel for settling the statement of claim and for advising generally, item (a) could not be allowed; as the case was a difficult one which depended on a number of small facts, the consultation with leading counsel before he wrote his opinion was justified, particularly in view of the fact that he advised certain amendments to the statement of claim, and, in the circumstances, the exceptional course of the country solicitor going to London to attend the consultation was also justified, and the proper fees and charges should be allowed in respect of items (b) and (c); in regard to (d), it was desirable to satisfy the plaintiff, if possible, that it was in her interest at that stage to settle the litigation and it was proper that she should see counsel for that purpose, and, therefore, counsel's fee for the conference and the solicitor's charge for attending should be allowed.

FOR THE LEGAL AID AND ADVICE ACT, 1949, sched. III, para. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 566.

ADJOURNED SUMMONS by the plaintiff for a review of the taxation of her costs.

The plaintiff, who had been granted a certificate of civil aid under the Legal Aid and Advice Act, 1949, brought the action against Barclays Bank, Ltd., as executors of Maud Mary Brown, deceased, and Mrs. Sonia Christie, the sole beneficiary under the will of the deceased, for specific performance of an agreement made in or about 1932 between the plaintiff and the deceased relating to a dwelling-house in Cardiff and to the testamentary dispositions concerning the house to be made, respectively, by the plaintiff and the deceased, and, alternatively, for damages for breach of the agreement. She further claimed in respect of goods and services supplied by her to the deceased prior to her death on July 16, 1950, and/or for breach of the promise to pay for the same. By her statement of claim the plaintiff alleged, inter alia, that, by an oral agreement made in or about 1932, she and the deceased had agreed to purchase the house and to live together therein, sharing the costs of the purchase and the maintenance and outgoings thereof, that they had further agreed that, in the event of the death of either, the house was to belong absolutely to the survivor, and that, in pursuance of this agreement, they had orally agreed, in 1933, to execute in each other's favour, and not to revoke, mutual wills so that each by her will should give her interest in the house to the other. The statement of claim went on to allege, inter alia, that pursuant to the agreement, in August, 1933, the plaintiff and the deceased each made a will in the other's favour, and that on June 29, 1950, the deceased, in breach of the agreement, made a new will, revoking her earlier will, and giving all her property to the second defendant absolutely.

Before any defence was delivered, the case was settled in consideration of the payment of a sum of money to the plaintiff by the second defendant, and an order was made in the action for the taxation of the plaintiff's costs as between solicitor and client in accordance with sched. III to the Legal Aid and Advice Act, 1949. On taxation the taxing master disallowed, inter alia, (a) a fee for the country solicitor's attendance at a consultation in London with leading and junior counsel and his disbursements on travelling, and (b) the fees in connection with a conference with junior counsel after the settlement had been offered and before it was accepted. The reasons for the objections were, in regard to (a), that the attendance was necessary to give leading counsel the background and history of the case and any detailed information which he might require, and that only the instructing solicitors had all the necessary knowledge of details; and, in regard to (b):

"This conference was held so that counsel could explain clearly to the plaintiff the desirability of considering seriously the offer put forward by the defendants. Plaintiff was naturally anxious not to accept a settlement

which could possibly be improved upon as she felt this one might, and it is respectfully submitted that she was entitled to hear direct from counsel his views on the difficulties facing her in establishing her case so that she could correct him if he was under any misapprehension as to some of the facts within her own knowledge. Only in this way could the plaintiff come to a decision on the offer made which she would not later regret."

- A The taxing master's answers were, in regard to (a), that the matter could have been dealt with adequately by written instructions to counsel to advise, and, in regard to (b), that the cost was incurred through over-caution and was neither necessary nor proper.

R. J. S. Harvey for the plaintiff.

- B **HARMAN, J.:** This is a summons to review a taxation under the Legal Aid and Advice Act, 1949. The taxation under sched. III, para. 4 (1), to that Act, is, subject to certain matters which do not concern us for this purpose, in these words:

- C "... costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested: Provided that no question shall be raised as to the propriety of any act for which prior approval was obtained as required by regulations."

- D Therefore, it is an ordinary solicitor and client taxation for my purpose.

- The plaintiff, who had been granted a civil aid certificate, objected to the taxing master's disallowance of certain items in her bill of costs. It appears that instructions were sent to junior counsel to advise and to settle the statement of claim, and, practically contemporaneously, instructions to advise on evidence. The taxing master has allowed counsel's fee for settling the statement of claim at £3 5s. 6d. He has allowed £5 10s. for advising generally on the case, and he has disallowed the fee of £3 5s. 6d. for advising on evidence, and to this objection is brought in. It seems to me that the taxing master was wholly right in that case. It is premature to ask counsel to advise on evidence before the issues in the action are pleaded. He could not know what might be admitted by the second defendant if and when she put in a defence, which, incidentally, she never did.
- F It was impossible to tell what would be the issues at the trial, and, therefore, advice on evidence, though it might help the solicitor in that he could make early inquiries, is not a matter which, on a solicitor and client taxation, should be allowed at this stage of the proceedings before the pleadings were closed. What counsel said in his general advice about the evidence necessary is, I think, properly covered by the fee of £5 10s. allowed for his general advice, and I
- G uphold the master's view on that matter.

- Next comes a group of matters of this kind. After the statement of claim was drawn and delivered, the country solicitors were minded to take the advice of leading counsel. They applied to the legal aid area committee for leave, which they obtained, and, therefore, having regard to the proviso to para. 4 (1) of sched. III to the Act, the master must start with the view that it was a case
- H appropriate for leading counsel, and no question of the propriety of instructing him arises. The master, looking at the matter broadly, started by allowing £5 10s. for leading counsel's opinion—he was practising in London—and he disallowed all other fees at that stage to the leader. The charges in the bill were (i) a fee for a consultation in London between the leader and the junior; (ii) the country solicitor's attendance at that consultation; (iii) as a disbursement, the travelling fees of the country solicitor coming up from Cardiff; and (iv) £11 for the opinion which leading counsel wrote as a result of the consultation.

The taxing master relented to the extent of £5 10s., and allowed £11 for leading counsel's opinion, but he still would not allow the consultation, nor the country solicitor's attendance. Having regard to the sort of case this was, and having looked at the statement of claim, which depended on a number of small facts, I think that this was a case which justified the exceptional course of the country solicitor coming up to London to attend a consultation between leading and junior counsel, and, certainly, in my view, it justified having the consultation before leading counsel wrote his opinion, because he would want—and, I think, would probably insist on it—to see junior counsel who had drawn the statement of claim and who had already advised. As it turned out, leading counsel advised certain amendments to the statement of claim, and no leader would do that without having his junior there, as a mere matter of ordinary courtesy. Therefore, I think it would be right to allow a proper fee for the leader and junior for that consultation, and to allow a proper fee for the country solicitor's attendance and for his disbursements on travelling. Whether they come to as much as he has charged, viz., £8 3s. 2d., is for the taxing master to determine and not for me. In regard to the fee for leading counsel's opinion, I do not think, on the whole, that £11 was an unjustified fee for him to charge.

An offer was made by the second defendant to settle the case for a money payment, not a very handsome one, and plaintiffs never like it when they are offered a sum which is less than they hope to get. But lawyers know the difficulties which they face when they are put to proof in cases of this kind, where the claim is based on mutual wills and so forth, and it was desirable to satisfy the plaintiff, if possible, that it was in her true interest to settle the litigation at that stage, and that she should see counsel for that purpose is, in my view, altogether proper. I propose to allow counsel's fee of £2 7s. for a conference and whatever sum the solicitor may properly charge for attending that conference.

Order accordingly.

Solicitors: *Wrentmore & Son*, agents for *H. Morgan Lloyd & Evans*, Cardiff (for the plaintiff).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re MALDONADO (deceased). STATE OF SPAIN *v.*
TREASURY SOLICITOR.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
November 26, 27, 30, 1953.]

*Conflict of Laws—Succession to estate of intestate—Foreign domicil of intestate—
A Personal property in England—Claim by foreign State as sole and universal
heir.*

On Oct. 11, 1924, the deceased, a Spanish citizen domiciled in Spain died there a widow and intestate, leaving movable property in England. On June 4, 1930, the State of Spain obtained in Spain a declaration of heirship on failure of heirs on intestacy, and now claimed a grant of letters of administration of the English property. On the evidence, the State of Spain was "a true heir just as any individual heir according to Spanish law", but it was contended by the Crown that the maxim "*mobilia sequuntur personam*" stopped short of recognition of a State as successor.

HELD: assuming that there was a valid distinction between the case where a foreign State claimed property in England of a person dying intestate and domiciled in the territory of the foreign State on the footing that it was ownerless and *bona vacantia* and the case where the foreign State claimed to be the successor by virtue of its own laws, in the latter case there was no rule of English law which confined such succession to individuals having a particular quality or characteristic or had the effect of excluding a State from entertaining the capacity of an heir, and, therefore, the State of Spain, as true heir was entitled to a grant.

Decision of BARNARD, J. (*ante*, p. 300), affirmed.

AS TO INTESTATE SUCCESSION TO MOVABLES, see HALSBURY, Hailsham Edn., Vol. 6, p. 245, para. 299; and FOR CASES, see DIGEST, Replacement Vol. 11, pp. 397, 398, Nos. 525-550.

Cases referred to:

- (1) *Re Barnett's Trusts*, [1902] 1 Ch. 847; 71 L.J.Ch. 408; 86 L.T. 346; 11 Digest, Replacement, 398, 548.
(2) *In the Estate of Musurus*, [1936] 2 All E.R. 1666; Digest Supp.

APPEAL by the defendant, the Treasury Solicitor, from a decision of BARNARD, J., dated May 22, 1953, and reported *ante*, p. 300.

Eloisa Hernandez Maldonado, a Spanish subject domiciled in Spain, died there on Oct. 11, 1924, a widow and intestate, with no ascendant, descendant or collateral relative entitled to succeed to her estate on her death under the law of Spain. She left movable property in England valued at the time of her death at the sum of £31,515 5s. 4d. but now said to be worth some £27,000. Article 956 of the Spanish Civil Code, as translated for the purposes of this case, and in the form in which it stood at the death of the intestate, was in these terms:

"In default of persons having the right to inherit in accordance with the provisions of the foregoing sections [which is the present case] the State shall inherit, the assets being devoted to institutions of charity and free instruction in the following order: (i) municipal charitable establishments and free schools of the place of residence of the deceased, (ii) establishments of both classes of the province to which the deceased belonged, (iii) charitable establishments and educational establishments of a general character."

On June 4, 1930, the State of Spain obtained in Spain a declaration of heirship in accordance with art. 958 of the Spanish Civil Code "to enable the State to take physical possession of the estate". The State of Spain brought proceedings in this country claiming that letters of administration to the estate of the intestate in this country should issue to the duly constituted attorney

of the Spanish State as the sole and universal heir to her estate by Spanish law. The defendant in the action was the Treasury Solicitor, who claimed that a grant should issue for the benefit of the Crown on the ground that the property of the intestate in this country passed to the Crown as *bona vacantia*. On May 22, 1953, BARNARD, J., held that on the evidence before him the State of Spain was a true heir just as any individual heir according to Spanish law; that there was nothing contrary to English policy or repugnant to English law in a foreign State being permitted to take possession of the movables of one of its citizens in this country, and that, therefore, the State of Spain was entitled to a grant of letters of administration of the English estate. The Treasury Solicitor appealed.

Sir Lynn Ungood-Thomas, Q.C., and *Victor Russell* for the Treasury Solicitor.
Russell, Q.C., and *Lindner, Q.C.*, for the State of Spain.

SIR RAYMOND EVERSHERD, M.R., stated the facts and continued: It was agreed in the court below, and it has been conceded in this court, that the question is, as between the plaintiff, the State of Spain, and the defendant, the Treasury Solicitor: Who is entitled to the property?—since it is conceded that the right to the grant depends on the right to the property. The claim of the State of Spain is that by the law of Spain the State is entitled, in the circumstances of the case, as “successor” to inherit all the property of the intestate, and, accordingly, that the English courts will apply the principle *mobilia sequuntur personam* and accept the State of Spain as entitled to the property in question. On the other side, the Treasury Solicitor argues that the claim of the State of Spain is in truth not by way of a succession, but by the exercise of a paramount right of a sovereign State to take property of its nationals which has become ownerless on their deaths, and that the corresponding right of the English Crown to ownerless property is the only right that the English courts will recognise, having regard to the fact that the property in question is in England.

BARNARD, J., had first to determine what was the relevant Spanish law. The material article of the Spanish Civil Code which was in force on Oct. 11, 1924 (the date of the death) is art. 956. On this article there was a sharp conflict of expert testimony. Two witnesses called for the State of Spain said that the effect of the article was, as is stated by its terms, that the intestate having left no issue, parents or grandparents, surviving spouse, or collaterals within the sixth degree (for the purpose of art. 955 as in force in October, 1924), the State of Spain was entitled as *ultimus heres*. On the other side, Dr. Colas, for the Treasury Solicitor said that, notwithstanding the language of the article, the State of Spain was not a true heir or successor but had become entitled to this property as *bona vacantia*. Between these two views the learned judge decided clearly in favour of the witnesses for the State of Spain. He said (ante, p. 305):

“I am satisfied on the evidence before me that the State of Spain is a true heir just as any individual heir according to Spanish law.”

That finding has not been challenged in this court.

The Crown’s argument before us may fairly be stated in the form of four propositions. (i) *Prima facie*, movable property situate within the limits and jurisdiction of any State is subject to the laws of that State, and if such property be found to be ownerless it will pass to and become the property of that State. This, at least, is the law of England, and in the case supposed the property in England is assumed by the Crown as *bona vacantia*. (ii) To the above general rule there is an exception, being a rule of private international law generally accepted by and forming part of the law of civilised States, including England. The exception is expressed by the formula *mobilia sequuntur personam*. Thus in the case of movables belonging, for example, to a deceased national of another country who died domiciled in that other country (as in the present case), the

courts of this country will treat as entitled to the movables the person or persons who are by the law of that other country entitled to succeed thereto either under a testamentary disposition valid by the law of that other country or on an intestacy, as the case may be. But, (iii) the extent and scope of the exception expressed by the formula *mobilia sequuntur personam* is a matter in the case of each State for its own municipal law. And, (iv) in the case of a national of another State dying domiciled in the other State, and dying, according to its laws, intestate (as in the present case) the English courts will not recognise as having a title in this country to the movables of the intestate any persons who are not "successors" in accordance with some generally recognised nexus of personal relationship with the intestate, or, at least, will not recognise as a successor the foreign State itself which has made itself such by its own laws; for, notwithstanding the language used in those laws, the truth is that the State is exercising the equivalent of our *jus regale* as regards ownerless property. In further support of his fourth proposition counsel for the Crown has argued that since the rules of private international law apply to the relations *inter se* of individuals or, at least, of subjects of States and not to the relations *inter se* of States themselves, the scope of the exception necessarily and logically stops short of recognition of a State as successor.

Counsel for the State of Spain has not, at any rate for the purposes of this appeal, been concerned to contest the first three of the propositions submitted by the Crown. His challenge has been directed to the fourth and last. According to this argument the successors of the foreign intestate are those persons, whether natural persons or *personae fictae* (including the foreign State itself) who, by the laws of the foreign State, are constituted successors. There can, according to counsel, be no justification for a requirement by our courts that the successors should have a particular quality, for example, that they should be blood relations of the deceased in some degree. Thus, to take the example used during the course of argument, if the Spanish law decreed that, in default of any relations of the degrees stated in the Code, the Archbishop of Toledo should be the next successor, the English courts must recognise the title of the archbishop to the movables here of a Spanish intestate. It follows thence that no line can be drawn to exclude a *persona ficta*, whether a corporation, a municipality, or the State itself, so long as, by the Spanish law, such *personae* are in truth made successors and do not claim their title otherwise, for example, by a right of appropriation of the property as *bona vacantia*.

In confining his argument to this single question, counsel accepted as good law the decision of KEKEWICH, J., in *Re Barnett's Trusts* (1), followed by SIR BOYD MERRIMAN, P., in *In the Estate of Musurus* (2). In *Re Barnett's Trusts* (1) the English Crown claimed as *bona vacantia* movables belonging to a former Austrian citizen. But there was joined as a party for the purpose of the argument a representative of the then Austrian government who also claimed the property. The relevant art. 760 of the General Civil Code of Austria, unlike the article with which we are concerned of the Spanish Code, used this language:

"If the spouse is no longer alive, the succession is confiscated as heirless property either by the *fiscus* or by those persons who according to the political ordinances are justified in confiscating heirless estates";

and, having regard to the terms of that article, KEKEWICH, J., held that the claim of the Austrian government or its representative did not depend on his being in the guise or clothing of a successor, his claim was a claim to ownerless property, and, as between similar claims on the part of the British Crown and on the part of the Austrian government, that of the former must prevail. The argument for the Crown is set out at length ([1902] 1 Ch. 849), and it was observed pertinently by counsel for the State of Spain that there was no argument put forward on the part of the English Crown that no claim to "ownerless" movables by a foreign State as a successor, or in any other capacity, could, in

any event, be successfully put forward in these courts. The argument of the representatives of the Crown was based on the terms of the article which I have read, and was to the effect that the right asserted by the Austrian government rested on a confiscation in the terms of art. 760 of the property as heirless (that is, ownerless) property. At the end of the argument it was said ([1902] 1 Ch. 852):

"If in one of the countries a different principle prevailed [that is, if the State took not as on confiscation of heirless property, but as being a successor], a more difficult question might arise, because international law depends on reciprocity. But as in this country, so in Austria the State takes, not as 'ultimus heres' but 'jure regali'. It being clear that goods of this kind are taken by the Crown in both countries as bona vacantia, the law of England must apply to the English goods as the law of Austria would to goods in Austria."

The representatives of the Crown cited BAR'S PRIVATE INTERNATIONAL LAW, Gillespie's translation, 2nd ed., p. 843, para. 387, which reads:

"The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered to be a right of occupation or a right of consolidation belonging to the feudal superior, or as a true right of succession. In either the first or second case, the property will go to the State where the property is situated; in the last case it will fall to that of the domicile of the deceased, in so far as both States hold the theory of an universal succession, or as the estate is made up of movables. The theory which is in conformity with modern ideas of law, which is more deserving of our respect, and which undoubtedly now prevails as the theory of the law in Germany, is that, if there is no one nearer in blood to be called to the succession, a man's fellow-countrymen must be regarded as his heirs. This view is supported by the fact that it is the State to which a man belongs that fixes the circle of those who are entitled to succeed to him as heirs, drawing it more or less wide, as it pleases; while, on the other hand, it has more or less of the air of robbery for a State to seize on the movable estate of a deceased person, who was by mere accident resident there at the moment of his death. Thus the State whose subject and citizen the deceased was, will be entitled to succeed him. But, beyond Germany, the other rule still prevails, and each State seizes the movables which happen to be within its borders."

In the course of his judgment BARNARD, J., also referred to a passage in WOLFF ON PRIVATE INTERNATIONAL LAW, 2nd ed., p. 579, which is as follows:

"In default of next of kin, the universal rule is that the property goes to the State or the Crown or a township or some other public body—in Germany, Italy, and Switzerland as ultimate 'heir', in England, Austria, and Turkey by virtue of a jus regale over bona vacantia. In the latter case the conflict rule on succession is not applicable because there is no 'succession' (inheritance) . . . the right to 'heirless' property is governed by the *lex situs*."

Other examples of a recognition of the distinction in the character in which a sovereign State may take is to be found in other text-books to which we were also referred during the course of the argument. For example, in DICEY'S CONFLICT OF LAWS, 6th ed., the statement of r. 178 (p. 817):

"The succession to the movables of an intestate is governed by the law of his domicile at the time of his death . . ."

is followed by this passage (*ibid.*, p. 818):

"Where a person dies, e.g., intestate and a bastard, and under the law

A of the country where he is domiciled there is no succession to his movables, but they are bona vacantia, and leaves movables situate in a country, e.g., England, in which he is not domiciled, the title to such movables is governed by the lex situs, i.e., under English law the movables being situate in England, the Crown is entitled thereto. In such a case the foreign Treasury claims not by way of succession but because there is no succession. It does not follow that the decision would be the same if the law of the domicile was such that the foreign Treasury claimed as ultimatus heres. That would be a true case of succession and would, it is submitted, be governed by the law of the domicile."

B As will be observed in that work, the distinction, or the result, in the case of a foreign State claiming by way of succession is put as a submission. It is stated more positively in CHESHIRE'S PRIVATE INTERNATIONAL LAW, 4th ed., p. 59. But assuming that there is a valid distinction between the case where a Sovereign State claims the property on the footing that it is ownerless and bona vacantia, and the case where the State claims as being the successor by virtue of its own laws, there is, at any rate, no statement, in any of the cases or the text-books, that I have been able to find, or to which our attention was C drawn, that there is in England a rule which confines successors to individuals having a particular quality or characteristic, or which has the effect of excluding a State from ever entertaining the capacity.

D In my judgment, the real question is: What is the right or title by virtue of which the Spanish State now makes its claim? And, in my judgment, this point has been decided adversely to the Crown. That decision, the validity of which has not been challenged, I regard as conclusive against the appeal. I am unable to accept that, notwithstanding the finding of the learned judge, who said (ante, p. 305):

"I am satisfied on the evidence before me that the State of Spain is a true heir just as any individual heir according to Spanish law",

E these courts will reject the result on an a priori view of the necessary qualifications for succession. If by the law of Spain it is possible to limit or define the individuals who can claim to be successors, that is, individuals having some connection by blood or marriage with the deceased, I can see no reason why the law of Spain should not nominate or constitute as heir, in default of such individual, any person or corporation, including the State itself. The idea of succession no F doubt imports some notion of continuity of, for example, title. But I see no reason why this conception is inapplicable to the State which is constituted successor by the laws of the State. It is, indeed, as I understand it, conceded that if under a valid will property of the deceased were given to the State of Spain, the State of Spain would be then treated as being a successor, although in that case as the result of the testamentary disposition. Nor does the Latin G word "heres" from which the word "inherit" is derived necessarily involve any notion of some blood connection. To quote a sentence from CICERO, me nemo nisi amicus heredem fecit. I add that, in my judgment, there is no question of the law of Spain amounting to such a confiscation as would be regarded as repugnant to our own laws, and, therefore, not enforceable in these courts. Finally, I refer again to the passage at the end of the reported argument in *Re Barnett's Trusts* H where the matter is put ([1902] 1 Ch. 852):

"If in one of the countries a different principle prevailed, a more difficult question might arise, because international law depends on reciprocity."

There is before us no evidence of what the law of Spain would be in the converse case of an English national dying domiciled in England intestate without next of kin under the English law and leaving movables in Spain. I am, however, not able to reject the argument of counsel for the State of Spain on the ground that

there is no evidence that the law, as I think it should be held in this country, might not be reciprocal in Spain. I think the appeal fails and should be dismissed.

JENKINS, L.J., stated the facts as set out above and continued: The general rule to be applied in a case such as this is summed up in the maxim *mobilia sequuntur personam*, and is thus stated in DICEY'S *CONFLICT OF LAWS*, 6th ed., p. 814:

"Rule 177. The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death."

Thus, in the present case the personalty in question should, *prima facie*, devolve in accordance with Spanish law, and therefore go to the State of Spain for application in accordance with the provisions of art. 956. There is, however, an admitted exception to the general rule to the effect that if, according to the law of the foreign State in which the deceased is domiciled, there is no one entitled to succeed to the movable property of the deceased owing, for example, to the bastardy of the deceased, or to the failure of kin near enough in degree to qualify for succession under the law of the domicile, and, by the law of the foreign State, the State itself is, in such circumstances, entitled to appropriate the property of the deceased as ownerless property, by virtue of some *ius regale* corresponding to our own law of *bona vacantia*, English law will not recognise the claim of the foreign State as part of the law of succession of the domicile, but will treat it merely as the assertion by the foreign State of a prerogative right which has no extra-territorial validity and must yield to the corresponding prerogative right of the Crown. That appears from DICEY'S *CONFLICT OF LAWS*, 6th ed., p. 818, to which SIR RAYMOND EVERSHERD, M.R., has already referred:

"Where a person dies, e.g., intestate and a bastard, and under the law of the country where he is domiciled there is no succession to his movables, but they are *bona vacantia*, and leaves movables situate in a country, e.g., England, in which he is not domiciled, the title to such movables is governed by the *lex situs*, i.e., under English law the movables being situate in England, the Crown is entitled thereto. In such a case the foreign Treasury claims not by way of succession but because there is no succession."

But the law of the relevant foreign State may be such as to constitute the State itself the successor to the deceased in the absence of any individual with a prior right of succession under that law, and the question then arises whether the claim of the foreign State should be recognised under the general rule as the claim of a person entitled to succeed according to the law of the domicile, or should be treated as falling within the exception on the ground that the claim of the foreign State as self-constituted successor does not differ in substance or in principle from a claim by a foreign State by virtue of its paramount right to ownerless property within its dominions as *bona vacantia* or the equivalent.

Accordingly, two questions were debated in the court below: First, whether under the Spanish Civil Code the State takes as a true heir or successor in the eye of Spanish law, or takes by virtue of a *ius regale*; and, secondly, if it takes in the former capacity, whether English law will recognise the State of Spain as a true heir or successor for the purpose of the maxim *mobilia sequuntur personam*. BARNARD, J., having heard evidence on both sides in regard to the Spanish law, answered the first question in the former sense, and the second question in the affirmative, holding in effect that the answer to the second followed from the answer to the first. The decision of BARNARD, J., on the first question has not been challenged by the Crown in this court. The sole issue before us, therefore, is whether or not the State of Spain, being admittedly according to its own law the true heir of, or successor to, the intestate, should be recognised as such by English law in its application of the maxim *mobilia sequuntur personam*.

This question has not been the subject of any direct decision, but the distinction between a sovereign State claiming "jura regalia" and as true heir or successor was recognised in *Re Barnett's Trusts* (1) and *In the Estate of Musurus* (2). Inasmuch as the foreign law in each of those cases was held to give the foreign State concerned a *jus regale* as distinct from a true right of succession, there was no actual decision on the present question, but, as I have said, the distinction was recognised. Indeed, as SIR RAYMOND EVERSHED, M.R., has pointed out, both those cases would have been susceptible of a short and simple answer if the view then taken of the law had been that in no circumstances could a foreign State claim the assets situated in this country of a deceased intestate, whether the claim was founded on *jus regale* or on a true right of succession. The question has also been discussed in various text-books on this branch of the law. For example, in DICEY'S *CONFLICT OF LAWS*, 6th ed., p. 818, the passage which I have quoted continues:

"It does not follow that the decision would be the same if the law of the domicile was such that the foreign Treasury claimed as *ultimus heres*. That would be a true case of succession and would, it is submitted, be governed by the law of the domicile."

There are also the passages referred to by SIR RAYMOND EVERSHED, M.R., in WOLFF ON PRIVATE INTERNATIONAL LAW, 2nd ed., p. 579, in BAR'S PRIVATE INTERNATIONAL LAW (Gillespie's Translation), 2nd ed., p. 843, para. 387, and CHESHIRE'S PRIVATE INTERNATIONAL LAW, 4th ed., p. 59, all of which I treat as incorporated in this judgment.

The conclusion of BARNARD, J., therefore, has the support of no inconsiderable weight of learned opinion, and although, for my part, I find it difficult to embrace with enthusiasm either side of this highly technical question, his conclusion also commends itself to me on the ground of consistency. In cases such as the present, English law professes to apply the law of the domicile to the devolution of the intestate's movables situated in this country. If the law of the domicile is that of a foreign State under whose law of intestacy the State itself is the successor, why should English law not give effect to that provision as part of the law of succession which it professes to apply?

The reasons why, it is claimed, English law does not do so are expressed in a variety of ways. First, the distinction between succession by a sovereign State and the appropriation of *bona vacantia* by a foreign State is said to be a mere matter of words. This argument is not without persuasive force, but I do not think the question can truly be said to be one of distinction without difference. The foreign State can only succeed under its own law of succession where the succession is governed by that law. On the other hand, where the case is not one of succession but of appropriation of ownerless property, the right applies to any ownerless property which may be reached by the law of the foreign State concerned, irrespective of the law by which its devolution is governed, provided only that by the relevant law it is in fact ownerless. Then it is said that the foreign State, being omnipotent so far as its own law of succession is concerned, can constitute itself successor in circumstances in which it could equally well rely on a claim based on *jus regale*. But in accepting the foreign State's law of succession, English law recognises the foreign State as arbiter of what the succession is to be. The foreign State could, for instance, enact that older relatives should

be preferred to younger, or that male relatives should be preferred to female, or vice versa, or even that fair-haired relatives should be preferred to dark-haired. And to such distinctions, unreasonable as they might seem, English law would, as I understand the matter, have no objection. Why, then, should English law stop short of recognising the foreign State itself as the successor where, according to its own law, it is indeed such? The answer that English law recognises it to be the function of the relevant foreign law to regulate succession as between individual subjects or citizens, but declines to recognise rights conferred by the

foreign State on itself in exercise of that function does not commend itself to me. It involves distinctions at least as arbitrary and artificial as those discerned by the Crown in the distinction between *jus regale* and true inheritance by the State. For example, it was, I think, conceded in argument that if the Spanish law of succession provided that in circumstances such as those of the present case the estate of the intestate was to go to some person, or body, or corporation, other than the State itself, for application to charitable purposes such as those stated in art. 956 of the Spanish Civil Code, there would be no reason why the English courts, in applying the general rule to the inheritance, should not recognise and allow effect to be given to that provision. Why, then, should not the same result ensue where, as in the present case, the estate goes by Spanish law to the Spanish State itself for application to those same charitable purposes ?

Then it is said that private international law is concerned only with the rights of individuals and not with the competing rights of sovereign States. That may well be so. But it is clear that English law recognises the legitimate proprietary rights of foreign sovereign States, and I see no reason why a right of succession to an intestate's estate should not be held to answer that description. Then it is said that English law should not recognise as "heir" or "successor" any person not bound by some personal nexus with the deceased. I cannot follow this. The heir or successor is surely the person, whether related to the deceased or not, who under the relevant law is entitled to inherit or to succeed. Then it is said that there is no reciprocity, because Spanish law would not give effect to a claim by the Crown in respect of *bona vacantia*. But non constat that Spanish law would not recognise a right to succession belonging to the Crown if any such right existed, and it could easily be made to exist by Act of Parliament if that were thought expedient.

There might be a case where a so-called right of succession claimed by a foreign State could be shown to be in truth no more than a claim to *bona vacantia*. If so, then, no doubt, it would be right to apply the recognised exception to the general rule, but this has not been shown to be such a case. On the contrary, it has been found (and the Crown has accepted the finding) that the State of Spain is, in the eye of Spanish law, the true heir, and I would add that, to my mind, notwithstanding what was said ([1936] 2 All E.R. 1667) by SIR BOYD MERRIMAN, P., in *In the Estate of Musurus* (2), the conclusion that this is a case of genuine succession is reinforced by the circumstance that the State of Spain is by art. 956 of the Spanish Civil Code enjoined to apply the property of the intestate to the charitable purposes therein mentioned. Accordingly, for the reasons given by SIR RAYMOND EVERSHED, M.R., and for such additional reasons as I have been able to offer, I agree that this appeal fails and should be dismissed.

MORRIS, L.J.: It is, I think, well settled that where a person dies domiciled in a foreign country our courts will follow and apply the law of that country when dealing with the succession, using that word in a strict sense, to the ownership of movables in this country. The property will go to the persons who become heirs to it according to the law of the domicile. One result is that the English court will, as a rule, make a grant of administration to the person who is constituted the personal representative of the deceased in the country where he was domiciled at his death. It is unnecessary to consider the basis of the recognised principle ; it has been said to imply a fiction which deems movables to exist in the place of the domicile of the deceased. *Re Barnett's Trusts* (1) was a case where, according to the General Civil Code of Austria, there was no one to whom distribution of the property could be made, so that it became liable under the Code to be confiscated as ownerless. The provision to this effect was held by KEKEWICH, J., to be precisely on the lines of the English law as to *bona vacantia*. As KEKEWICH, J., said ([1902] 1 Ch. 859):

"When there is no heir, some paramount authority steps in and claims

it, not as against any one, but because there is no one to claim it at all."

As the ownerless property was in England he held that the paramount authority was the English Crown.

A The State of Spain has not found it necessary to challenge the decision in *Re Barnett's Trusts* (1) which has stood since 1902. It has in its favour the finding of BARNARD, J., not assailed in this court, that the State of Spain is a true heir just as any individual heir according to Spanish law. Counsel for the Crown, while acknowledging that he must accept that this is the position under Spanish law, submits that the substance of the matter is that the Spanish State is to take in default of there being kindred of the deceased, and he submits that our adoption of the law of the deceased's domicile need not go beyond the stage when it legislates to distribute among those with some personal nexus with the deceased, and, in any event, can stop short of any stage at which the State is decreed to take. Though this submission is reasonable and clearly formulated, I can see no warrant for acceding to, nor authority to support, it. It invites the court to lay down new doctrine in one of two alternative forms. It requires partial non-acceptance of the law of succession of the domicile, and the existence of the alternative submissions points to the fact that the court is really being asked to fix in arbitrary manner some limit to the extent of the adoption of the law of the domicile relating to succession. No question arises for consideration whether there might be provisions in a foreign law of such a nature that, either on grounds of public policy or of repugnance to English principles, our courts would not recognise rights to succession given by the foreign law.

D I can see no reason why either this or another country should not by law provide that on intestacy the Crown or the State should in certain circumstances inherit. The line in such a case between becoming owner as heir or inheritor by a law dealing with inheritance on intestacy and acquiring movables because there is no one who is made their owner as heir or inheritor may be a fine one, but it is, I think, a real one. If in regard to the foreign law dealing with succession as such, partial non-acceptance is embarked on, the line of such non-acceptance must be arbitrarily drawn. I can see no warrant for differentiating between a provision of the foreign law which on intestacy might, for example, give to remote relatives and a provision which, for example, might give to some public body whose activities might be generally welcome. As it is established and not in this court challenged, that the State of Spain is under Spanish law the heir of the deceased, and is as truly the heir as any individual heir would be, I can see no reason why the English courts should decline to recognise this particular heir. The substance of the matter, as it seems to me, is that by the law to which reference is made, the property in England is not left ownerless, but is to pass to an heir, that heir being the State of Spain. I think that this appeal fails.

Appeal dismissed.

Solicitors: *Vernor Miles & Clark* (for the plaintiff); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SMEATON HANSCOMB & CO., LTD. v. SASSOON I. SETTY,
SON & CO. (No. 2).

[QUEEN'S BENCH DIVISION (Devlin, J.), November 30, December 1, 1953.]

Arbitration—Costs—Discretion of arbitrator—Judicial exercise—Special Case stated by arbitrator—Costs awarded to buyers however questions of law answered—Decision in favour of sellers—Arbitration Act, 1950 (c. 27), s. 18 (1).

A

In a Special Case stated by an arbitrator for the consideration of the court, one paragraph of the award ran: "However the court answers the three questions [of law] or any of them, I award and direct that . . . the sellers shall pay the costs of this my award which I assess at £75 17s." On considering the questions of law, the court decided that the buyers were not entitled to maintain any claim against the sellers. On a motion by the sellers to set aside the award as to the costs of the award,

B

HELD: the discretion as to the award of costs given to the arbitrator by the Arbitration Act, 1950, s. 18 (1), must be exercised judicially; the phraseology of the award as to costs showed that the arbitrator was not directing his mind judicially to one of the most important elements affecting his discretion, i.e., the result of the case; and, consequently, that part of the award must be set aside.

C

Lloyd Del Pacifico v. Board of Trade (1930) (46 T.L.R. 476), and *Stotesbury v. Turner* ([1943] K.B. 370), applied.

Per curiam: If an arbitrator has made an award in the form of a Special Case and has departed from the usual order that costs follow the event, it is desirable that the grounds which have caused him to depart from the usual order should be set out.

D

FOR THE ARBITRATION ACT, 1950, s. 18, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 104.

Cases referred to:

E

(1) *Foster v. Great Western Ry. Co.*, (1882), 8 Q.B.D. 515; 51 L.J.Q.B. 233; 46 L.T. 74; 38 Digest 371, 736.

(2) *Gray v. Ashburton (Lord)*, [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; 2 Digest 47, 259.

(3) *Lloyd Del Pacifico v. Board of Trade*, (1930), 46 T.L.R. 476; Digest Supp.

(4) *Stotesbury v. Turner*, [1943] K.B. 370; 112 L.J.K.B. 365; 168 L.T. 355; 2nd Digest Supp.

F

MOTION to set aside an arbitrator's award as to costs.

A dispute (reported ante, p. 1471) between the buyers and the sellers relating to the quality of logs sold and delivered was referred to arbitration pursuant to the provisions of the contract. The arbitrator made his award in the form of a Special Case stated for the consideration of the court on three points of law, the first of which was whether the buyers were entitled to maintain any claim against the sellers. **DEVLIN, J.** having answered that question in the negative the other two questions did not arise. One paragraph of the award read:

G

"However the court answers the three questions or any of them, I award and direct that each party shall bear their own costs of the arbitration and that the sellers shall pay the costs of this my award which I assess at £75 17s."

H

It was contended on behalf of the sellers that the arbitrator had no jurisdiction to make such an order as to the costs of the award, or, alternatively, that in making such an order he could not have exercised his discretion judicially.

Adrian Hamilton for the sellers.

Widgery for the buyers.

DEVLIN, J.: In this case I have given judgment determining a question of law that was set out in an award in the form of a Special Case. The Case sets out three questions of law, the first of them being whether the buyers were entitled to maintain any claim against the sellers. I answered that question in the negative by saying that the buyers were not entitled to maintain any claim against the sellers, and accordingly the other two questions did not arise. The matter now before the court is a motion that a part of the award which deals with costs should be set aside. The paragraph that is complained of is in the following terms:

"However the court answers the three questions or any of them, I award and direct that each party shall bear their own costs of the arbitration and that the sellers shall pay the costs of this my award which I assess at £75 17s."

The motion does not attack that part of the paragraph which requires each party to bear its own costs of the arbitration, but attacks the second part of the paragraph which requires the sellers, who have, on my determination of the question of law, been successful, to pay the costs of the award amounting to £75 17s. That part of the award is attacked on two grounds set out in the motion, the first being that the arbitrator did not in law have any jurisdiction to make such an order, and the second (and alternative) being that the arbitrator cannot have exercised his discretion as to the costs of the award judicially in making such an order.

The arbitrator's power to deal with costs is now governed by the Arbitration Act, 1950, s. 18, which by sub-s. (1) provides:

"Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire . . ."

There is a contrary provision in the submission providing for the expenses of the arbitration to be equally divided between buyers and sellers, but, by virtue of s. 18 (3), that provision is to be deemed to be void. The result, therefore, is that there is no contrary intention expressed in the submission, and so the matter is one for the arbitrator's discretion under s. 18 (1). It seems at first sight, therefore, a little odd to find one of the grounds of the motion being a complaint that the arbitrator had no jurisdiction, since the Act appears in terms to confer discretion on him. The basis of that submission is to be found in *Foster v. Great Western Ry. Co.* (1). The Court of Appeal was there dealing with a section of a different Act, but one which was in similar terms to s. 18, and the reasoning of the Court of Appeal (if I may seek to paraphrase it) was this. A section of this sort, which leaves costs to the discretion of the arbitrator, must be considered as giving the arbitrator no more than the sort of discretion that is enjoyed by a judge of the High Court, i.e., a discretion which has to be exercised on judicial principles. If, therefore, the arbitrator exercises a wider discretion and gives costs on grounds which could not be supported on principle, then he is exceeding his jurisdiction. On the true construction of the section, it is not to be given its wide apparent meaning, but a limited meaning in relation to the practice of the High Court.

The principle that was thus laid down in *Foster v. Great Western Ry. Co.* (1) was very strongly criticised by all their Lordships in *Gray v. Lord Ashburton* (2). If I may respectfully say so I feel, quite apart from the authority of what was said in their Lordships' House, that there is very great force in the criticisms that were there made. However, the decision in *Foster v. Great Western Ry. Co.* (1) is a decision of the Court of Appeal, and WRIGHT, J., in *Lloyd Del Pacifico v. Board of Trade* (3) felt that on the whole he was not justified in treating *Foster v. Great Western Ry. Co.* (1) as having been overruled. In view of that dictum, it would be difficult for me to treat the case as having been overruled, but I

cannot feel that any decision that is based on it would be a very satisfactory one. I prefer, therefore, to proceed on the second ground that is alleged in the motion.

In *Lloyd Del Pacifico v. Board of Trade* (3), WRIGHT, J., laid it down as a principle that an arbitrator's discretion as to costs must be exercised judicially, and he set aside the part of the award in that case which dealt with costs on the ground that the umpire had not exercised his discretion judicially. That principle was followed by ATKINSON, J., in *Stotesbury v. Turner* (4). In RUSSELL ON ARBITRATION, 15th ed., p. 233, the principle is stated in the following terms:

" . . . the discretion must be exercised judicially, and it will be reviewed by the court to the same extent as a judge's order as to costs will be reviewed upon an appeal."

Counsel for the buyers has not disputed that principle, but he does dispute its application in this case and on two grounds. The first of them is that he distinguishes between the costs of the arbitration or the reference and the costs of the award. He concedes that if a successful defendant is made to pay a part of the unsuccessful plaintiff's costs of the reference it is not, prima facie (unless there are, of course, some exceptional grounds), a judicial exercise of his discretion. But he says that that principle does not apply to the costs of the award which stand on a different footing. I do not feel able to draw any distinction in principle between the costs of the award and the costs of the reference. It is a mere matter of convenience, I think, that the costs of the award are kept separate. They are usually kept separate because the parties have to pay the arbitrator directly, and the practice is now universal that the award is not handed over except to a party who takes it up and tenders the necessary payment of the arbitrator's costs. It is, therefore, convenient that the costs of the award shall be set out separately and mentioned in the award; but in principle I think they are just as much costs in the arbitration as the court fees are costs in the action. I see, therefore, no ground for drawing any distinction there.

The second ground is that there is not to be found in the case anything which shows that the arbitrator has proceeded on a wrong principle in the exercise of his discretion. In the two cases to which I have referred, the decisions of WRIGHT, J., and ATKINSON, J., there were grounds given by the arbitrator for the course which he had taken, grounds which the two learned judges thought to be inadequate. Here, counsel for the buyers argues that there is no reason given and, therefore, there is no material on which this court can interfere with the way in which the arbitrator exercised his discretion. I have come to the conclusion on the whole that there is such material, and that that material does show that the arbitrator did not exercise his discretion judicially. The phraseology of his award as to costs is this:

"However the court answers the three questions or any of them, I award and direct that each party shall bear their own costs and the sellers shall pay the costs of this my award."

That appears to me to show that the arbitrator is not directing his mind to one of the most important elements, if not the most important element, which ought to affect his discretion, i.e., the result of the case. Prima facie, a successful party is entitled to his costs. To deprive him of his costs or to require him to pay a part of the costs of the other side is an exceptional measure, and if an arbitrator says: "No matter what the result is going to be I make this, that or the other order as to costs," that shows sufficiently, I think, that he is excluding from his mind in arriving at his order what ought to be the most important consideration affecting it. The fact also, as counsel for the sellers points out, that he has ordered that each side should pay its own costs of the reference shows that he has not anything in mind which would cause him to feel that one party had committed some act of misconduct, or anything of that sort, which ought to affect the usual practice that costs follow the event. Even if the buyers had wholly

succeeded they would still have had to bear their own costs of the reference. These considerations seem to me to be sufficient to show that the arbitrator has not applied his mind judiciously to the question of costs.

A I hope that it will not be thought that in saying that I mean to make the least reflection on the conduct of this arbitration or of the arbitrator. It is very difficult for a lay arbitrator, unless he is informed on them (and I do not know whether this lay arbitrator was or was not), to know exactly what the principles as to costs are that he ought to apply. The only thing, I think, that a lay arbitrator ought to bear in mind is that there are certain principles as to costs which have been worked out by the court. If for any reason he thinks it desirable to depart from the usual order that costs follow the event, and if he knows that there are such principles, he may invoke the assistance of those who appear before him, their counsel or solicitors, as to what the principles are, and in the light of them make up his mind what he is going to do. I think, also, that it would be very proper and convenient that any arbitrator who is making an award in the form of a Special Case and who is departing from the usual order that costs follow the event should set out in the Case the grounds which have caused him to depart from the usual order. That will enable the court which is reviewing his decision to be fully informed as to what has influenced him, and it will not have to speculate from the nature of the Case itself. It is plainly a very exceptional jurisdiction that the court, on the decision of WRIGHT, J., has taken on itself. Normally the court is not concerned with the arbitrator's discretion at all or how he exercises it, but only with questions of law. This is an exceptional jurisdiction whereby the court reviews the arbitrator's discretion as to costs, and it calls, therefore, I think for the exceptional measure of the arbitrator stating in the Case the reasons which have led him to his conclusion as to costs. That is what a judge would normally do, and as the jurisdiction of this court is the same over an arbitrator as that of a Court of Appeal over a judge in the matter of costs, it is convenient that this court should be informed in the same way as the Court of Appeal would normally be.

E Difficulties, I think, might also arise as to what are the consequences of the conclusion at which I have arrived. There is no doubt that on the authority of the cases the proper course is to set aside that part of the award which is successfully complained of, and that I do in response to the motion which is before me. What the results of that will be in the ordinary case I do not know, but the parties here very sensibly agreed (as it is not a very large sum involved) that rather than spend a great deal more in going back to the arbitrator, and possibly coming back to this court again, I should put myself in the position of a tribunal which has power to deal with costs and that I should deal with them accordingly. Therefore, I deal with them by determining that the buyers shall pay the costs of the award. I think that there are no grounds shown in the Case (and that is, of course, the only material I have, and it is agreed that I may act on that material) for departing from the usual rule, and, indeed, I think that the buyers can consider themselves fortunate that they have not got to pay the sellers' costs of the arbitration.

H Accordingly, the order that I make on the motion is that the part of the award which is complained of shall be set aside, and that the buyers shall pay to the sellers the sum of £75 17s. The position is that the buyers originally took up the award and paid the arbitrator his fees, but the sellers desired to set it down and they were able to get it from the buyers only on paying to the buyers the amount of the fees. The result, therefore, at the moment is that the sellers are out of pocket, and accordingly the order should go for payment in the way I have made it.

Judgment for the sellers.

Solicitors: *Parker, Garrett & Co.* (for the sellers); *William A. Crump & Son* (for the buyers). [Reported by MICHAEL MALONEY, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. UNIVERSAL GRINDING WHEEL CO., LTD.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.J.J.), November 26, 27, 1953.]

Profits Tax—Distribution—Exclusion of “sum applied . . . in reducing share capital”—Company’s redemption of preference shares—Price equal to nominal amount of share plus a premium—Finance Act, 1947 (c. 35), s. 36 (1).

By s. 36 (1) of the Finance Act, 1947, “. . . no sum applied . . . in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution” for the purpose of determining the “net relevant distributions” to proprietors on which profits tax was chargeable at twenty-five per cent. compared with fifteen per cent. chargeable on the excess of the profits over such distributions, under s. 30 (1) and s. 30 (2) of the Act as amended by the Finance (No. 2) Act, 1947, s. 7. A company redeemed four hundred thousand cumulative participating preference shares of a nominal value of £1 each, paying the shareholders 27s. for each share, as required by its articles of association, and providing 20s. of that sum by an issue of new capital and the premium of 7s. out of profits as required by s. 46 (1) (d) of the Companies Act, 1929.

HELD (HODSON, L.J., dissentiente): as the company was bound by its articles to pay 27s. for every £1 value thereof in order to redeem the preference shares, the full 27s. was “applied” in reducing its share capital within the meaning of the proviso to s. 36 (1) of the Act of 1947, and no part of it represented a distribution under the Act.

Decision of UPJOHN, J. (ante, p. 133), affirmed.

FOR THE FINANCE ACT, 1947, s. 36 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 780.

Cases referred to:

- (1) *Re Serpell & Co., Ltd.*, [1944] Ch. 233; 113 L.J.Ch. 165; 170 L.T. 335; 2nd Digest Supp.
- (2) *Trevor v. Whitworth*, (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 9 Digest 98, 411.

APPEAL by the Crown against an order of UPJOHN, J., dated May 7, 1953, and reported ante, p. 133.

In December, 1947, a company redeemed four hundred thousand £1 preference shares at a redemption price of 27s. per share under a power contained in its articles of association (as provided for in the Companies Act, 1929, s. 46), which required the redemption price to be the nominal amount of the shares plus a premium of 7s. per share. Of the 27s. per share, 20s. was provided by an issue of new preference shares and 7s. out of profits. The company was assessed to profits tax for the twelve months to Sept. 30, 1948, on the basis that only 20s. of the 27s. was “applied . . . in reducing the share capital” of the company within the proviso to s. 36 (1) of the Finance Act, 1947, and that, therefore, the 7s. represented a distribution of profits for profits tax purposes under s. 30 (1) and s. 30 (2) of the Act, as amended by the Finance (No. 2) Act, 1947, s. 7. The Special Commissioners allowed the company’s appeal against the assessment and UPJOHN, J., dismissed the Crown’s appeal against that decision. The Crown appealed to the Court of Appeal.

C. Montgomery White, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown. *Borneman, Q.C., and G. W. H. Richardson* for the company.

SINGLETON L.J.: The Universal Grinding Wheel Co., Ltd., was incorporated on Mar. 8, 1935, with a nominal capital of £600,000, divided into four hundred thousand five per cent. cumulative participating preference shares

of £1 each and four hundred thousand ordinary shares of 10s. each. The capital at the material time was fully paid. The preference shares, under cl. 7 (B) of the articles, were entitled to participate to the extent that they might receive a dividend of eight per cent. In or before 1947 it was decided by those responsible for the government of the company that it would be good policy to redeem the preference shares. That involved consideration of the articles of association, and in particular cl. 8, which deals with the redemption of the five per cent. cumulative participating preference shares, and also s. 46 of the Companies Act, 1929, which enabled a company to issue preference shares redeemable at the option of the company. Sub-section (1) (d) provided that:

- A “where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption, must have been provided for out of the profits of the company before the shares are redeemed.”

B In order to redeem the preference shares the company made a fresh issue of the like nominal amount, and it follows from what I have said that any premium, which had to be paid, had to be paid out of the profits of the company.

Clause 8 of the articles provided:

- C “The five per cent. cumulative participating preference shares when fully paid up shall be liable to redemption at the option of the company in accordance with the following provisions . . . (D) The redemption price of a redeemable preference share shall be the nominal amount of the share plus a premium of 7s. per share and a sum equal to all (if any) arrears or deficiency of the fixed cumulative dividend (less tax) and the current fixed cumulative dividend (less tax) calculated down to the date of repayment of capital . . .”

- D The five per cent. cumulative participating preference shares thus could be redeemed by the company on payment of 27s. a share. In the result the holders of five per cent. cumulative participating preference shares were paid the sum of 27s. in respect of each £1 preference share, and of that sum 20s. was provided by the new issue and 7s. was found from the profits of the company in accordance with the provisions of s. 46 of the Companies Act, 1929.

- E The Finance Act, 1947, by Part IV, brought into operation the profits tax. The relevant provisions are to be found in ss. 30-36 of the Act. The tax was a tax on the profits of the trade or business, but if the net relevant distributions to the proprietors were less than the profits the amount chargeable by way of profits tax was to be reduced by $7\frac{1}{2}$ per cent.—see s. 30 (2). Sections 35 and 36 deal with distribution to proprietors. Putting it quite generally, s. 35 (1) provides that the gross relevant distributions to the proprietors are the total distributions to the members of the company, being either

- G “(a) dividends declared not later than six months after the end of [the relevant chargeable accounting period] . . . or (b) distributions (other than dividends which, under para. (a) of this sub-section, are to be treated as part of the gross relevant distributions to proprietors for any previous chargeable accounting period) made in the period.”

I shall refer to para. (c) of s. 35 (1) later. This appeal depends on s. 36 (1), which reads:

- H “Subject to the provisions of the next succeeding sub-section, wherever—
(a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or (b) assets are distributed in kind to any person . . . there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets: Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.”

The case for the Crown is that the 7s. a share was a distribution under s. 36 (1) (a) or (b), and that it is a matter for assessment to profits tax under the Act. The case for the company is that the proviso to s. 36 (1) clearly takes the payment out of that category; in other words, it was a sum applied in reducing the share capital of the company. *UPJOHN, J.*, decided in favour of the company.

The company wished to reduce its capital by eliminating its five per cent. cumulative participating preference shares. It could only do that by the application of cl. 8. If there had been an application to the court to reduce the capital by redeeming the preference shares, the answer would have been: "You need not come here; you have agreed as to the terms on which you can do it." Thus it was necessary for the company to pay each £1 preference shareholder 27s., and the company did that. The redemption of preference capital is equivalent to a reduction of capital: see per *UTHWATT, J.*, in *Re Serpell & Co., Ltd.* (1). It is claimed for the company that the sum so paid was a sum applied in reducing the share capital of the company and so within the proviso to s. 36 (1) of the Finance Act, 1947. It is agreed on both sides that the question for the court is: "What amount did the company 'apply' to reduce its capital?"

The contention put forward by counsel for the Crown is that the amount applied to reduce the capital of the company was only £1 a share, and that the 7s. was in the nature of a conditional payment which came out of profits and was not a sum (or part of a sum) applied in reducing the share capital. In the course of the argument I suggested that the proviso might have had words added to make it read: "Provided that no sum applied in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution, except in so far as the sum so applied exceeds the nominal amount of the share capital repaid". In the absence of any such words I find difficulty in agreeing with the submission made on behalf of the Crown, especially in view of the reference to the nominal amount of the capital in s. 35 (1). We are concerned solely with a question of construction. It seems to me that the word "applied" in the proviso to s. 36 (1) has the same meaning as "paid". The company could not redeem the preference shares unless it paid 27s. a share to the holders of those shares. In paying that amount it was applying it to redeem the preference shares and in reducing the share capital of the company. Thus the sum which it paid was applied in reducing the capital of the company, and does not fall to be treated as a distribution.

The view which I have formed is, I think, supported by reference to the last part of s. 35 (1) of the Act, where there is reference to the "nominal amount of the paid-up share capital" of the company. I refer, too, to s. 71 of the Companies Act, 1947, which received the Royal Assent a week after the Finance Act. I need not read those sections, for I have formed the view that this appeal depends on the construction of the proviso to s. 36 (1) of the Finance Act, 1947. I agree with the judgment of *UPJOHN, J.*, and I am in favour of dismissing the appeal.

BIRKETT, L.J.: The question in this appeal was not susceptible of any prolonged argument, both learned counsel coming back time after time to the construction of the proviso to s. 36 (1) of the Finance Act, 1947. No cases were directly in point, and the matter had never been the subject of any judicial decision. The proviso appears in a section in Part IV of the Act, relating to profits tax, but one must be careful not to seek to find the intention of the legislature in these sections and then to make the construction of the proviso accord with that presumed intention. One must consider the relation of the words in s. 35 (1):

"... (c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this sub-section applies) as is not a distribution of capital, and, for the purposes

of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

A It was suggested in argument that the case for the Crown required the addition of some words to the proviso which are not there at the moment. Counsel disclaimed any such intention, and relied on the plain meaning of the words. I think, therefore, that, without cases to guide us, the case turns on the construction of this proviso.

B The company redeemed its redeemable preference shares under art. 8 of the articles of association, para. (D) of which reads:

"The redemption price of a redeemable preference share shall be the nominal amount of the share plus a premium of 7s."

C On the redemption, therefore, the company's obligation was to pay 27s. per share. It is true that it is possible to divide the 27s., and, indeed, it must be divided because 20s. of the 27s. could properly be paid by means of a new issue, but no more, and the 7s. by s. 46 (1) of the Companies Act, 1929, had to come from profits. Section 46 (1) provided:

D "(a) no [redeemable preference] shares shall be redeemed except out of profits of the company which would otherwise be available . . . (d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption, must have been provided for out of the profits of the company before the shares are redeemed."

E Notwithstanding the need to divide this 27s. in this way, it was in fact 27s. in all, and in my view the division does not matter for the purposes of this case. The argument for the Crown was: "In fact you have only applied, in the meaning of this proviso, 20s. in the reduction of capital, because your capital was £400,000, and when you have paid 20s. for each share you reach your £400,000. Therefore, anything else which you paid above and beyond the 20s. was not applied in reduction of capital." It was suggested that the 7s. was paid or applied for something else, e.g., as an inducement to the preference shareholders to consent to the redemption. But the articles show clearly that the company already had such permission. It was said nevertheless: "Whether that is right or not, the 7s. clearly was not applied in reduction of capital; it was over and above the amount required for the repayment of the £400,000".

F The company, on the other hand, said: "The *only* way open to us here to get rid of the £400,000 redeemable preference shares was to repay on the terms laid down in the articles; and the preference shareholders, who had subscribed for the shares on the faith of the statement that if redeemed they would be redeemed at 27s., were entitled to 27s." Nobody disputes that. The company also said it made no difference that it had to pay the 27s. in the manner outlined because of the provisions of the Companies Act. The essential fact for this appeal is that it *had to pay* 27s. And, in regard to the proviso to s. 36 (1):

H "Provided that no sum applied in . . . reducing the share capital of the person carrying on the trade or business shall be treated as a distribution,"

(much emphasis was laid on the word "in"), it said: "It makes no difference whatever that one is able to split up this sum of 27s.; that was the sum we paid and the sum we applied". If there is any distinction between the word "paid" and the word "applied" in this section, it must be that one applied 20s. and paid the extra 7s. But if one pays the sum of 27s. to rid oneself of a 20s. share I should have thought that one "applied" the 27s. for that purpose. The company, therefore, say: "It is not a question here of what is the nominal

capital which we have reduced. Nobody doubts it is £400,000, but, in order that we could reduce that sum of £400,000, we *had to pay*, and we did pay, 27s. for every 20s. share, and, therefore, we applied the sum of 27s.”

The mere recital of the amount of the nominal capital does not lead us anywhere, because this particular proviso says nothing about nominal capital. My Lord has pointed out the distinction between s. 35 and s. 36. The latter says nothing about nominal capital. It is in the plainest terms, and provides that *no sum* applied in reducing the share capital shall count as a distribution. The first question is: Is this figure a sum? There is no question about that. The second question is: Was it applied? I think it is clear beyond contradiction that it was applied. The third and vital question, is: Was it applied in reducing the share capital? I cannot see any particular virtue in the word “in”. Even supposing the wording had been, “in order to reduce the capital” or “for the purpose of reducing the capital”, I cannot see any clear or vital distinction between that and “in reducing the capital”. It would be different if it could be contended that the word “in” impliedly meant nominal capital, but I do not think it does. The company is entitled to ask: “In reducing this block of four hundred thousand £1 redeemable preference shares, what has it cost the company to do it?”. The plain answer to that question is 27s. for every 20s. share. That is what it cost. If it is put in this way: “What has the company paid in order to reduce that capital?” the answer clearly is that it has paid 27s. for every 20s. share. If the question is: “What sum has the company applied in reducing the four hundred thousand £1 redeemable preference shares?” the answer again is 27s. for every 20s. share. I appreciate the Crown’s argument that what is being done by this operation is not really an operation to reduce the capital; it is an operation properly described as redeeming the redeemable preference shares. In my opinion, no such distinction can properly be made. The two are inextricably intertwined, and are really indivisible. For by the very act of redeeming one’s preference shares one is in fact reducing the capital.

Without entering into any question of what the intention of the legislature might have been, but applying the plain words of the proviso to the admitted facts of this case, I come to the same conclusion as UPJOHN, J., and as the Special Commissioners. This was the way of reducing the capital by redeeming the preference shares. It could only be done by paying 27s. for every 20s. share, and that was a sum “applied” in the reduction of the capital of the company. I agree that this appeal ought to be dismissed.

HODSON, L.J.: I have the misfortune to differ both from my Lords and also from the learned judge from whom this appeal is brought. In December, 1947, the company redeemed four hundred thousand preference shares of £1 each at the price of 27s. per share. This was done pursuant to the articles of association of the company, in accordance with the powers given by s. 46 (1) of the Companies Act, 1929, for the redemption of preference shares. The redemption was carried out in part by an issue of new capital and in part out of profits available for dividend. In particular the premium of 7s. per share was paid out of profits as required by s. 46 of the Companies Act, 1929, and by the articles of association of the company.

Prima facie the distribution of 27s. a share is a distribution for the purposes of the Finance Act, 1947. The company contends that the proviso to s. 36 (1) of the Act takes it out of the definition contained in the section. The proviso reads:

“Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.”

The sum of 20s. per share was clearly applied in reducing the share capital, and the sole question is whether or not, having regard to the language of the proviso, the extra sum of 7s. is to be treated as a distribution. The company said that the

27s. had in fact been applied in reducing the capital, and in no other way. It was said that this is the plain effect of the wording of the proviso, and that the force of the language cannot be resisted in the absence of a proviso to the proviso on these lines: "Except in so far as the sum applied exceeds the nominal amount of the share capital repaid". In support of the argument, the company contended that the redemption of preference shares was equivalent to the reduction of capital, or, alternatively, the redemption of shares was a way of reducing capital.

- A I am unable to accept these contentions of the company. I would emphasise—because I think it is important—that, as the Crown pointed out in argument, the words of the proviso are "in reducing", not "for the purpose of reducing", nor "in connection with reducing", nor "on reducing". As a matter of arithmetic, the maximum sum which can be applied in reduction of the capital is the amount of the capital itself, namely, £1 per share. The additional sum of 7s. per share is a sum which the company was pledged to pay to the shareholders because of the redemption provision contained in the articles, and cannot in my opinion be regarded as a sum applied in reduction of capital. It is not in itself a reduction, whether it be regarded as a term or condition on which a reduction can be effected or an inducement to shareholders to persuade them to submit to a reduction of capital. The word "reduction" is not synonymous with "redemption", although it is true that the result of redemption is to reduce the capital of the company.

The company was constrained to argue that, in construing the words "no sum applied in reducing the capital," the question to be posed was: "What is the cost of redemption?". The answer being 27s. per share, it was said that this was the sum applied. I cannot read the word "sum" as equivalent to "the cost of redemption". The sum which is under consideration is the sum to be applied in reduction of the capital. This sum cannot exceed the amount of the capital, whereas the cost of redemption would include sums which are not applied in reduction of capital, e.g., not only the premium in question, but the costs of stockbrokers and solicitors incurred in connection with the redemption.

- D The matter may, I think, be conveniently explained by reference to the company's balance sheet. In so far as the company's capital is reduced from its nominal value to zero this can be done by reducing the capital figure on the left side of the balance sheet, but in so far as a sum is to be applied in excess of the nominal value of the capital it is necessary to draw on the balance of profit and loss item. The additional sum is not reduction of capital but a reduction of the reserve of profits or the profits carried forward.

- F Some reliance was placed on the difference between the terms of s. 35 (1) (e) and those of the proviso to s. 36 (1) of the Finance Act, 1947. Section 35 (1) is concerned with the distribution to shareholders on the liquidation of a company, provides for the return of capital to shareholders, and excludes from relief any excess over capital. The material words are:

- G "for the purposes of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid-up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

- H Reliance is placed on the adjective "nominal" before the word "amount", contrasted with the absence of this adjective before the words "share capital" in the proviso under consideration. I cannot see that this argument reinforces the contention of the company. In the first place s. 35 (1) is dealing with a company winding-up and distributing its assets, whereas s. 36 (1) is dealing with the balance sheet position of a company which is in being as an operating concern. Moreover, if the word "nominal" had been included before the words "share capital" in the proviso to s. 36 (1), the same arguments would have

been open to the company as have been addressed to the court in this case on the wording as it stands. The language of s. 35 (1) does not, in my view, support the argument for the company. On the other hand, it lays the foundation for the comment that, in dealing with the return of capital on a winding-up, shares issued at a premium for cash are specifically mentioned as a legitimate addition to the capital of the company for the purpose of arriving at the excess distribution. Logically one would expect to find the same position in considering sums applied in reduction of capital under the proviso to s. 36 (1).

A further supporting argument was sought to be derived from the proposition that a redemption of shares was equivalent to the purchase of shares by the company, and that a company which purchased its own shares thereby reduced its capital. Reliance was placed on passages from the speeches in *Trevor v. Whitworth* (2). That case was decided in 1887, before redeemable preference shares were authorised by the Companies Act, 1929, and the actual decision was that a company had no power under the then Companies Acts to purchase its own shares and that the purchase was, therefore, ultra vires. It was said, therefore, that the company had had to apply 27s. per share in the purchase of its shares, and had thereby reduced its capital. I confess I derive no assistance from this argument, which leaves the question to be answered exactly as it was, i.e.: "Can any sum in excess of £1, the full nominal value of the shares, be accurately described as having been applied in reducing the capital?" In my judgment, the answer is in the negative. The amount of the reduction of the capital is limited by the amount of the capital itself, and any sum in excess of £1 applied is applied not in reduction of the capital but as the price of redemption. This, in my judgment, is the plain meaning of the proviso as it stands, and this result is reached without the aid of any proviso to the proviso which it has been suggested must be implied in order to reach this end. I, for my part, therefore, would have allowed the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Linklaters & Paines* (for the company).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

BIRTWISTLE v. TWEEDALE.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), December 15, 1953.]

Practice—Citation of cases—Report by person not member of the Bar.

In the course of the argument counsel for the appellant drew the court's attention to a report contained in the *ESTATES GAZETTE*.

SOMERVELL, L.J., said that he did not wish to be cited cases that were reported by persons who were not members of the Bar since such reports might mislead rather than assist the court.

DENNING and ROMER, L.JJ., agreed and DENNING, L.J., said that there were sufficient cases that could be cited apart from those in the *ESTATES GAZETTE*.

P.P.

LEWIS v. HAVERFORDWEST RURAL DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), December 2, 1953.]

Arbitration—Costs—Discretion of arbitrator—Judicial exercise—Successful party deprived of costs—Each party ordered to pay own costs—No serious effort to settle claim—Arbitration Act, 1950 (c. 27), s. 18 (1).

A In 1949 a local authority laid a sewer under the applicant's land. In 1953, after unsuccessful negotiations, the applicant's claim for compensation under the Public Health Act, 1936, was referred to arbitration and he was awarded £156 2s. 6d. The arbitrator ordered that both parties should pay their own costs on the ground that no serious effort had been made by either party to settle the matter. On a motion to set aside the award as to costs,

B HELD: the discretion of an arbitrator as to the award of costs (under the Arbitration Act, 1950, s. 18 (1)) must be exercised judicially; in the absence of special circumstances, a successful party should receive his costs; the reason given by the arbitrator did not constitute special circumstances; and, therefore, the award as to costs must be set aside.

C FOR THE ARBITRATION ACT, 1950, s. 18 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 104.

Cases referred to:

- (1) *Smeaton Hanscomb & Co., Ltd. v. Sassoon I. Setty, Son & Co. (No. 2)*, ante, p. 1588.
- (2) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; 43 Digest 335, 1570.

D MOTION to set aside an arbitration award as to costs.

E The applicant, the tenant of a smallholding at St. David's, Haverfordwest, claimed under the Public Health Act, 1936, against the Haverfordwest Rural District Council, compensation for damage caused by the laying of a sewer across his land by the council. The work was completed in 1949 or 1950, and, although there were negotiations between the parties, proceedings were not brought by the applicant until 1953. The arbitrator awarded the applicant £156 2s. 6d. and ordered that both parties should pay their own costs. The applicant thereupon moved the court to set aside the award as to costs on the ground that the arbitrator had misdirected himself as to that part of the award.

J. D. May for the applicant.

F J. C. Rogers for the respondents.

G LORD GODDARD, C.J., stated the facts and continued: It is a curious circumstance that lay arbitrators always seem to think parties should pay their own costs. Perhaps this case and that which has recently been before DEVLIN, J., *Smeaton Hanscomb & Co., Ltd. v. Sassoon T. Setty, Son & Co. (No. 2)* (1), may be of some use in emphasising to lay arbitrators that it has been laid down in the House of Lords, re-affirming the Court of Appeal, in *Donald Campbell & Co. v. Pollak* (2), that there is a settled practice of the courts that, in the absence of special circumstances, a successful litigant should receive his costs, and that it is necessary to show some grounds for refusing an order which would give them to him. The discretion to refuse that order must be judicially exercised. Those words

H "judicially exercised" are somewhat difficult to apply, but they mean that the arbitrator must not act capriciously and must, if he exercises his discretion to refuse the usual order, show a reason connected with the case which the court can see is proper.

In this case the arbitrator was asked why he made this order as to costs, and he answered:

"I had several reasons for awarding that each party should bear its own costs, and one of those was that I had no evidence that during the long time

between the event and the date of the arbitration any serious effort had been made by either party to settle the question."

The question had to be settled at some time, and why should the respondents' failure to take steps to settle or to make the tender place them in a better position than they might otherwise have been? They made no effort to settle, and the applicant did not bring his proceedings, but he has brought his proceedings now, and he is entitled to recover the compensation which the Public Health Act, 1936, gives him and which the respondents had apparently made no effort to pay. I do not think it is a judicial exercise of discretion to say that because neither party did anything, the successful party will not be awarded the costs. That seems to me to be contrary to what was said in *Donald Campbell & Co. v. Pollak* (2), that it is the settled practice of the court that in the absence of special circumstances a successful litigant should receive his costs. I cannot find that the reason mentioned by the arbitrator is a special circumstance, and, therefore, I think that the arbitrator was wrong in not awarding the successful applicant his costs. He recovered £156 2s. 6d., and I can see no reason why he should not have been paid the costs of the arbitration.

The respondents had the opportunity, if they so wished, of making an offer to him. In a matter of this sort, making an offer would be regarded in the same way as a payment into court. If they had made an offer to pay a sum approximating to the amount which the applicant recovered, that would have been an excellent reason for refusing costs to the applicant. It might even be a reason for ordering the applicant to pay the respondents' costs, but I do not think there is any reason in this case for depriving him of his costs.

The parties have sensibly agreed that I should deal with the costs. Therefore I make an order setting aside that part of the award which deals with costs and, by consent, I order that the applicant's costs of the arbitration be taxed and paid by the respondents and that the applicant must have the costs of this motion.

Award as to costs set aside.

Solicitors: *John L. Rendall* (for the applicant); *Denton, Hall & Burgin*, agents for *Philipps Williams*, Haverfordwest (for the respondents).

[*Reported by* MICHAEL MALONEY, Esq., *Barrister-at-Law.*]

END OF VOLUME TWO.



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